

OFFICIAL CODE  
OF  
GEORGIA  

---

ANNOTATED



VOLUME 12

Title 14. Corporations, Partnerships, and  
Associations

2003 Edition



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# OFFICIAL CODE OF GEORGIA ANNOTATED

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With Provision for Subsequent Pocket Parts

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*Prepared by*  
The Code Revision Commission  
The Office of Legislative Counsel  
*and*  
The Editorial Staff of LexisNexis™



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## Volume 12 2003 Edition

Title 14. Corporations, Partnerships, and Associations

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Including Acts of the 2003 Session of the General Assembly  
of Georgia and Annotations taken from the Georgia  
Reports and the Georgia Appeals Reports

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**LexisNexis™**  
Charlottesville, Virginia  
2003

OFFICIAL CODE OF GEORGIA  
ANNOTATED

THE OFFICE OF THE ATTORNEY GENERAL  
ATLANTA, GEORGIA

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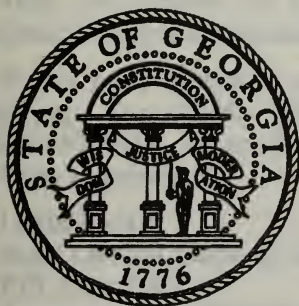
THE OFFICE OF THE ATTORNEY GENERAL  
ATLANTA, GEORGIA

(Pub. 41805)



*I, Cathy Cox, Secretary of State of the State of Georgia, do hereby certify that* the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as same appear of file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 1st day of August, in the year of our Lord Two Thousand and Three and of the Independence of the United States of America the Two Hundred and Twenty-seventh.



*Cathy Cox*

SECRETARY OF STATE





## Preface

This volume cumulates and replaces the 1994 edition of Volume 12 of the Official Code of Georgia Annotated, as supplemented by the 2002 Cumulative Supplement. The 1994 Volume 12 and its 2002 Supplement may be recycled or, if so desired retained for historical purposes.

This volume contains all laws specifically codified in Title 14 by the General Assembly through the 2003 Session. This volume also contains case annotations reflecting decisions posted to LEXIS-NEXIS® through March 14, 2003. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LEXIS-NEXIS® citations will be made.

Additionally, LexisNexis™ has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; and American Law Reports. Also included where appropriate are cross-references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2001, 2002, and 2003 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2001 Session of the General Assembly, the user should consult the Georgia Laws.

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## User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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## **TITLE 14**

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#### **CODE REVISION COMMISSION NOTE ON COMMENTS**

The comments appearing in this title have been prepared under the supervision of the State Bar of Georgia as noted in the comments. Neither the General Assembly of Georgia nor the Code Revision Commission of the State of Georgia has participated in the drafting of these comments or has reviewed the comments for their content. The comments should not be considered to constitute a statement of legislative intention by the General Assembly of Georgia nor do they have the force of statutory law.

#### **NOTES AS TO COMMENTS**

The comments in Chapters 3 through 6 of Title 14 were prepared in 1967 and 1968 by Pasco M. Bowman, II, then a professor at the University of Georgia School of Law, who was reporter of the Special Advisory Committee of the Corporate and Banking Law Section of the State Bar of Georgia when the former Georgia Business Corporation Code was enacted in 1968. These comments have been reproduced, without substantial change, under the supervision of Nat G. Slaughter, III, Chairman, and Mitchell M. Purvis, Secretary, of the Corporation Code Revision Committee of the Corporate and Banking Law Section of the State Bar of Georgia. Those comments which are designated

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as Notes to 1975, 1976, or 1977 Amendments were prepared under the supervision of John D. Hopkins, then Chairman of the Corporation Code Revision Committee. Those comments which are designated as Notes to 1969, 1970, 1972, 1973, 1980, or 1981 Amendments were prepared by Nat G. Slaughter, III, Chairman, and Mitchell M. Purvis, Secretary, of the Corporation Code Revision Committee.

Certain references in the comments prepared by Professor Bowman to the procedures under Georgia law prior to the 1976 constitutional amendment of presenting articles of incorporation and other corporate documents to judges of the superior courts have been deleted. References in all comments to "prior Georgia law" or to a certain specific section of "prior Ga. Code Ann. § 22-\_\_\_\_\_" are to the Georgia corporate law which existed prior to April 1, 1969, the effective date of the Georgia Business Corporation Code. References to a certain specific section of "Georgia Business Corporation Code § 22-\_\_\_\_\_" are to sections enacted in 1968 or thereafter which were repealed prior to the effective date of the 1981 Code. Citations and references in all comments to existing provisions of Georgia law are to the 1981 Code sections.

For comments in Chapter 2, see note at beginning of Chapter 2.

**Cross references.** — Subjection of corporate charters to provisions of Constitution of Georgia, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Actions subjecting corporations to criminal liability, § 16-2-22. Professional fund raisers and solicitors, § 43-17-1 et seq. Taxation of corporations generally, §§ 48-7-21, 48-7-25, 48-7-31.

**Administrative rules and regulations.** — Rules of General Applicability, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Commissioner of Corporations, Chapter 590-7-1.

Corporate Information Center, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Commissioner of Corporations, Chapter 590-7-5.

**Law reviews.** — For article discussing early laws of incorporation in Georgia, see 11 Ga. B.J. 156 (1948). For article discussing Georgia's Corporation Law prior to the 1968 Acts, see 2 Ga. St. B.J. 153 (1965). For article,

"Does State Corporation Law Have a Future?," see 8 Ga. St. B.J. 311 (1972). For article discussing developments in Georgia Corporation Law in 1976 and 1977, see 29 Mercer L. Rev. 31 (1977). For article surveying Georgia cases in the area of business associations from June 1977 through May 1978, see 30 Mercer L. Rev. 1 (1978). For article on recent judicial and legislative developments in Georgia Corporation Law, see 31 Mercer L. Rev. 43 (1979). For survey article on business associations, see 44 Mercer L. Rev. 67 (1992). For annual survey article on business associations, see 50 Mercer L. Rev. 171 (1998). For survey article discussing developments in law of business associations for the period from June 1, 1998 through May 31, 1999, see 51 Mercer L. Rev. 127 (1999). For survey article discussing developments in law of business associations for the period from June 1, 1999 through May 31, 2000, see 52 Mercer L. Rev. 95 (2000).

## OPINIONS OF THE ATTORNEY GENERAL

**The standards of fidelity** set by the Financial Institutions Code (see O.C.G.A. T. 7) are as high or higher than those which are set by the Georgia Business Corporation Code (see O.C.G.A. T. 14). 1977 Op. Att'y Gen. No. U77-62.

**Title not applicable to mergers between**

**banks and business corporations.** — Mergers and consolidations between banks or trust companies and business corporations are governed exclusively by Ga. L. 1968, p. 565, as amended, and thus Ga. L. 1974, p. 705, as amended, is not applicable. 1978 Op. Att'y Gen. No. 78-36 (see O.C.G.A. T. 7 and T. 14).

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	<b>PROCEDURE FOR EXERCISE OF DISSENTERS' RIGHTS</b>	14-2-1408.	Articles of dissolution.
14-2-1320.	Notice of dissenters' rights.	14-2-1409.	Revival of corporation after dissolution by expiration of period of duration.
14-2-1321.	Notice of intent to demand payment.	14-2-1410.	Preservation of remedies of dissolved corporations.
14-2-1322.	Dissenters' notice.		<b>PART 2</b>
14-2-1323.	Duty to demand payment.		<b>ADMINISTRATIVE DISSOLUTION</b>
14-2-1324.	Share restrictions.	14-2-1420.	Grounds for administrative dissolution.
14-2-1325.	Offer of payment.	14-2-1421.	Procedure for and effect of administrative dissolution.
		14-2-1422.	Reinstatement following administrative dissolution.
		14-2-1423.	Appeal from denial of reinstatement.
			<b>PART 3</b>
			<b>JUDICIAL DISSOLUTION</b>
		14-2-1430.	Grounds for judicial dissolution.



## BUSINESS CORPORATIONS

### PART 3

- Sec.  
14-2-1431. Procedure for judicial dissolution.  
14-2-1432. Receivership or custodianship.  
14-2-1433. Decree of dissolution.

### REVOCATION OF CERTIFICATE OF AUTHORITY

- Sec.  
14-2-1530. Grounds for revocation.  
14-2-1531. Procedure for and effect of revocation.  
14-2-1532. Appeal from revocation.

### PART 4

### MISCELLANEOUS

- 14-2-1440. Deposit of assets with Office of Treasury and Fiscal Services.

### Article 15

### Foreign Corporations

### PART 1

### CERTIFICATE OF AUTHORITY

- 14-2-1501. Authority to transact business required.  
14-2-1502. Consequences of transacting business without authority.  
14-2-1503. Application for certificate of authority.  
14-2-1504. Amended certificate of authority.  
14-2-1505. Effect of certificate of authority.  
14-2-1506. Corporate name of foreign corporation.  
14-2-1507. Registered office and registered agent of foreign corporation.  
14-2-1508. Change of registered office or registered agent of foreign corporation.  
14-2-1509. Resignation of registered agent of foreign corporation.  
14-2-1510. Service on foreign corporation.

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### WITHDRAWAL

- 14-2-1520. Withdrawal of foreign corporation.

### PART 4

### DOMESTICATION

- 14-2-1540. Application of chapter to foreign corporations domesticated under prior law.

### Article 16

### Records and Reports

### PART 1

### RECORDS

- 14-2-1601. Corporate records.  
14-2-1602. Inspection of records by shareholders.  
14-2-1603. Scope of inspection right.  
14-2-1604. Court-ordered inspection.

### PART 2

### REPORTS

- 14-2-1620. Financial statements for shareholders.  
14-2-1621. Other reports to shareholders.  
14-2-1622. Annual registration for Secretary of State.

### Article 17

### Transition Provisions

- 14-2-1701. Application of chapter.  
14-2-1702. Application to qualified foreign corporations.  
14-2-1703. Saving provisions.

**Editor's notes.** — Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, repealed the Code sections formerly codified as this chapter and enacted the current chapter. The former chapter consisted of Code Sections

14-2-1 through 14-2-7 (Article 1), 14-2-20 through 14-2-23 (Article 2), 14-2-40 through 14-2-43 (Article 3), 14-2-60 through 14-2-63 (Article 4), 14-2-80 through 14-2-98 (Article 5), 14-2-110 through 14-2-123 (Article 6),

## CORPORATIONS, PARTNERSHIPS, ETC.

14-2-140 through 14-2-156 (Article 7), Ga. L. 1976, p. 1102; Ga. L. 1976, p. 1576;  
14-2-170 through 14-2-177 (Article 8), Ga. L. 1977, p. 324; Ga. L. 1977, p. 649; Ga.  
14-2-190 through 14-2-196 (Article 9), L. 1977, p. 1098; Ga. L. 1979, p. 435; Ga. L.  
14-2-210 through 14-2-218 (Article 10), 1980, p. 603; Ga. L. 1980, p. 623; Ga. L. 1980,  
14-2-230 through 14-2-231 (Article 11), p. 715; Ga. L. 1980, p. 1188; Ga. L. 1981, Ex.  
14-2-250 through 14-2-251 (Article 12), Sess., p. 8 (Code enactment Act) and Ga. L.  
14-2-270 through 14-2-295 (Article 13), 1982, p. 3, Ga. L. 1982, p. 156, Ga. L. 1982,  
14-2-310 through 14-2-331 (Article 14), p. 694, Ga. L. 1982, p. 886, Ga. L. 1983, p. 3,  
14-2-350 through 14-2-351 (Article 15), Ga. L. 1983, p. 1299, Ga. L. 1983, p. 1479,  
14-2-370 through 14-2-373 (Article 16), Ga. L. 1984, p. 22, Ga. L. 1984, p. 514, Ga. L.  
14-2-390 through 14-2-393 (Article 17), and 1984, p. 1319, Ga. L. 1985, p. 527, Ga. L.  
14-2-410 through 14-2-411 (Article 18), and 1985, p. 1281, Ga. L. 1985, p. 1302, Ga. L.  
was based on Ga. L. 1968, p. 565; Ga. L. 1969, p. 152; Ga. L. 1970, p. 195; Ga. L. 1970,  
p. 243; Ga. L. 1970, p. 605; Ga. L. 1972, p. 433; Ga. L. 1973, p. 833; Ga. L. 1975, p. 778;  
1986, p. 10, Ga. L. 1986, p. 1454, Ga. L. 1987,  
p. 537, Ga. L. 1987, p. 849, Ga. L. 1987, p. 1448.

### CODE REVISION COMMISSION NOTE ON COMMENTS

The comments appearing in this chapter have been prepared under the supervision of the Georgia Corporation Code Revision Committee of the Corporate and Banking Law Section of the State Bar of Georgia and are included in the Official Code of Georgia Annotated at the request of the committee. Neither the General Assembly of Georgia nor the Code Revision Commission of the State of Georgia has participated in the drafting of these comments or has reviewed the comments for their content. The comments should not be considered to constitute a statement of legislative intention by the General Assembly of Georgia nor do they have the force of statutory law.

#### COMMENT

#### NOTE AS TO DRAFTING COMMITTEE

The Georgia Business Corporation Code was completely recodified by an Act (Ga. L. 1988, p. 1070) that was based on a draft proposed by the Georgia Business Corporation Code Revision Committee of the Section of Corporate and Banking Law of the State Bar of Georgia composed of the following:

George L. Cohen, Chairman

William J. Carney, Reporter, Professor, Emory University Law School

Elliott Goldstein, Special Consultant

Thomas C. Herman, Secretary

W. Hale Barrett

Holcombe T. Green, Jr.

J. Kermit Birchfield, Jr.

Edward J. Hardin

Terry C. Bridges

Donald R. Harkleroad

John W. Collier

Edward J. Hawie

C. Powers Dorsett, Jr.

James L. Smith, III

William E. Eason, Jr.

L. Neil Williams, Jr

Alan S. Gaynor

## BUSINESS CORPORATIONS

The Committee was assisted by the following special advisers:

Senator Edward Hine, Jr.

Wayne Howell, Deputy  
Secretary of State

Stephanie Manis,  
Assistant Attorney General

Representative  
Thomas Chambless

Valerie A. Hepburn,  
Director of Administration,  
Office of the Secretary of State  
State of Georgia

George E. Hibbs, Assistant  
General Counsel,  
State Bar of Georgia

### Table of Comparable Provisions for Chapter 2 of Title 14

This table lists each Code section in the former Business Corporation Code, Ga. L. 1968, p. 565, as amended, and comparable provisions of the new Business Corporation Code, Ga. L. 1988, p. 1070. It is intended to assist the user, who is familiar with the former chapter, to find comparable new provisions. Table entries do not indicate that the former provision was reenacted without change in the new chapter, only that the comparable new provision pertains to the same subject. Absence of a comparable new provision in the table may mean only that there was no new provision similar enough for inclusion in this table, not that the subject is no longer covered.

<u>OLD</u>	<u>NEW</u>
14-2-82	—
14-2-83	14-2-620
14-2-84	14-2-621, 14-2-623
14-2-85	14-2-621, 14-2-628
14-2-86	14-2-624
14-2-87	14-2-150, 14-2-625, 14-2-626
14-2-88	14-2-604
14-2-89	—
14-2-90	14-2-623, 14-2-640
14-2-91	14-2-640
14-2-92	14-2-631, 14-2-640
14-2-93	—
14-2-94	14-2-631
14-2-95	—
14-2-96	—
14-2-97	—
14-2-101	14-2-641
14-2-140, 14-2-723	14-2-622
14-2-1701	14-2-630
14-2-120, 14-2-1408	14-2-701, 14-2-702, 14-2-703, 14-2-704
14-2-120, 14-2-123, 14-2-124, 14-2-125	14-2-141, 14-2-705, 14-2-706, 14-2-823
14-2-127, 14-2-128	14-2-705, 14-2-707
14-2-102	14-2-720, 14-2-724
14-2-301	14-2-725, 14-2-727, 14-2-1021
14-2-302	14-2-721, 14-2-724, 14-2-728
14-2-304	14-2-727, 14-2-1021
14-2-204	14-2-722, 14-2-724, 14-2-728
14-2-401	14-2-731, 14-2-920
14-2-402	14-2-730
14-2-403	14-2-1601, 14-2-1602, 14-2-1604, 14-2-1620
14-2-501	14-2-120
14-2-502, 14-2-503	14-2-121
14-2-504	14-2-122
14-2-510	
14-2-601	
14-2-602	



# CORPORATIONS, PARTNERSHIPS, ETC.

<u>OLD</u>	<u>NEW</u>	<u>OLD</u>	<u>NEW</u>
14-2-123	14-2-740, 14-2-741,	14-2-215	14-2-1108
	14-2-742, 14-2-745, 14-2-746	14-2-216	14-2-1105, 14-2-1106
14-2-140	14-2-801, 14-2-802,	14-2-217	14-2-1107
	14-2-811	14-2-218	14-2-1109
14-2-141	14-2-803, 14-2-804,	14-2-230	14-2-1201
	14-2-805	14-2-231	14-2-1202
14-2-142	14-2-940	14-2-232	14-2-1110
14-2-143	14-2-806	14-2-233	14-2-1111
14-2-144	14-2-805, 14-2-807,	14-2-234	14-2-1112
	14-2-810	14-2-235	14-2-1113
14-2-145	14-2-808	14-2-236	14-2-1131
14-2-146	14-2-820, 14-2-824,	14-2-237	14-2-1132
	14-2-1022	14-2-238	14-2-1133
14-2-147	14-2-825	14-2-250	14-2-1302, 14-2-1303
14-2-148	14-2-820, 14-2-822,	14-2-251	14-2-1301, 14-2-1320,
	14-2-823		14-2-1321, 14-2-1322,
14-2-149	14-2-821		14-2-1323, 14-2-1325,
14-2-150	14-2-840		14-2-1326, 14-2-1327,
14-2-151	14-2-844		14-2-1330, 14-2-1331
14-2-152	14-2-842	14-2-270	14-2-1401
14-2-152.1	14-2-842	14-2-271	—
14-2-153	14-2-831	14-2-272	14-2-1402
14-2-154	14-2-640, 14-2-824	14-2-273	14-2-1402, 14-2-1403
14-2-155	14-2-861, 14-2-862,	14-2-274	14-2-1403
	14-2-863	14-2-275	14-2-1405
14-2-156	14-2-851, 14-2-852,	14-2-276	14-2-1403.1, 14-2-1405,
	14-2-855, 14-2-856,		14-2-1406
	14-2-858, 14-2-859,	14-2-277	14-2-1404
	14-2-1621	14-2-278	14-2-1404
14-2-170	14-2-201	14-2-279	14-2-1404
14-2-171	14-2-202, 14-2-203	14-2-280	14-2-1404
14-2-172	14-2-201.1	14-2-281	14-2-1408
14-2-173	14-2-203	14-2-282	14-2-1408
14-2-174	—	14-2-283	14-2-1420, 14-2-1421,
14-2-175	14-2-205		14-2-1422
14-2-176	14-2-206, 14-2-1022	14-2-284	14-2-1430, 14-2-1431
14-2-177	14-2-207, 14-2-303	14-2-285	14-2-940, 14-2-1430,
14-2-190	14-2-1001		14-2-1431
14-2-191	14-2-1002, 14-2-1003,	14-2-286	14-2-1432
	14-2-1005	14-2-287	14-2-1432
14-2-192	14-2-1004	14-2-288	14-2-1406
14-2-193	14-2-1006	14-2-289	14-2-1432
14-2-194	14-2-1006, 14-2-1006.1	14-2-290	14-2-1433
14-2-195	14-2-1009	14-2-291	14-2-1433
14-2-196	14-2-1007	14-2-292	14-2-1406, 14-2-1408,
14-2-197	14-2-1008		14-2-1440
14-2-210	14-2-1101	14-2-293	14-2-1405, 14-2-1406,
14-2-211	14-2-1101		14-2-1407, 14-2-1408
14-2-212	14-2-1103	14-2-294	14-2-1409
14-2-213	14-2-1105, 14-2-1105.1	14-2-295	14-2-1409
14-2-214	14-2-1104	14-2-310	14-2-1501

# BUSINESS CORPORATIONS

<u>OLD</u>		<u>NEW</u>	<u>OLD</u>		<u>NEW</u>
14-2-311		14-2-1505	14-2-329		14-2-1702
14-2-312		14-2-1506	14-2-330		14-2-1540
14-2-313		14-2-1504	14-2-331		14-2-1502
14-2-314		14-2-1503	14-2-350		14-2-1622
14-2-315		14-2-1503	14-2-351		14-2-1622
14-2-316		14-2-1505	14-2-370		14-2-122
14-2-317		14-2-1507	14-2-371		14-2-122
14-2-318	14-2-1508,	14-2-1509	14-2-372		14-2-122
14-2-319	14-2-1510,	14-2-1520	14-2-373		—
14-2-320		14-2-1504	14-2-390	14-2-121, 14-2-130	
14-2-321		14-2-1504	14-2-391		—
14-2-322		14-2-1504	14-2-392		—
14-2-323		14-2-1520	14-2-393	14-2-126, 14-2-1532	
14-2-324		14-2-1520	14-2-394		—
14-2-325		14-2-1530	14-2-410		—
14-2-326	14-2-1530,	14-2-1531	14-2-411		14-2-129
14-2-327		14-2-1531	14-5-2		14-2-301
14-2-328		14-2-1531			

**Law reviews.** — For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For annual survey on business associations, see 35 Mercer L. Rev. 37 (1983). For annual survey on business associations, see 36 Mercer L. Rev. 91 (1984). For article, "Maintaining the Corporation as a Separate Entity," see 23 Ga. St. B.J. 36 (1986). For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986). For annual survey of cases concerning business associations, see 39 Mercer L. Rev. 53 (1987). For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989). For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988). For annual survey of law of business associations, see 40 Mercer L. Rev. 61 (1988). For survey article on business associations, see 42 Mercer L. Rev. 71 (1990). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991). For article, "The Development

of the Shareholder's Direct Action Damage Remedy," see 28 Ga. St. B.J. 195 (1992). For annual survey of law of business associations, see 43 Mercer L. Rev. 85 (1991). For annual survey article on business associations, see 45 Mercer L. Rev. 53 (1993). For article discussing developments in law of business associations from June 1, 1996 through May 31, 1997, see 49 Mercer L. Rev. 71 (1997). For annual survey article on business associations, see 50 Mercer L. Rev. 171 (1998). For survey article discussing developments in law of business associations for the period from June 1, 1998 through May 31, 1999, see 51 Mercer L. Rev. 127 (1999). For survey article discussing developments in law of business associations for the period from June 1, 1999 through May 31, 2000, see 52 Mercer L. Rev. 95 (2000).

For note on 1993 amendment of this chapter, see 10 Ga. St. U.L. Rev. 74 (1993). For note on 1999 amendments to sections in this chapter, see 16 Ga. St. U.L. Rev. 27 (1999).

For comment, "An Empirical Study of Defective Incorporation," see 39 Emory L.J. 523 (1990).

## NOTES AS TO COMMENTS

The comments in Chapter 2 of Title 14 were prepared in 1987, 1988, and 1989 by William J. Carney, Charles Howard Candler Professor at Emory University Law School, who was reporter to the Georgia Corporation Code Revision Committee (hereinafter the "Code Revision Committee") of the Corporate and Banking Law Section of the State Bar of Georgia, which submitted a proposed draft of the revised Georgia Business Corporation Code (the "Code") in the form in which it was introduced in the Georgia General Assembly. The Comments were reviewed by the Code Revision Committee, which was chaired by George L. Cohen. They were presented to the General Assembly, in substantially this form, as part of the explanation for the changes proposed from prior law, and to clarify the meaning of the Code. The Comments also note amendments made by the General Assembly to the Code as initially introduced.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Chapter 2 of Title 14, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, are included in the annotations for this chapter.

Cited in *Hullender v. Acts II*, 153 Ga. App. 119, 264 S.E.2d 486 (1980).

## RESEARCH REFERENCES

**ALR.** — What corporate communications are entitled to attorney-client privilege — modern cases, 27 ALR5th 76.



## ARTICLE 1

## GENERAL PROVISIONS

**Cross references.** — Incorporation of banks and trust companies, § 7-1-390 et seq. Incorporation of condominium associations, § 44-3-100 et seq.

**Law reviews.** — For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989). For article, "Georgia's

New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988).

For note surveying revisions to Georgia Condominium Act between 1963 and 1975 regarding expansion, disclosure, liens, and incorporation, see 24 Emory L.J. 891 (1975).

For article, "Researching Georgia Law," see 3 Ga. St. U.L. Rev 585 (1993).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Article 1 of Chapter 2 of Title 14, which was repealed by Ga. L. 1988, p. 1070, § 1, effec-

tive July 1, 1989, are included in the annotations for this article.

**Cited in** Whitley v. Whitley Constr. Co., 121 Ga. App. 696, 175 S.E.2d 128 (1970).

## PART 1

## SHORT TITLE AND RESERVATION OF POWER

## 14-2-101. Short title.

This chapter shall be known and may be cited as the "Georgia Business Corporation Code." (Code 1981, § 14-2-101, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: 1984 Revised Model Business Corporation Act (3d ed.) ("Model Act") § 1.01. It follows the nomenclature of the former law, § 14-2-1. Citations to "former law" are to the Official Code of Georgia Annotated, including the 1987 Cumulative Supplement.

This Code was drawn primarily from the Model Act, which was prepared by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association.

To the extent this statute follows the Model Act, the Official Comments to the Model Act should be regarded as providing guidance to the interpretation of this Code. Some of the comments to this Code were drawn from the Model Act, with permission of the publisher, Law & Business Inc. Harcourt Brace Jovanovich. Comments to Part 6 of Article 8 were drawn from Changes in the Model Business Corporation Act — Amendments Pertaining to Directors' Conflicting Interest Transactions, 43 Bus. Law. 691 (1988), with permission of the American Bar Association, and its Section of Corporation, Business and Banking Law.

As the title indicates, this Chapter deals only with business corporations, that is, corporations organized and operated for profit. The subject of nonprofit corporations is dealt with in Chapter 3 of Title 14, the "Georgia Nonprofit Corporation Code."

**Cross-References**

Application of Act to existing domestic corporation, see § 14-2-1701. Application of Act to qualified existing foreign corporation, see § 14-2-1702. Close corporations, see Article 9. Effective date of Act, see § 14-2-1706. Professional corporations, see Georgia Professional Corporation Act, Title 14, Chapter 7. Saving provisions, see § 14-2-1703.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-1, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

Cited in *Broome v. Ginsberg*, 159 Ga. App. 202, 283 S.E.2d 1 (1980); *Miller & Meier & Assocs. v. Diedrich*, 174 Ga. App. 249, 329 S.E.2d 918 (1985).

**14-2-102. Reservation of power to amend or repeal.**

The General Assembly has power to amend or repeal all or part of this chapter at any time and all domestic and foreign corporations subject to this chapter are governed by the amendment or repeal. (Code 1981, § 14-2-102, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Act, § 1.02. There is no change from former law, § 14-2-7.

Provisions similar to section 14-2-102 have their genesis in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to section 14-2-102. The purpose of section 14-2-102 is to avoid any possible argument that a corporation has contractual or vested rights in any specific statutory provision and to ensure that the state may in the future modify its corporation statutes as it deems appropriate and require existing corporations to comply with the statutes as modified.

All articles of incorporation or certificates of authority granted under the Code are subject to the reservation of power set forth in section 14-2-102. Further, corporations "governed" by this Act which includes all corporations formed or qualified under earlier, general incorporation statutes that contain a reservation of power are also subject to the reservation of power of section 14-2-102 and are bound by subsequent amendments to the Code.

Former Georgia law had reserved to the state the right to withdraw the franchise in all cases of private charters granted since January 1, 1863. No such reserved power exists, however, with respect to private corporations created prior to 1863, and it would be unconstitutional for the General Assembly to alter a pre-1863 charter. See *Thompson v. Atlantic Coast Line R.R.*, 200 Ga. 856, 38 S.E.2d 774 (1946).

**Cross-References**

Application of Act to existing domestic corporation, see § 14-2-1701. Application of Act to existing qualified foreign corporation, see § 14-2-1702. Effective date of Act, see § 14-2-1706. Saving provisions, see § 14-2-1703.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 13, 14, 83-90.

**C.J.S.** — 18 C.J.S., Corporations, § 54.

**ALR.** — Power of state to amend charter of a private incorporated charity, 62 ALR 573.

Constitutional and statutory provisions relating to consolidation, merger, or reorganization of corporations as applicable retrospectively to corporation previously chartered, 131 ALR 734.

**14-2-103. Independent legal significance of chapter provisions.**

Each provision of this chapter shall have independent legal significance. (Code 1981, § 14-2-103, enacted by Ga. L. 1989, p. 946, § 1.)

## COMMENT

Source: This section was added by amendment in 1989.

This section is a codification of a widely recognized rule of construction of business corporation laws. This confirms "the general theory of the Delaware Corporation law that action taken pursuant to the authority of the various sections of that law constitute acts of independent legal significance and their validity is not dependent on other sections of the Act." *Hariton v. Arco Electronics, Inc.*, 41 Del. Ch. 74, 188 A.2d 123, 125 (Del. Supr. 1963), citing *Langfelder v. Universal Laboratories, Inc.*, 68 F. Supp. 209, 211 (D.Del. 1946).

## PART 2

## FILING DOCUMENTS

**Law reviews.** — For article discussing developments in law of business associations from June 1, 1996 through May 31, 1997, see 49 Mercer L. Rev. 71 (1997). •

**14-2-120. Filing requirements.**

(a) A document must satisfy the requirements of this Code section and of any other Code section that adds to or varies these requirements to be entitled to filing by the Secretary of State.

(b) This chapter must require or permit filing the document in the office of the Secretary of State.

(c) The document must contain the information required by this chapter. It may contain other information as well.

(d) The document must be typewritten or printed.

(e) The document must be in the English language. A corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

(f) The document must be executed:

(1) By the chairperson of the board of directors of a domestic or foreign corporation, by its president, or by another of its officers;

(2) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(3) If the corporation is in the hands of a receiver, trustee, or other court appointed fiduciary, by that fiduciary;

provided, however, that the person executing the document may do so as an attorney in fact. Powers of attorney relating to the execution of the document do not need to be shown to or filed with the Secretary of State.

(g) The person executing the document shall sign it and state beneath or opposite his or her signature his or her name and the capacity in which he or she signs; provided, however, that if the document is electronically transmitted, the electronic version of such person's name may be used in lieu of a signature. The document may but need not contain:

(1) The corporate seal;

(2) An attestation by the secretary or an assistant secretary; or

(3) An acknowledgment, verification, or proof.

(h) The document must be delivered to the office of the Secretary of State for filing and must be accompanied by one exact or conformed copy (except as provided in Code Sections 14-2-503 and 14-2-1509), the correct filing fee, any certificate required by Code Section 14-2-201.1, 14-2-1006.1, 14-2-1105.1, or 14-2-1403.1, and any penalty required by this chapter or other law.

(i) Notwithstanding the provisions of this chapter, the Secretary of State may authorize the filing of documents by electronic transmission, following the provisions of Chapter 12 of Title 10, the "Georgia Electronic Records and Signatures Act," and the Secretary of State shall be authorized to promulgate such rules and regulations as are necessary to implement electronic filing procedures. (Code 1981, § 14-2-120, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 2; Ga. L. 1999, p. 405, § 1.)

**Cross references.** — Limits on General Assembly's powers as to corporations, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

#### COMMENT

Source: Model Act, § 1.20. While the pattern of this section generally follows former law, §§ 14-2-4 and 14-2-5, the application is more general.

Subsection (a) standardizes the filing requirements for all documents required or permitted by the Code to be filed with the Secretary of State. In a few instances, other sections of the Act impose additional requirements which must also be complied with if the document in question is to be filed. Publication of a notice must be evidenced in



filings connected with articles of incorporation, name changes, mergers and dissolutions. See §§ 14-2-201.1, 14-2-1006.1, 14-2-1105.1, and 14-2-1403.1.

Subsection (b) makes it clear that these filing requirements relate only to documents which the Code expressly requires or permits to be filed with the Secretary of State; it does not authorize or direct the Secretary of State to accept or reject for filing other documents relating to corporations and does not treat documents required or permitted to be filed under other statutes.

Under subsection (c), a document must be filed by the Secretary of State if it contains the information required by the Code. The document may contain additional information or statements and their presence is not ground for the Secretary of State to reject the document for filing. These documents must be accepted for filing even though the Secretary of State believes that the language is illegal or unenforceable.

Under subsections (d) and (e), to be eligible for filing, a document must be typed or printed and in the English language (except to the limited extent permitted by section 14-2-120(e)).

Under subsection (f), to be filed, a document must simply be executed by a corporate officer. No specific corporate officer is designated as the appropriate officer to sign though the signing officer must designate his office or the capacity in which he signs the document.

Subsection (g) is permissive with respect to use of the corporate seal, attestations and acknowledgements. Former § 14-2-4(c) required attestation of documents by the secretary or assistant secretary. These requirements serve little purpose in connection with documents filed under the Code. Corporate seals no longer have legal significance under the Code, although they may have significance in other contexts, such as statutes of limitations governing contracts under seal. See also § 14-5-7, concerning the evidentiary effect of corporate seals on documents affecting real property.

The Model Act provision permitting the Secretary of State to prescribe mandatory use of forms was omitted.

### Cross-References

Certificate of existence for foreign corporation, see § 14-2-1503. Corporate name, see article 4 and § 14-2-1506. Correcting filed document, see § 14-2-124. "Deliver" includes mail, see § 14-2-140. Effective time and date of filing, see § 14-2-123. Evidence of publication of notice, see §§ 14-2-201.1, 14-2-1006.1, 14-2-1105.1, and 14-2-1403.1. Filing fees, see § 14-2-122. Forms, see § 14-2-121. Penalty for filing false document, see § 14-2-129. Secretary of corporation defined, see § 14-2-140. Secretary of state's filing duty, see § 14-2-125.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-4, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Cited in** *Milton v. Austin*, 124 Ga. App. 657, 185 S.E.2d 551 (1971); *Teri-Lu, Inc. v. Georgia R.R. Bank & Trust Co.*, 147 Ga. App.

860, 250 S.E.2d 548 (1978); *Sachs v. Lee & Sandra Assocs.*, 153 Ga. App. 823, 266 S.E.2d 573 (1980); *Computer Maintenance Corp. v. Tilley*, 172 Ga. App. 220, 322 S.E.2d 533 (1984); *Schroeder v. Hunter Douglas, Inc.*, 172 Ga. App. 897, 324 S.E.2d 746 (1984); *Herrli Homes, Inc. v. Roon*, 175 Ga. App. 85, 332 S.E.2d 379 (1985).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code 1933, §§ 22-104 and 22-105, and former Code Sections 14-2-4 and 14-2-5, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Corporation cannot escape liability by pleading failure to comply.** — Where a corporation did not file certified copies of the application for revivor with the Secretary of State as formerly required or pay the fees required by law when reviving its charter,

and while it was not thereafter licensed to transact any business in Georgia, it cannot now escape liability for the fees in question by pleading its own failure to comply with the clear and unambiguous terms and conditions of the law or the subsequent lapse of time. 1957 Op. Att'y Gen. p. 23 (decided under former Code 1933, § 22-105).

**Cancellation of security deeds and writs of execution from record.** 1972 Op. Att'y Gen. No. U72-79 (decided under former Code 1933, § 22-104).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 300-304.

**C.J.S.** — 19 C.J.S., Corporations, §§ 556, 663.

### 14-2-121. Forms.

The Secretary of State may prescribe and furnish on request forms for:

- (1) An application for a certificate of existence;
- (2) A foreign corporation's application for a certificate of authority to transact business in this state;
- (3) A foreign corporation's application for a certificate of withdrawal;
- (4) The annual registration; and
- (5) Such other forms not in conflict with this chapter as may be prescribed by the Secretary of State. (Code 1981, § 14-2-121, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 1.21. Former law, § 14-2-390, was more general, granting the Secretary of State the power and authority "reasonably necessary to enable him to administer this chapter efficiently and to perform the duties therein imposed upon him. . . ."

This authority is not intended to permit the Secretary to prescribe and mandate the use of official forms so as to preclude additional information that is permitted by statute, or is commonly contained in, a document to be filed, such as articles of incorporation or articles of merger or share exchange, which, under section 14-2-1105, include the plan of merger or share exchange. In short, where the document is contractual in nature, the Secretary of State may not limit its contents by prescribing official and mandatory forms; only where the documents are informational is such prescription permitted. Elimination of the last sentence of § 1.21(a) of the Model Act, "If the Secretary of State so requires, use of these forms is mandatory," is intended to require the Secretary of State to use his rule-making authority before requiring additional information on forms.



Cross-References

Annual registration, see § 14-2-1622. Application for certificate of authority, see § 14-2-1503. Application for certificate of withdrawal, see § 14-2-1520. Certificate of existence, see § 14-2-128. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120.

14-2-122. Filing fees and penalties.

The Secretary of State shall collect the following fees and penalties when the documents described in this Code section are delivered to him or her for filing:

<u>Document</u>	<u>Fee</u>
(1) Articles of incorporation .....	\$ 100.00
(2) Application for certificate of authority .....	225.00
(3) Annual registration .....	30.00
(4) Agent’s statement of resignation .....	No fee
(5) Certificate of judicial dissolution .....	No fee
(6) Application for reservation of a corporate name .....	25.00
(7) Civil penalty for a foreign corporation transacting business in this state without a certificate of authority ....	500.00
(8) Statement of change of address of registered agent..... \$5.00 per corporation but not less than .....	20.00
(9) Application for reinstatement .....	100.00
(10) Any other document required or permitted to be filed by this chapter .....	20.00

(Code 1981, § 14-2-122, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 3; Ga. L. 1997, p. 1165, § 1; Ga. L. 2002, p. 989, § 2; Ga. L. 2003, p. 883, § 1.)

The 2002 amendment, effective July 1, 2002, inserted “or her” near the end of the undesignated paragraph and substituted “a foreign corporation transacting” for “each year or part thereof during which a foreign corporation transacts” in paragraph (7).

The 2003 amendment, effective July 1,

2003, substituted “\$100.00” for “\$60.00” in paragraph (1), substituted “225.00” for “170.00” in paragraph (2), substituted “30.00” for “15.00” in paragraph (3), and substituted “25.00” for “No fee” in paragraph (6).

COMMENT

Source: Model Act, § 1.22. This reduces the large number of separate fees and charges presently provided in §§ 14-2-371 and 14-2-372.

Section 14-2-122 establishes in a single section the filing fees for all documents that may be filed under the Code. The fee provisions have been simplified, by reducing the number of categories, and covering all other filings with a single fee.

#### Note to 1989 Amendment

The 1989 amendments deleted subsection (4), providing penalties for late filings of annual registrations, and added subsection (6), specifying that there is no charge for reservation of a corporate name.

#### Cross-References

Agent's change of registered office, see § 14-2-502. Agent's resignation, see § 14-2-503. Amended certificate of authority, see § 14-2-1504. Amendment of articles of incorporation, see §§ 14-2-602, 14-2-631, 14-2-1006 & 14-2-1008. Annual registration, see § 14-2-1622. Certificate of authority, see § 14-2-1503. Certificate of withdrawal, see § 14-2-1520. Certificates for copies of documents, see chapter 5 of this title. Copies of documents, see chapter 5 of this title. Corporation's change of registered agent or office, see § 14-2-502. Correction, see § 14-2-124. Dissolution: administrative, see § 14-2-1421. decree, see § 14-2-1433. judicial, see §§ 14-2-1430 & 14-2-1431; reinstatement, see § 14-2-1422; revocation, see § 14-2-1404; voluntary, see § 14-2-1401 et seq. Evidentiary effect of certified copy, see § 14-2-127. Existence, certificate of, see § 14-2-128. Fee for copying and certifying copies of filed documents, see Title 14, Chapter 5. Fee for service of process on Secretary of State, see Title 14, Chapter 5. Incorporation, see § 14-2-201. Merger, see § 14-2-1105. Name of corporation, see § 14-2-401. Reserved name, see § 14-2-402. Restatement of articles of incorporation, see § 14-2-1007. Revocation of certificate of authority, see § 14-2-1531. Service on Secretary of State, see §§ 14-2-1107, 14-2-1520 & 14-2-1531. Share exchange, see § 14-2-1105.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 212. 36 Am. Jur. 2d, Foreign Corporations, § 220. **C.J.S.** — 18 C.J.S., Corporations, § 44. 19 C.J.S., Corporations, § 903.

#### 14-2-123. Effective time and date of document.

(a) Except as provided in subsection (b) of this Code section and subsection (c) of Code Section 14-2-124, a document accepted for filing is effective:

(1) At the time of filing on the date it is filed, as evidenced by the Secretary of State's date and time endorsement on the original document; or

(2) At the time specified in the document as its effective time on the date it is filed.

(b) A document may specify a delayed effective time and date, and if it does so the document shall become effective at the time and date specified. If a delayed effective date but no time is specified, the document shall become effective at the close of business on that date. A delayed effective date for a document may not be later than the ninetieth day after the date on which it is filed.



(c) If a document is determined by the Secretary of State to be incomplete and inappropriate for filing, the Secretary of State may return the document to the person or corporation filing it, together with a brief written explanation of the reason for the refusal to file, in accordance with subsection (c) of Code Section 14-2-125 and, if the applicant returns the document with corrections in accordance with the rules and regulations of the Secretary of State, the filing date of the document will be the filing date that would have been applied had the original document not been deficient. (Code 1981, § 14-2-123, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 1.23. With minor exceptions described below, this follows the pattern of former law, § 14-2-5.

Subsection (a) provides that documents accepted for filing become effective at the time and date of filing, or at another specified time on that date, unless a delayed effective date is selected under section 14-2-123(b). This section gives express statutory authority to the practice of the Secretary of State of ignoring processing time and treating a document as effective as of the date it is submitted for filing even though it may not be reviewed and accepted for filing until several days later. Former § 14-2-5(a)(3) sanctioned this practice by providing that the date when the document was received and stamped "filed" by the Secretary of State was the filing date.

Subsection (c) has no counterpart in either the Model Act or former law. It was added to reflect and authorize the previous practice of the Secretary of State, which permitted the existing filing date to be used even if the filed document is deficient, if, after receipt of notice of the deficiency, the document is corrected and returned to the Secretary of State in timely fashion.

#### Cross-References

Effective date: amendment or restatement of articles of incorporation, see § 14-2-1009. Merger or share exchange, see § 14-2-1105. Voluntary dissolution, see § 14-2-1403. Filing duty of Secretary of State, see § 14-2-125. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Reliance of third persons on uncorrected documents, see § 14-2-124.

#### 14-2-124. Correcting filed document.

(a) A domestic or foreign corporation may correct a document filed by the Secretary of State if the document:

- (1) Contains an incorrect statement; or
- (2) Was defectively executed, attested, sealed, verified, or acknowledged.

(b) A document is corrected:

(1) By preparing articles of correction that:

- (A) Describe the document (including its filing date);
- (B) Specify the incorrect statement and the reason it is incorrect or the manner in which the execution was defective; and



(C) Correct the incorrect statement or defective execution; and

(2) By delivering the articles to the Secretary of State for filing.

(c) Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed. (Code 1981, § 14-2-124, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 4; Ga. L. 2002, p. 989, § 3.)

The 2002 amendment, effective July 1, articles" at the end of subparagraph 2002, deleted "or attach a copy of it to the (b)(1)(A).

#### COMMENT

Source: Model Act § 1.24. This substantially preserves the practice of former law, § 14-2-5(b).

Section 14-2-124 permits making corrections in filed documents without refileing the entire document or submitting formal articles of amendment. This continues the practice of former law, under § 14-2-5(b). Under subsection (c), even the correction relates back to the original effective date of the document except as to persons relying on the original document and adversely affected by the correction. As to these persons, the effective date of articles of correction is the date the articles are filed.

A document may be corrected either because it contains an "incorrect statement" or because it was defectively executed (including defects in optional forms of execution that do not affect the eligibility of the original document for filing).

#### Cross-References

"Deliver" includes mail, see § 14-2-140. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120.

### 14-2-125. Filing duty of Secretary of State.

(a) If a document delivered to the office of the Secretary of State for filing satisfies the requirements of Code Section 14-2-120, the Secretary of State shall file it.

(b) The Secretary of State files a document by stamping or otherwise endorsing his official title and the date and time of receipt on both the original and the document copy. After filing a document, except as provided in Code Sections 14-2-503 and 14-2-1510, the Secretary of State shall deliver the document copy to the domestic or foreign corporation or its representative.

(c) If the Secretary of State refuses to file a document, he shall return it to the domestic or foreign corporation or its representative within ten days after the document was delivered, together with a brief, written explanation of the reason for his refusal.

(d) The Secretary of State's duty to file documents under this Code section is ministerial. His filing or refusing to file a document does not:

(1) Affect the validity or invalidity of the document in whole or part;

(2) Relate to the correctness or incorrectness of information contained in the document; or

(3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect. (Code 1981, § 14-2-125, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 1.25. Changes from former law, § 14-2-5 and § 14-2-393(a), are described below.

Under section 14-2-125 the Secretary of State is required to file a document if it "satisfies the requirements of Code section 14-2-120." There was no express standard in former Georgia law. Such a review was implicit in § 14-2-393(a), which provided that if the Secretary of State rejects a document for filing, he must provide notice of his reasons for such action.

Subsection (c) provides that if the Secretary of State does reject a document for filing he must return it to the corporation or its representative within ten days (rather than the five days provided in the Model Act) together with a brief written explanation of his reason for rejection. This rejection may be the basis of judicial review under section 14-2-126.

Provisions of former § 14-2-5(d) that required the Secretary of State to keep hard copies of charter documents for seven years, and annual reports for five years, before switching to microform, have been eliminated.

#### Cross-References

Appeal from rejection of document, see § 14-2-126. "Deliver" includes mail, see § 14-2-140. Effective time and date of filing, see § 14-2-123. Filing requirements: fees, see § 14-2-122. Generally, see § 14-2-120. Resignation of registered agent, see §§ 14-2-503 & 1509. Service on foreign corporation, see § 14-2-1510. Powers of Secretary of State, see § 14-2-130.

### **14-2-126. Appeal from Secretary of State's refusal to file document.**

(a) If the Secretary of State refuses to file a document delivered to his office for filing, the domestic or foreign corporation may appeal the refusal within 30 days after the return of the document to the superior court of the county where the corporation's registered office is or will be located. The appeal is commenced by petitioning the court to compel filing the document and by attaching to the petition the document and the Secretary of State's explanation of his refusal to file.

(b) The matter shall promptly be tried de novo by the court without a jury. The court may summarily order the Secretary of State to file the document or take other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (Code 1981, § 14-2-126, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Act § 1.26. The major change from former law, § 14-2-393(a), is reduction from 40 to 30 days of the time limit for appeals.

This Code, like earlier versions, does not address either the burden of proof or the standard for review in judicial proceedings challenging action of the Secretary of State.

**Cross-References**

"Deliver" includes mail, see § 14-2-140. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Registered office: designated in annual registration, see § 14-2-1622; requirement, see §§ 14-2-202 & 14-2-501. Secretary of state's filing duty, see § 14-2-125.

**14-2-127. Evidence of filing.**

A certificate attached to a copy of a document or electronic transmission filed by the Secretary of State, bearing his or her signature, which may be in facsimile, and the printed or embossed seal of this state, or its electronic equivalent, is prima-facie evidence that the original document has been filed with the Secretary of State. (Code 1981, § 14-2-127, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1999, p. 405, § 2.)

**COMMENT**

Source: Model Act, § 1.27. This follows the pattern of the former law, § 14-2-6(a).

The Secretary of State may be requested to certify that a specific document has been filed with him upon payment of the fees specified in the fee schedule of the Secretary of State. Georgia departed from the Model Act language, which made the certificate conclusive evidence of filing, to provide that it is only prima facie evidence of filing, to allow for the possibility of fraud or collusion between an employee of the Secretary of State and the applicant. The limited effect of the certificate is consistent with the ministerial filing obligation imposed on the Secretary of State under the Model Act.

The Model Act was modified to provide that the Secretary of State's certificate will be evidence not that the original document "is on file," in the words of the Model Act, but "have been filed," since in some cases original documents will be destroyed and retained only in microform.

**Cross-References**

Forms, see § 14-2-121. Secretary of state's filing duty, see § 14-2-125.

**JUDICIAL DECISIONS**

Cited in *Due W. Assocs. v. Renfroe Mining & Grading Co.*, 194 Ga. App. 397, 391 S.E.2d 13 (1990).



**14-2-128. Certificate of existence.**

(a) Any person may apply to the Secretary of State to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(b) A certificate of existence or authorization sets forth:

(1) The domestic corporation's corporate name or the foreign corporation's corporate name used in this state;

(2) That the domestic corporation is duly incorporated under the law of this state and the date of its incorporation, or that the foreign corporation is authorized to transact business in this state;

(3) That its most recent annual registration required by Code Section 14-2-1622 has been delivered to the Secretary of State; and

(4) That articles of dissolution have not been filed.

(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as prima-facie evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state. (Code 1981, § 14-2-128, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Act, § 1.28. This is substantially the same as former law, § 14-2-6.

Section 14-2-128 establishes a procedure by which anyone may obtain a certificate from the Secretary of State that a particular domestic or foreign corporation is in existence or is authorized to transact business in the state. Where the Model Act provides that the certificate is conclusive evidence, Georgia provides only for a prima facie effect, to allow for the possibility of fraud or collusion between an employee of the Secretary of State and an applicant.

The certificate will be a standardized form. To accommodate the standardization of the process, Georgia eliminated the Model Act provision allowing the applicant to request certification of other facts of record in the office of the Secretary of State. Requests for copies of documents on file containing facts other than those provided in the standardized form may be obtained under the procedures set out in Chapter 5 of this title.

**Cross-References**

Certificate of existence for nonqualified foreign corporation, see § 14-2-1503. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Forms, see § 14-2-121. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Registered office: designated in annual registration, see § 14-2-1622; requirement, see §§ 14-2-202, 14-2-501 & 14-2-1507.

**14-2-129. Penalty for signing false document.**

A person who signs a document he knows is false in any material respect with intent that the document be delivered to the Secretary of State for

filing shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed \$500.00. (Code 1981, § 14-2-129, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 1.29. The level of the fine imposed remains the same as in the former law, § 14-2-411(b).

#### Cross-References

Administrative dissolution, see § 14-2-1440. "Deliver" includes mail, see § 14-2-140. Revocation of certificate of authority of foreign corporation, see § 14-2-1530.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 1865. 36 Am. Jur. 2d, Foreign Corporations, §§ 56, 404.

**C.J.S.** — 19 C.J.S., Corporations, §§ 552, 553, 962.

**ALR.** — Constitutionality of statute regarding conduct of officers or directors of insolvent corporation which will render them criminally responsible, 76 ALR 530.

### PART 3

#### SECRETARY OF STATE

**Cross references.** — Limits on General Assembly's powers as to corporations, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

#### 14-2-130. Powers.

The Secretary of State has the power reasonably necessary to perform the duties required of him by this chapter. (Code 1981, § 14-2-130, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 1.30. This continues the authority granted by former law, in § 14-2-390.

#### Cross-References

Administrative dissolution, see § 14-2-1420. Judicial dissolution, see § 14-2-1430. Revocation of certificate of authority of foreign corporation, see § 14-2-1530. Secretary of state's filing duty, see § 14-2-125.

### PART 4

#### DEFINITIONS

#### 14-2-140. Code definitions.

As used in this chapter, the term:

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(3) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color or typing in capitals or underlined is conspicuous.

(4) "Corporation" or "domestic corporation" means a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of this chapter.

(5) "Deliver" includes mail.

(6) "Distribution" means a direct or indirect transfer of money or other property (except its own shares or rights to acquire its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

(7) "Effective date of notice" is defined in Code Section 14-2-141.

(7.1) "Electronic transmission" or "electronically transmitted" means any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient.

(8) "Employee" includes an officer but not a director. A director may accept duties that make him or her also an employee.

(9) "Entity" includes corporation and foreign corporation; nonprofit corporation and foreign nonprofit corporation; profit and nonprofit unincorporated association; business trust, estate, general partnership, limited partnership, trust, two or more persons having a joint or common economic interest; limited liability company and foreign limited liability company; limited liability partnership and foreign limited liability partnership; and state, United States, and foreign government.

(10) "Foreign corporation" means a corporation for profit incorporated under a law other than the law of this state.

(11) "Governmental subdivision" includes authority, county, district, and municipality.

(12) "Includes" denotes a partial definition.

(13) "Individual" includes the estate of an incompetent or deceased individual.

(14) "Mail" means the United States mail.



(15) "Means" denotes an exhaustive definition.

(16) "National securities exchange" means any securities exchange or securities quotation system if the securities listed on that exchange or system are exempt from the registration requirements of Chapter 5 of Title 10, known as the "Georgia Securities Act of 1973," pursuant to paragraph (8) or (8.1) of Code Section 10-5-8 or any successor provision.

(17) "Notice" is defined in Code Section 14-2-141.

(18) "Person" includes individual and entity.

(19) "Principal office" means the office (in or out of this state) so designated in the annual registration where the principal executive offices of a domestic or foreign corporation are located.

(20) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

(21) "Record date" means the date established under Article 6 or 7 of this chapter on which a corporation determines the identity of its shareholders and their shareholdings for purposes of this chapter. The determinations shall be made as of the close of business on the record date unless another time for doing so is specified when the record date is fixed.

(22) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under subsection (c) of Code Section 14-2-840 for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

(23) "Shares" means the units into which the proprietary interests in a corporation are divided.

(24) "Share exchange" means a plan of exchange of all of the outstanding shares of one or more classes or series of shares in accordance with Code Section 14-2-1102.

(25) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(26) "State," when referring to a part of the United States, includes a state and commonwealth (and their agencies and governmental subdivisions) and a territory and insular possession (and their agencies and governmental subdivisions) of the United States.

(27) "Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.



(28) "Treasury shares" means shares of a corporation which have been issued and which subsequently have been acquired by the corporation if the articles of incorporation of such corporation provide that shares so acquired become treasury shares. Treasury shares shall be deemed to be issued shares, but not outstanding shares.

(29) "United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

(30) "Voting group" means all shares of one or more classes or series that under the articles of incorporation or this chapter are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this chapter to vote generally on the matter are for that purpose a single voting group. (Code 1981, § 14-2-140, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 5; Ga. L. 1990, p. 257, § 1; Ga. L. 1993, p. 1231, § 1; Ga. L. 1995, p. 482, § 1; Ga. L. 1996, p. 1203, § 2; Ga. L. 1999, p. 405, § 3.)

**Cross references.** — Status of corporations as persons, § 1-2-1.

**Law reviews.** — For article discussing "earned" surplus and "capital" surplus concepts under Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article discussing rights granted owners of unpaid and partly paid shares under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article discussing treasury shares and restrictions placed upon their use by a corporation, see 3 Ga. L. Rev. 11 (1968).

For article discussing "stated capital" concept under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973). For article discussing establishment and transaction of business in Georgia by a foreign corporation, see 27 Mercer L. Rev. 629 (1976).

For review of 1996 corporation, partnership, and association legislation, see 13 Ga. St. U. L. Rev. 70.

### COMMENT

Source: Model Act, § 1.40. The former law was § 14-2-2.

Section 14-2-140 collects in a single section definitions of terms used throughout the Code. Articles and Parts of the Code in a few instances contain specialized definitions applicable only to those articles or parts.

Most of the definitions of section 14-2-140 are drawn directly from earlier versions of the Model Act and the Georgia Code and are reasonably self-explanatory. See § 14-2-2. The principal change in the definitions relates to elimination of legal capital concepts, such as stated capital, capital surplus, and earned surplus.

The term "distribution" defined in subsection (6) is a fundamental element of the financial provisions of the Model Act as amended in 1980. Section 14-2-640 sets forth a single, unitary test for the validity of any "distribution." Section 14-2-140(6) in turn defines "distribution" to include all transfers of money or other property made by a corporation to a shareholder in respect of the corporation's shares, except mere changes in the unit of interest such as share dividends and share splits. Thus, a "distribution" includes the declaration or payment of a dividend, a purchase by a corporation of its own shares, a distribution of evidences of indebtedness or promissory notes of the corporation, and a distribution in voluntary or involuntary liquidation. If a corporation incurs indebtedness in connection with a distribution (as in the case of a

distribution of a debt instrument or an installment purchase of shares), the creation, incurrence, or distribution of the indebtedness is the event which constitutes the distribution rather than the subsequent payment of the debt by the corporation.

The term "indirect" in the definition of "distribution" is intended to include transactions like the repurchase of parent company shares by a subsidiary whose actions are controlled by the parent. It also is intended to include any other transaction in which the substance is clearly the same as a typical dividend or share repurchase, no matter how structured or labeled.

The definition of "national securities exchange" in section 14-2-140(16) is defined by reference to the Georgia Securities Act, which authorizes the Georgia Securities Commissioner to determine which exchanges qualify as national securities exchanges for purposes of exemption from registration under that Act.

The definition of "shareholder" in section 14-2-140(25) includes a beneficial owner of shares named in a nominee certificate under section 14-2-723, but only to the extent of the rights granted the beneficial owner in the certificate for example, the right to receive notice of, and vote at, shareholders' meeting.

Subsection (29) defines "voting group" for purposes of the Code as a matter of convenient reference. A "voting group" consists of all shares of one or more classes or series that under the articles of incorporation or the Code are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter under the articles of incorporation or this Code are for that purpose a single voting group. The word "generally" signifies all shares entitled to vote on the matter by the articles of incorporation or this Code that do not expressly have the right to be counted or tabulated separately. "Voting groups" are thus the basic unit of collective voting at shareholders' meeting, and voting by voting groups may provide essential protection to one or more classes or series of shares against actions that are detrimental to the rights or interests of that class or series.

#### **Note to 1990 Amendment**

The 1990 amendment expands the definition of "national securities exchange" to include the National Association of Securities Dealers, Inc.'s automated national quotation system. This amendment effectively eliminates the right of shareholders to dissent from mergers or share exchanges involving the issuance of NASDAQ-listed securities and so conforms the statutory dissent rights to the exemption from registration provided under § 10-5-8(8.1) of the Georgia Securities Act of 1973.

#### **Note to 1993 Amendment**

The 1993 amendment added a new definition of Treasury shares, recognizing that a corporation retains the option pursuant to Section 14-2-631 of retaining reacquired shares rather than cancelling such shares and having them revert to authorized but unissued shares.

#### **Note to 1996 Amendment**

The definition of "distribution" in subsection (6) was amended to add to the exception rights to acquire shares of the corporation. Thus, neither the issuance of its own shares nor rights to acquire them will constitute a distribution.

#### **Note to 1999 Amendment**

Source: Model Act § 1.40(7A). The definition of "electronic transmission" or "electronically transmitted" includes both communication systems which in the normal course produce paper, such as telegrams and facsimiles, as well as communication systems which transmit and permit the retention of data which is then subject to



subsequent retrieval and reproduction in written form. Electronic transmission is intended to be broadly construed and include the evolving methods of electronic delivery, including electronic transmissions between computers via modem, as well as data stored and delivered on magnetic tapes or computer diskettes.

### Cross-References

Annual registration, see § 14-2-1622. Nominee certificate, see § 14-2-723. Special definitions: "Affiliate," see § 14-2-1110. "Announcement date," see § 14-2-1110. "Associate," see § 14-2-1110. "Beneficial owner," see §§ 14-2-1110 & 14-2-1131. "Beneficial shareholder," see § 14-2-1301. "Business combination," see §§ 14-2-1110 & 14-2-1131. "Call," see § 14-2-641. "Claim," see § 14-2-1407. "Conflicting interest," see § 14-2-860. "Continuing director," see § 14-2-1110. "Control," see §§ 14-2-1110 & 1131. "Corporation," see §§ 14-2-850, 14-2-1110 & 14-2-1301. "Derivative proceeding," see § 14-2-740. "Determination date," see § 14-2-1110. "Director," see § 14-2-850. "Director's conflicting interest transaction," see § 14-2-860. "Dissenter," see § 14-2-1301. "Dissenters' notice," see § 14-2-1322. "Expenses," see § 14-2-850. "Fair value," see § 14-2-1301. "Insolvent," see § 14-2-1201. "Interest," see § 14-2-1301. "Interested shareholder," see § 14-2-1110. "Joint-stock association," see § 14-2-1109. "Liability," see § 14-2-850. "Limited partnership," see § 14-2-1109. "Net assets," see § 14-2-1110. "Officer," see § 14-2-864. "Officer's conflicting interest transaction," see § 14-2-864. "Outstanding shares," see § 14-2-603. "Parent," see § 14-2-1104. "Participating shares," see § 14-2-1103. "Party," see § 14-2-850. "Proceeding," see § 14-2-850. "Professional corporation," see Georgia Professional Corporation Act O.C.G.A. Ch. 7, T. 14. "Qualified shares," see § 14-2-863. "Record shareholder," see § 14-2-1301. "Redemption," see § 14-2-641. "Registered holder," see § 14-2-641. "Related person," see § 14-2-860. "Required disclosure," see § 14-2-860. "Resident domestic corporation," see § 14-2-1131. "Shares," see §§ 14-2-627, 14-2-630 & 14-2-1109. "Shareholder," see §§ 14-2-740, 14-2-1109 & 14-2-1301. "Statutory close corporation," see O.C.G.A. Art. 9, T. 14. "Subsidiary," see § 14-2-1104. "Time of commitment," see § 14-2-860. "Voting shares," see §§ 14-2-1103 & 14-2-1110.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### COMPANY

#### CORPORATION

#### CORPORATIONS ENGAGED IN ANY BUSINESS

### General Consideration

**Editor's notes.** — In light of the similarity of the provisions or the issues dealt with, decisions under former Code 1873, § 1670; former Civil Code 1895, § 1831; former Civil Code 1910, § 2188; and former Code 1933, §§ 22-101, 22-102 and decisions under former Code Section 14-2-2, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Corporation and individual separate entities.** — A person may own all the stock of a corporation and still such individual shareholder and the corporation would, in law, be

two separate and distinct persons. *Barnes v. Finnegan Enters., Inc.*, 150 Ga. App. 430, 258 S.E.2d 55 (1979) (decided under former Code 1933, §§ 22-101, 22-102).

**Person may transact business as individual in corporate name.** — To be the alter ego of the corporation the sole stockholder cannot disregard the entity of the corporation, although the stockholder may transact business as an individual in the corporate name, in which case there still would be no merger. *Barnes v. Finnegan Enters., Inc.*, 150 Ga. App. 430, 258 S.E.2d 55 (1979) (decided under former Code 1933, §§ 22-101, 22-102).

**Workers' compensation applies to both**

**General Consideration (Cont'd)**

**nonprofit and profit-making business corporations.** — The 1975 amendment to Ga. L. 1970, p. 196, § 1 (see O.C.G.A. § 34-9-4) eliminated the exempted status for nonprofit business corporations as set out in Part I, Title 22 of the Georgia Business Corporation Code (see O.C.G.A. Ch. 3, T. 14) and made the workers' compensation law apply to them as it does to profit-making corporations as set forth in Part II, Title 22 (see O.C.G.A. Ch. 2, T. 14). *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978) (decided under former Code 1933, § 22-102).

Cited in *Corbin v. Corbin*, 429 F. Supp. 276 (M.D. Ga. 1977); *Forest Managers, Inc. v. Wilkes County*, 152 Ga. App. 639, 263 S.E.2d 478 (1979); *Nicholson v. Core* (In re Carolee's Combine, Inc.), 3 Bankr. 324 (Bankr. N.D. Ga. 1980); *Miller & Meier & Assocs. v. Diedrich*, 174 Ga. App. 249, 329 S.E.2d 918 (1985); *Corporate Jet Aviation, Inc. v. Vantress*, 45 Bankr. 629 (Bankr. N.D. Ga. 1985).

**Company**

**Term "company" imports a corporation until the contrary is shown.** *Caroline Realty Inv., Inc. v. Kuniansky*, 127 Ga. App. 478, 194 S.E.2d 291 (1972) (decided under former Code 1933, § 22-101).

**Corporation**

**Corporation is an artificial being, an entity.** *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739 (1903); *Garmany v. Lawton*, 124 Ga. 876, 53 S.E. 669, 110 Am. St. R. 207 (1906) (decided under former Civil Code 1895, § 1831).

**No existence before grant of certificate of incorporation.** — A corporation is not a person in law until after the grant of its charter (now certificate of incorporation). *Venable Bros. v. Southern Granite Co.*, 135 Ga. 508, 69 S.E. 822 (1910) (decided under former Civil Code 1910, § 2188).

**Corporations have been divided into three classes** — corporations de jure, corporations

de facto, and corporations by estoppel. *Cason v. State*, 16 Ga. App. 820, 86 S.E. 644 (1914) (decided under former Civil Code 1910, § 2189).

**When corporation not impliedly a person.** — Though the term "person" will ordinarily include a corporation, a corporation is not impliedly within a statutory provision applicable to persons, if it is not within the purpose and intent of such provision, or an attempt to exclude it otherwise appears. *Georgia R.R. Bank & Trust Co. v. Liberty Nat'l Bank & Trust Co.*, 180 Ga. 4, 177 S.E. 803 (1934) (decided under former Civil Code 1910, § 2188).

**Corporation and individual separate entities though one person owns entire stock.** — Though one person owns the entire stock of a corporation, still, in law, the corporation and the individual are separate entities. A corporation is an artificial person created by law. This legal entity retains its separate and independent character regardless of the ownership of its capital stock. *Jones v. Major*, 80 Ga. App. 223, 55 S.E.2d 846 (1949) (decided under former Code 1933, § 22-101).

**Effect of bankruptcy.** — The bankruptcy of a corporation does not put an end to the corporate existence, nor vacate the office of its directors. The creating state alone can destroy. *Holland v. Heyman & Bro.*, 60 Ga. 174 (1878); *National Sur. Co. v. Medlock*, 2 Ga. App. 665, 58 S.E. 1131 (1907) (decided under former Code 1873, § 1670, and former Civil Code 1895, § 1831).

**Corporations Engaged In Any Business**

**Phrase "corporations engaged in any business" in Ga. L. 1970, p. 196, § 1 (see O.C.G.A. § 34-9-4)** included only those corporations governed by the Georgia Business Corporation Code (see O.C.G.A. § 14-2-101). Hospital authorities are not governed by the Georgia Business Corporation Code, but are expressly exempted therefrom. *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978) (decided under former Code 1933, § 22-102).



## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former § 14-2-2, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Definition of "foreign corporation"** is based upon the premise that such an entity must be a corporation; thus, since a business

trust is not considered a corporate entity, it cannot be a foreign corporation under Georgia law and does not have to register with the Secretary of State as a corporation under the Georgia Business Corporation Code (see O.C.G.A. § 14-2-101 et seq.). 1978 Op. Att'y Gen. No. 78-42 (decided under former Code 1933, § 22-102).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 3-5, 32. 18A Am. Jur. 2d, Corporations, §§ 306, 431, 463, 485, 578-580, 582, 728, 965, 966, 1019, 1020. 18B Am. Jur. 2d, Corporations, §§ 1168, 1205, 1236, 1343, 1344. 36 Am. Jur. 2d, Foreign Corporations, §§ 1, 2.

**C.J.S.** — 18 C.J.S., Corporations, §§ 2, 5, 107, 108, 122-124, 126-131, 184, 301-303, 305, 375-378. 19 C.J.S., Corporations, § 883.

**ALR.** — Right of creditor of insolvent

corporation to sue stockholder at law upon unpaid subscription, 7 ALR 100.

Validity of release, cancellation, or compromise of unpaid subscription for stock by corporation or its representatives, 101 ALR 231.

Eligibility as corporate director of one who was not stockholder in fact, or not stockholder of record, at time of election, but who afterwards became such, 130 ALR 156.

## 14-2-141. Notice.

(a) Notice under this chapter shall be in writing unless oral notice is reasonable under the circumstances.

(b) Notice may be communicated in person; by telephone, telegraph, teletype, facsimile, or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published, or by radio, television, or other form of public broadcast communication. Unless otherwise provided in the articles of incorporation, bylaws, or this chapter, notice by facsimile transmission, telegraph, or teletype shall be deemed to be notice in writing for purposes of this chapter.

(c) Written notice by a domestic or foreign corporation to its shareholders, if in a comprehensible form, is effective when mailed, if mailed with first-class postage prepaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders. If the corporation has more than 500 shareholders of record entitled to vote at a meeting, it may utilize a class of mail other than first class if the notice of the meeting is mailed, with adequate postage prepaid, not less than 30 days before the date of the meeting.

(d) Written notice to a domestic or foreign corporation (authorized to transact business in this state) may be addressed to its registered agent at its

registered office or to the corporation or its secretary at its principal office shown in its most recent annual registration or, in the case of a foreign corporation that has not yet delivered an annual registration, in its application for a certificate of authority.

(e) Except as provided in subsection (c) of this Code section, written notice, if in a comprehensible form, is effective at the earliest of the following:

(1) When received, or when delivered, properly addressed, to the addressee's last known principal place of business or residence;

(2) Five days after its deposit in the mail, as evidenced by the postmark, or such longer period as shall be provided in the articles of incorporation or bylaws, if mailed with first-class postage prepaid and correctly addressed; or

(3) On the date shown on the return receipt, if sent by registered or certified mail or statutory overnight delivery, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(f) Oral notice is effective when communicated if communicated in a comprehensible manner.

(g) In calculating time periods for notice under this chapter, when a period of time measured in days, weeks, months, years, or other measurement of time is prescribed for the exercise of any privilege or the discharge of any duty, the first day shall not be counted but the last day shall be counted.

(h) Without limiting the manner by which notice otherwise may be given effectively under this chapter:

(1) Any notice by a corporation under any provision of this chapter, the articles of incorporation, or the bylaws to record or beneficial holders of its shares shall be effective if given by a single written notice to two or more such holders who share an address if consented to by those holders. Any such consent shall be revocable by a holder by written notice to the corporation. Except as provided in paragraph (2) of this subsection, any such consent shall be in writing and signed by each record or beneficial holder with respect to which such single written notice is to be effective.

(2) Any record or beneficial holder of shares of any class or series which are either listed on a national securities exchange or held of record by more than 500 shareholders who fails to object in writing to the corporation, within 60 days of having been given written notice by the corporation of its intention to send the single notice permitted under paragraph (1) of this subsection to such holders, shall be deemed to have consented to receiving such single written notice.

(i) If this chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws



prescribe notice requirements, not inconsistent with this Code section or other provisions of this chapter, those requirements govern. (Code 1981, § 14-2-141, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 6; Ga. L. 1997, p. 1165, § 1.1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2003, p. 897, § 1.)

**The 2003 amendment**, effective July 1, 2003, added subsection (h) and redesignated former subsection (h) as present subsection (i).

§ 16, not codified by the General Assembly, provided that the amendment to paragraph (e)(3) was applicable with respect to notices delivered on or after July 1, 2000.

**Editor's notes.** — Ga. L. 2000, p. 1589,

### COMMENT

Source: Model Act, § 1.41. This section generally follows the approach of former law, in § 14-2-113.

Section 14-2-141 establishes rules for determining how notice may be given and when notice is effective for a variety of purposes.

Subsection (a) expressly validates oral notice for all purposes except where written notice is required, as where dissenter's rights are to be triggered, or disclosure of an agreement and plan of merger or share exchange is required. This is new to Georgia law.

Subsection (b)'s authorization of notice by publication has no counterpart in former Georgia law.

Subsection (c) of the Model Act was amended by adding provisions permitting use of third class mail by large corporations, to preserve the approach of former law.

Subsection (e) of the Model Act was amended by the addition of "the articles of incorporation or bylaws" to the introductory clause. This permits corporations to provide for longer periods for the effective dates of notices, but does not allow the minimum periods set out in subsection (e) to be shortened.

Subsection (g) was added to the Model Act's provisions to clarify rules for calculating the time when notice becomes effective. It is based on O.C.G.A. § 1-3-1(d)(3), but does not exclude weekends and holidays where the final day falls on one.

#### Note to 1989 Amendment

The 1989 amendments changed subsection (e)(2) by the addition of "or such longer period as shall be provided in the articles of incorporation or bylaws" to the introductory clause. This permits corporations to provide for longer periods for the effective dates of notices, but does not allow the minimum periods set out in subsection (e)(2) to be shortened. The 1989 amendments also changed subparagraph (1) to clarify the effective date of delivery of a notice. Thus, actual receipt always establishes a delivery date, unless an earlier date is established under subparagraphs (2) or (3). Physical delivery to an addressee's office or residence also establishes delivery.

#### Note to 1997 Amendment

The last sentence of subsection (a) is new. This clarifies that the decision in *Georgia Dept. of Transportation v. Norris*, 1996 Ga. App. LEXIS 791 (1996) (holding that a facsimile transmission did not satisfy a requirement under another statute for a notice "given in writing") does not normally apply to corporate law matters under this Chapter.

**Note to 2003 Amendment**

New subsection (h) of Code Section 14-2-141 is modeled on Section 233 of the Delaware General Corporation Law and is designed to permit corporations to give a single written notice of meetings and other matters to shareholders who share the same address, if those shareholders consent to receiving only one notice. This provision is intended to interface with and permit use of the Securities and Exchange Commission's "householding" rules adopted in 2000. Delivery of Proxy Statements and Information Statements to Households, Securities Act Release No. 7912, Exchange Act Release No. 43487, Investment Company Act Release No. 24715, [2000-2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) 86,404 at 83,931 (October 27, 2000). These "householding" rules permit companies and intermediaries to satisfy the delivery requirements for proxy statements, information statements and certain other materials with respect to two or more security holders sharing the same address by delivering a single proxy statement, information statement or other disclosure document to those security holders. This method of delivery may reduce the amount of duplicative information that shareholders receive and lower the cost of complying with the proxy rules for companies. This amendment, which is not limited to public companies, provides that sending a non-objecting shareholder such a "household" document that includes a notice required to be given under this chapter, the articles of incorporation or the bylaws, shall satisfy the requirement that such notice be given to each shareholder.

**Cross-References**

Annual registration, see § 14-2-1622. Application for certificate of authority, see § 14-2-1503. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. "Mail" defined, see § 14-2-140. Notice of directors' meetings, see § 14-2-822. Record of shareholders, see § 14-2-1601. Special notice requirements: creditors of dissolving corporation, see §§ 14-2-1406 & 14-2-1407; derivative proceedings, see § 14-2-745; intent to dissolve, see § 14-2-1403 resignation of registered agent, see §§ 14-2-503 & 14-2-1509; service on corporation, see §§ 14-2-504 & 14-2-1510. Waiver of notice by directors, see § 14-2-823. Waiver of notice by shareholders, see § 14-2-706.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-604 and former Code Section 14-2-113, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Shareholders may act through attorney in calling special meeting** of corporation's shareholders. *Comolli v. Comolli Granite*

Co., 233 Ga. 461, 211 S.E.2d 750 (1975) (decided under former Code 1933, § 22-604).

**Cited in** Milton Frank Allen Publications, Inc. v. Georgia Ass'n of Petro. Retailers, 224 Ga. 518, 162 S.E.2d 724 (1968); *Sherrer v. Hale*, 248 Ga. 793, 285 S.E.2d 714 (1982); *J.M. Clayton Co. v. Martin*, 177 Ga. App. 228, 339 S.E.2d 280 (1985).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 963, 970, 977-979. 18B Am. Jur. 2d, Corporations, §§ 1205, 1368, 1460.

**C.J.S.** — 18 C.J.S., Corporations, §§ 300,

365-367, 436. 19 C.J.S., Corporations § 436.

**ALR.** — Participation in meeting as waiver of compliance with notice requirement for shareholders' meeting, 64 ALR3d 358.



**14-2-142. Number of shareholders.**

(a) For purposes of this chapter, the following identified as a shareholder in a corporation's current record of shareholders constitute one shareholder:

- (1) Three or fewer co-owners;
- (2) A corporation, partnership, trust, estate, or other entity;
- (3) The trustees, guardians, custodians, or other fiduciaries of a single trust, estate, or account.

(b) For purposes of this chapter, shareholdings registered in substantially similar names constitute one shareholder if it is reasonable to believe that the names represent the same person. (Code 1981, § 14-2-142, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1994, p. 97, § 14.)

**COMMENT**

Source: Model Act, § 1.42. There was no counterpart in former law. Determination of the number of shareholders is critical for determining eligibility to elect statutory close corporation status under Article 9.

**Cross-References**

Close corporations, see article 9. Dissenter's rights, see § 14-2-1302. "Entity" defined, see § 14-2-140. Record of shareholders, see §§ 14-2-720 & 14-2-1601. "Shareholder" defined, see § 14-2-140. Voting trusts, see § 14-2-730.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 735, 736, 738, 739, 747.

**C.J.S.** — 18 C.J.S., Corporations, § 305.

**PART 5****EXECUTION OF DOCUMENTS****14-2-150. Signatures.**

The signatures of the officers of a corporation and the seal of the corporation upon any bond, debenture, interest coupon, or other debt security may be facsimiles if the instrument is authenticated or countersigned by a trustee or transfer agent or registered by a registrar other than the corporation or an employee of the corporation. The transfer agent or registrar may sign manually or in facsimile. (Code 1981, § 14-2-150, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 7.)

**Law reviews.** — For article discussing issuance of debt securities under the Georgia

Business Corporation Code, see 3 Ga. L. Rev. 11 (1968).

**COMMENT**

Source: This provision was taken from former law, § 14-2-87(b).

**Note to 1989 Amendment**

The 1989 amendment changed this provision to provide that all signatures on a bond or debenture may be facsimiles. The 1989 amendments made a similar change in the requirements for stock certificates contained in Code Section 14-2-625(d).

**Cross-References**

Signatures on share certificates, see § 14-2-625.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 554. 18B Am. Jur. 2d, Corporations, §§ 2005-2007.

**C.J.S.** — 19 C.J.S., Corporations, § 667.

**14-2-151. Secretary or assistant secretary of corporation to authenticate records of corporation; reliance on affixed seal by third party.**

(a) With respect to any contract, conveyance, or similar document executed by or on behalf of a domestic or foreign corporation, the presence of the corporate seal, or a facsimile thereof, attested by the secretary or assistant secretary of the corporation, or other officer to whom the bylaws or the directors have delegated the responsibility for authenticating records of the corporation, shall attest:

(1) That the corporate seal or facsimile thereof affixed to the document is in fact the seal of the corporation or a true facsimile thereof, as the case may be;

(2) That any officer of the corporation executing the document does in fact occupy the official position indicated, that one in such position is duly authorized to execute such document on behalf of the corporation, and that the signature of such officer subscribed thereto is genuine; and

(3) That the execution of the document on behalf of the corporation has been duly authorized.

(b) With respect to any contract, conveyance, or similar document executed by or on behalf of a domestic or foreign corporation, execution by the president or vice-president of the corporation, attested by the secretary or assistant secretary of the corporation or other officer to whom the bylaws or the directors have delegated the responsibility for authenticating records of the corporation, shall attest:

(1) That the person executing the document as president or vice-president of the corporation does in fact occupy the official position, that one in such position is duly authorized to execute such document on behalf of the corporation, and that the signature of such officers subscribed thereto is genuine; and

(2) That the execution of the document on behalf of the corporation has been duly authorized.

(c) When the seal of a corporation or the facsimile thereof is affixed to any document, or where a document is executed by the president or a vice-president of a corporation, and in either case is attested by the secretary or assistant secretary of that corporation or other officer to whom the bylaws or the directors have delegated the responsibility for authenticating records of the corporation, a third party without knowledge or reason to know to the contrary may rely on such document as being what it purports to be.

(d) The seal of the corporation may be affixed to any document executed by the corporation, but the absence of the seal shall not impair the validity of the document or of any action taken in pursuance thereof or in reliance thereon. (Code 1981, § 14-2-151, enacted by Ga. L. 1989, p. 946, § 8; Ga. L. 1992, p. 1180, § 1.)

**Editor's notes.** — Ga. L. 1992, p. 1180, § 3, not codified by the General Assembly, provided that the amendment to this Code section was applicable to acts occurring prior to July 1, 1992, as well as to acts occurring on or after such date.

#### COMMENT

Source: Former O.C.G.A. § 14-2-4 (1982).

This section restores provisions of former section 14-2-4 that were an addition to Model Act provisions when enacted in 1968. Subsections (a) and (b) correspond to former subsections (a) and (b) of the prior code provision, while subsection (c) corresponds to former subsection (d). This section omits provisions of former law that specified which corporate officers must sign corporate documents required by the code, and omits provisions relating to deeds. The effect of a seal upon deeds is governed by Code Section 14-5-7.

#### Cross-References

Power to have a corporate seal, see § 14-2-302(2). Required officers, see § 14-2-840. "Secretary" defined, see § 14-2-140. Signatures, see §§ 14-2-150 & 14-2-625.

#### JUDICIAL DECISIONS

**Signature in representative capacity without seal.** — The presence of an unattested corporate seal and an individual signature on a promissory note placed the instrument within the representative capacity provisions of the Uniform Commercial Code, so as to permit the introduction of parol evidence to show agency. *Hartkopf v. Heinrich Ad. Berkemann*, 200 Ga. App. 355, 408 S.E.2d 450, cert. denied, 200 Ga. App. 896, 408 S.E.2d 450 (1991).

**Section not persuasive in actions against individuals.** — O.C.G.A. § 14-2-151, authorizing an action against a corporation because of the corporate seal, is not persuasive in an action brought against a party individually. *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991); *Castellana v. Conyers Toyota, Inc.*, 200 Ga. App. 161, 407 S.E.2d 64 (1991).



## ARTICLE 2

## INCORPORATION

**Administrative rules and regulations.** — Articles of Incorporation, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Commissioner of Corporations, Chapter 590-7-3.

**Law reviews.** — For article discussing the advantage of incorporation by farmers, see 4 Ga. St. B.J. 335 (1968). For article, "Comparison of Features of Old and New Business

Corporation Laws Relating to Domestic Corporations," see 5 Ga. St. B.J. 13 (1968). For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973). For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989). For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988).

## RESEARCH REFERENCES

**ALR.** — Liability of officers, directors, or members of defectively organized corporation to one of their number for advances, commissions, etc., 115 ALR 658.

Organization sought to be incorporated under an unconstitutional statute as a de facto corporation, 136 ALR 187.

Construction and effect of corporate articles, charter, or bylaws limiting duration or maturity of its indebtedness, 55 ALR2d 949.

Liability of attorney for improper or ineffective incorporation of client, 40 ALR4th 535.

## 14-2-201. Incorporators.

One or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the Secretary of State for filing. (Code 1981, § 14-2-201, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Model Act, § 2.01. The only change from previous law is that former § 14-2-170 required natural persons who serve as incorporators to be over 18 years of age.

The only functions of incorporators under the Code are (1) to sign the articles of incorporation, (2) to deliver them for filing with the Secretary of State, and (3) to complete the formation of the corporation to the extent set forth in Section 14-2-205.

## Cross-References

Articles of incorporation, see § 14-2-202. "Deliver" includes mail, see § 14-2-140. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Organization of corporation by incorporators, see § 14-2-205. "Person" defined, see § 14-2-140.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 189, 190, 208.

**C.J.S.** — 18 C.J.S., Corporations, §§ 31, 32.

**14-2-201.1. Publication of notice of intent to file articles of incorporation.**

(a) Together with the articles of incorporation, the incorporator or incorporators shall deliver to the Secretary of State an undertaking (which may appear in the articles of incorporation or be set forth in a letter or other instrument executed by an incorporator or any person authorized to act on behalf of the corporation) to publish a notice of the filing of the articles of incorporation as required by subsection (b) of this Code section.

(b) No later than the next business day after filing the articles of incorporation, the incorporator shall deliver to the publisher of a newspaper which is the official organ of the county where the initial registered office of the corporation is to be located or which is a newspaper of general circulation published within such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation a request to publish a notice in substantially the following form:

**“NOTICE OF INCORPORATION**

Notice is given that articles of incorporation which incorporate \_\_\_\_\_ (name of corporation) have been delivered to the Secretary of State for filing in accordance with the Georgia Business Corporation Code. The initial registered office of the corporation is located at \_\_\_\_\_ (address of registered office) and its initial registered agent at such address is \_\_\_\_\_ (name of agent).”

The request for publication of the notice shall be accompanied by a check, draft, or money order in the amount of \$40.00 in payment of the cost of publication. The notice shall be published once a week for two consecutive weeks commencing within ten days after receipt of the notice by the newspaper. Failure on the part of the incorporator to deliver the notice or payment therefor or failure on the part of the newspaper to publish the notice in compliance with this subsection shall not invalidate the incorporation of the corporation or the filing of the articles of incorporation. (Code 1981, § 14-2-201.1, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 9; Ga. L. 1990, p. 257, § 2; Ga. L. 1993, p. 1231, § 2.)

**Cross references.** — Limits on General Assembly's powers as to corporations, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

**Law reviews.** — For survey article on

business associations, see 34 Mercer L. Rev. 13 (1982). For article, “Some Distinctive Features of the Georgia Business Corporation Code,” 28 Ga. St. B.J. 101 (1991).

**COMMENT**

Source: Former § 14-2-172.



Prior Georgia law required publication of a similar notice for four consecutive weeks at a fee of \$60. It also required filing with the clerk of the superior court in the county where the registered office of the corporation was located. Further, documents to effect the filing and publication were forwarded, together with the required checks, to the Secretary of State for transmittal to the clerks and newspapers. Local filing has been eliminated entirely by the Code with the expectation that it will be replaced by computer access to the corporate data base of the Secretary of State from the offices of all clerks. Filing fees under the Code were increased to fund the installation of the hardware for such a system. The Revision Committee recommended elimination of all publication requirements, to correspond to the Model Act and modern practice. While this was rejected by the General Assembly, publication requirements have been reduced and simplified. Incorporators will be required to see to publication, rather than to pass that responsibility on to the Secretary of State, at a saving in administrative costs.

#### **Note to 1989 Amendment**

The 1989 amendment eliminated references in the form of notice to multiple registered agents. The Code does not provide for such agents, as prior law did. See § 14-2-501.

#### **Note to 1990 Amendment**

The 1990 amendment makes it clear that any person acting on behalf of the corporation (such as an attorney or other agent) may execute the requisite certificate of publication and not just an incorporator.

#### **Note to 1993 Amendment**

The 1993 amendment deals with the timing of making a request for publication in connection with the incorporation process, permitting such a request to be delivered no later than the business day after filing of the certificate of incorporation with the Secretary of State. The amendment also changes the form of notice in recognition that it generally is published after such filing has occurred.

#### **Cross-References**

Articles of incorporation, see § 14-2-202. Failure to publish notice as grounds for administrative dissolution, see § 14-2-1420(5). Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Registered office and registered agent, see § 14-2-501.

### **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-172, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Contract offer in corporate name prior to corporation's existence.** — Contract offer in corporate name remained merely a tender

until its acceptance, a date after the corporate existence began; therefore, incorporators incurred no personal liability on ground of unauthorized assumption of corporate powers. *Satellite Syndicated Sys. v. Henderson*, 162 Ga. App. 453, 291 S.E.2d 749 (1982) (decided under former § 14-2-172).

### **OPINIONS OF THE ATTORNEY GENERAL**

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code Section 14-2-172, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, are included in the annotations for this Code section.

**Secretary of State authorized to incorporate marketing associations.** — Since consti-



tutional amendment (former Art. III, Sec. VIII, Para. II of the 1976 Constitution) transfers the power to incorporate private companies to the Secretary of State, and marketing associations are private companies, the Sec-

retary of State, rather than the superior courts, is authorized to incorporate marketing associations. 1977 Op. Att'y Gen. No. 77-34 (decided under former § 14-2-172).

### RESEARCH REFERENCES

**ALR.** — Effect upon the corporate existence of failure to file certificate in organizing a corporation, 22 ALR 376; 37 ALR 1319.

### 14-2-202. Articles of incorporation.

(a) The articles of incorporation must set forth:

- (1) A corporate name for the corporation that satisfies the requirements of Code Section 14-2-401;
- (2) The number of shares the corporation is authorized to issue;
- (3) The street address and county of the corporation's initial registered office and the name of its initial registered agent at that office;
- (4) The name and address of each incorporator; and
- (5) The mailing address of the initial principal office of the corporation, if different from the initial registered office.

(b) The articles of incorporation may set forth:

- (1) The names and addresses of the individuals who are to serve as the initial directors;
- (2) Provisions not inconsistent with law regarding:
  - (A) The purpose or purposes for which the corporation is organized;
  - (B) Managing the business and regulating the affairs of the corporation;
  - (C) Defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders;
  - (D) A par value for authorized shares or classes of shares; and
  - (E) The imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions;
- (3) Any provision that under this chapter is required or permitted to be set forth in the bylaws;

(4) A provision eliminating or limiting the liability of a director to the corporation or its shareholders for monetary damages for any action taken, or any failure to take any action, as a director, except liability:

(A) For any appropriation, in violation of his or her duties, of any business opportunity of the corporation;

(B) For acts or omissions which involve intentional misconduct or a knowing violation of law;

(C) For the types of liability set forth in Code Section 14-2-832; or

(D) For any transaction from which the director received an improper personal benefit,

provided that no such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective; and

(5) A provision that, in discharging the duties of their respective positions and in determining what is believed to be in the best interests of the corporation, the board of directors, committees of the board of directors, and individual directors, in addition to considering the effects of any action on the corporation or its shareholders, may consider the interests of the employees, customers, suppliers, and creditors of the corporation and its subsidiaries, the communities in which offices or other establishments of the corporation and its subsidiaries are located, and all other factors such directors consider pertinent; provided, however, that any such provision shall be deemed solely to grant discretionary authority to the directors and shall not be deemed to provide to any constituency any right to be considered.

(c) The articles of incorporation need not set forth any of the corporate powers enumerated in this chapter. (Code 1981, § 14-2-202, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 10; Ga. L. 1996, p. 1203, § 3; Ga. L. 1999, p. 405, § 4.)

**Law reviews.** — For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service therein, see 21 Mercer L. Rev. 457 (1970). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991). For

article, "A Statutory Model for Corporate Constituency Concerns," see 49 Emory L.J. 1085 (2000).

For review of 1996 corporation, partnership, and association legislation, see 13 Ga. St. U. L. Rev. 70.

#### COMMENT

Source: Model Act, § 2.02. Comparable provisions were in former § 14-2-171.

Subsection (a) sets forth the minimum mandatory requirements for all articles of incorporation while subsection (b) describes optional provisions that may be included. The mandatory contents of articles of incorporation have been shortened from the former requirements of § 14-2-171. This eliminates the former requirements of



§ 14-2-171 that articles contain recitals that the corporation is organized under the Business Corporation Code, the period of duration, a statement of corporate purposes, the par value of shares or a statement that they will have no par value, classification of shares and designations of preferences, statements that the corporation will not commence business without minimum consideration paid for shares, preemptive rights requirements, and the number and names and addresses of the initial directors. Subsection (a)(5) was added to the Model Act to provide a mailing address to which the Secretary of State may send notices and forms.

Everything else is optional. A corporation formed under these provisions will automatically have perpetual duration under Section 14-2-302(1) unless a special provision is included providing a shorter period. Similarly, a corporation formed without reference to a purpose clause will automatically have the purpose of engaging in any lawful business under Section 14-2-301(a), unless a narrower purpose clause is provided pursuant to subsection (b)(2).

Subsection (b) describes specific options that may be elected by the draftsman and contains general authorization to include other provisions relevant to the authority of the corporation, its officers and board of directors, or to the management of the corporation's internal affairs. Subsection (b)(4) has been expanded beyond the Model Act provisions to incorporate the 1987 amendment to former § 14-2-171(b)(3), authorizing shareholders to provide in the articles of incorporation that directors will not be liable to the corporation or its shareholders except for certain types of actions. Subsection (b)(4)(ii), containing one of the exceptions to permitted exculpation, has been altered by deletion of the phrase "not in good faith." The exculpatory statutes of a number of jurisdictions now follow this pattern of excluding from exculpation only acts involving intentional or willful "misconduct or a knowing violation of" law, Nev. laws, Ch. 28, 1987 or of criminal law, Va. Code § 13.1-692.1. Fla. Laws 87-245, § 2, exculpates except for knowing criminal law violations.

#### **Note to 1989 Amendment**

Subsection (b)(5) was added by the 1989 amendment. It expressly validates a provision in articles of incorporation permitting boards of directors, board committees, and individual directors to consider the interests of constituencies of the corporation other than the shareholders in making decisions.

#### **Note to 1996 Amendments**

Amendments to subsection (b)(4) were made to conform to some, but not all of the 1990 proposals to amend the Revised Model Business Corporation Act. The introductory clause to subsection (b)(4) was amended to delete the word "personal" before "liability of a director", to delete the phrase "breach of duty of care of other duty" before "as a director", to delete "provided that no provision shall delete or limit", which was replaced with "except", and to delete the ending phrase, "of a director." None of these changes were intended to be substantive. The Code takes no position on whether limitations on liability beyond those previously in effect are binding on corporations that have previously elected coverage under this subsection, with language purporting to limit liability to the full extent permitted by the Code as then in effect or as later amended. Whether such language is effective depends in part on judicial interpretations of the doctrine of waiver, and whether proxy disclosures made to shareholders at the time of adoption adequately disclosed this possibility.

#### **Cross-References**

Amendment of articles, see §§ 14-2-603, 14-2-631, and Article 10, Part 1. Bylaws, see §§ 14-2-206 & 14-2-207, and Article 10, Part 2. Close corporations, see Article 9. Conflict of interest, see § 14-2-860 et seq. Duration of corporate existence, see § 14-2-302. Filing



fees, see § 14-2-122. Filing requirements, see § 14-2-120. Incorporators, see § 14-2-201. Liability of shareholders, see § 14-2-622. Powers, see § 14-2-302. Professional corporations, see Georgia Professional Corporation Act. Purposes, see § 14-2-301. Restated articles, see § 14-2-1007. Share classes, see § 14-2-601.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-171, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Undercapitalization.** — Satisfaction of former § 14-2-171(a)(8) (now repealed), requiring minimum capital of \$500, does not preclude a determination that a corporation is undercapitalized. *Hyzer v. Hickman*, 195

Ga. App. 213, 393 S.E.2d 79 (1990), rev'd on other grounds, 261 Ga. 38, 401 S.E.2d 738 (1991) (decided under former § 14-2-171).

**Cited in** *Saint Francis Hosp. v. Dion*, 123 Ga. App. 360, 181 S.E.2d 72 (1971); *Davenport v. Petroleum Delivery Serv. of Ga., Inc.*, 235 Ga. 116, 218 S.E.2d 848 (1975); *Bloodworth v. Sandersville Prod. Credit Ass'n*, 245 Ga. 40, 262 S.E.2d 804 (1980); *Bryant v. State*, 155 Ga. App. 621, 271 S.E.2d 875 (1980).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 199-206.

**C.J.S.** — 18 C.J.S., Corporations, § 34.

**ALR.** — Effect upon the corporate existence of failure to file certificate in organizing a corporation, 22 ALR 376; 37 ALR 1319.

Corporate stock without par value, 36 ALR 791; 45 ALR 1501; 65 ALR 1347.

Validity and construction of corporate articles or bylaws relating to stock held by one retiring from corporate office or employment, 66 ALR 1295.

Validity, construction, and effect of provisions of articles of incorporation or certificates of stock relating to redemption or retirement of stock, 88 ALR 1131.

Validity and effect of agreement by a corporation contemporaneously with issue or sale of stock, to repurchase or redeem the stock or to cancel the subscription therefor and refund consideration paid, 101 ALR 154.

Liability of officers, directors, or members of defectively organized corporation to one of their number for advances, commissions, etc., 115 ALR 658.

Conclusiveness of charter as regards character, kind, or purposes of corporation, 119 ALR 1012.

Provision of statute, charter, or bylaws respecting amendment of corporate bylaws as excluding waiver thereof, 169 ALR 1374.

Enforceability in another jurisdiction of personal liability of stockholders for debts of corporation whose organization is incomplete or defective, 42 ALR2d 659.

Construction and effect of corporate articles, charter, or bylaws limiting duration or maturity of its indebtedness, 55 ALR2d 949.

Validity of restrictions on alienation or transfer of corporate stock, 61 ALR2d 1318.

Corporations: validity of charter provision for nonvoting common stock, 52 ALR3d 1131.

Validity and construction of provision restricting transfer of corporate stock, which conditions transfer upon consent of one other than shareholder, officer, or director of corporation, 53 ALR3d 1272.

### 14-2-203. Incorporation.

(a) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.

(b) The Secretary of State's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation. (Code 1981, § 14-2-203, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For comment, "An Empirical Study of Defective Incorporation," see 39 Emory L.J. 523 (1990).

### COMMENT

Source: Model Act § 2.03. Comparable provisions were in former §§ 13-2-171 and 14-2-173.

Subsection (a) provides that the existence of a corporation begins when the articles of incorporation are filed, unless a delayed effective date is specified under Section 14-2-123. The provision of subsection (a) for a delayed effective date is new. See former § 14-2-171.

Local filing requirements of former § 14-2-172 have been eliminated.

Under the unequivocal provisions of subsection (b) of the Code, which is substantially similar to former § 14-2-173, de jure incorporation is complete upon the Secretary of State's filing of the articles of incorporation except as against the state in certain proceedings challenging the corporate existence. Any steps short of filing of the articles by the Secretary of State would not constitute apparent compliance with the conditions precedent to incorporation. Therefore a de facto corporation cannot exist under this Code.

### Cross-References

Corporations de facto, see § 14-2-204. Dissolution, see Article 14. Duration, see § 14-2-302. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Secretary of state's filing duty, see § 14-2-125.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-173, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, are included in the annotations for this Code section.

**Cited in** *Cahoon v. Ward*, 231 Ga. 872, 204 S.E.2d 622 (1974).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, § 67.

**C.J.S.** — 18 C.J.S., Corporations, § 51.

**ALR.** — Effect upon the corporate existence of failure to file certificate in organizing a corporation, 22 ALR 376; 37 ALR 1319.

### 14-2-204. Liability for preincorporation transactions.

All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting. (Code 1981, § 14-2-204, enacted by Ga. L. 1988, p. 1070, § 1.)



**Law reviews.** — For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, and as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For survey article on business associations, see 34 Mercer L. Rev. 13 (1982). For survey article discussing de-

velopments in law of business associations for the period from June 1, 1998 through May 31, 1999, see 51 Mercer L. Rev. 127 (1999).

For comment, "An Empirical Study of Defective Incorporation," see 39 Emory L.J. 523 (1990).

### COMMENT

Source: Model Act, § 2.04. While Section 14-2-204 is substantially identical to § 14-2-23, it represents a change in Georgia law. Formerly directors remain liable until the corporation is organized, under provisions requiring payment of minimum capital of at least \$500 under former § 14-2-154(a)(4). No such organizational steps are a condition precedent to limited liability under the Code.

The Code follows the approach of limited partnership law: that innocent investors who are ignorant of the failure to complete the incorporation process do not become personally liable by virtue of that failure. Thus, where both shareholders and innocent third parties deal on the basis of corporate credit and corporate liability, no public policy requires shareholder liability. Notice of the failure, and continued participation in the business thereafter, would, of course, trigger personal liability.

### Cross-References

Incorporation, see § 14-2-203. "Person" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions and the issues dealt with, decisions under former Civil Code 1910, §§ 2192, 2220, former Code 1933, § 22-204 and former Code Section 14-2-23 which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Common law "promoter's liability" supplanted by statute.** — O.C.G.A. § 14-2-204 requires actual knowledge by persons who engage in preincorporation transactions that there was no incorporation; thus, defendant who entered a contract as president of a corporation before articles of incorporation had been issued was not personally liable for the corporation's alleged breach of contract where the defendant had no knowledge that the articles had not been issued at the time of the contract. *Weir v. Kirby Constr. Co.*, 213 Ga. App. 832, 446 S.E.2d 186 (1994).

**Necessity for certificate of incorporation.** — Without a charter (now certificate of incorporation) there is no corporation; and without organization under the charter there can be no corporate act, no corporate

property, no corporate liability. *Michael Bros. Co. v. Davidson & Coleman*, 3 Ga. App. 752, 60 S.E. 362 (1908) (decided under former Civil Code 1910, § 2192).

**Agreements between individuals insufficient for incorporation.** — Corporations cannot be created by a mere agreement between individuals; the agreement and association must be authorized and sanctioned by law. *Meinhard, Schaul & Co. v. Bedingfield Mercantile Co.*, 4 Ga. App. 176, 61 S.E. 34 (1908) (decided under former Civil Code 1910, § 2192).

**Doctrine of corporation by estoppel.** — The doctrine of corporation by estoppel should not be applied where an individual purporting to act for a nonexistent corporation attempts to escape liability on a contract by defending on the basis of the nonexistent corporation. *Don Swann Sales Corp. v. Echols*, 160 Ga. App. 539, 287 S.E.2d 577 (1981) (decided under former Code 1933, § 22-204).

Doctrine of corporation by estoppel is inapplicable to transactions occurring prior to issuance of certificate of incorporation. *Echols v. Vienna Sausage Mfg. Co.*, 162 Ga.



App. 158, 290 S.E.2d 484 (1982) (decided under former Code 1933, § 22-204).

**Incorporators held liable.** — Defendants were individually liable for debts where plaintiff's agents were repeatedly told by defendants that the entity with which they were contracting was a Georgia corporation but the evidence was undisputed that the corporation had never existed. *Kelley v. R S & H of N.C., Inc.*, 197 Ga. App. 236, 398 S.E.2d 213 (1990) (decided under former § 14-2-23).

Evidence that defendant knowingly signed a lease on behalf of a corporation that did not exist was sufficient to find him personally liable for damage to the lessor's property. *Zuberi v. Gimbert*, 230 Ga. App. 471, 496 S.E.2d 741 (1998).

**The plaintiff loaned money to a partnership** and, therefore, O.C.G.A. § 14-2-204 did not apply where there was no indication that the plaintiff believed that the business had been incorporated when making the loans or that either of the plaintiff's partners was responsible for incorporating the business. *Jamal v. Hussein*, 237 Ga. App. 779, 515 S.E.2d 407 (1999).

**Mere offer to enter into contract at unspecified future time** will not result in personal liability of incorporators where contract was not in fact consummated until after formation of corporate entity. *Satellite Syn-*

*dicated Sys. v. Henderson*, 162 Ga. App. 453, 291 S.E.2d 749 (1982) (decided under former Code 1933, § 22-204). *Watson v. Sierra Contracting Corp.*, 226 Ga. App. 21, 485 S.E.2d 563 (1997).

**Cause of action when organizers transacted business in company name.** — Where the debtor company never received enough capital stock for its organization, no cause of action arose in favor of the creditor bank before the persons who organized the company transacted business in its name with the bank, and the statute of limitations did not apply until such cause of action accrued. *Rucker v. Mobley*, 178 Ga. 496, 173 S.E. 392 (1934) (decided under former Civil Code 1910, § 2220).

**Arranger of telephone service for not-yet-formed corporation.** — An individual who arranged for telephone service on behalf of a corporation that was not yet incorporated was personally liable for all charges, including post-incorporation charges, since the telephone company had not been advised that it was dealing with a newly formed corporation. *Korey v. BellSouth Telecommunications, Inc.*, 225 Ga. App. 857, 485 S.E.2d 498 (1997), *rev'd* on other grounds, 269 Ga. 108, 498 S.E.2d 519 (1998).

**Cited in** *Cahoon v. Ward*, 231 Ga. 872, 204 S.E.2d 622 (1974).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, § 135. 18A Am. Jur. 2d, Corporations, § 251. (decided under former Civil Code 1910, § 2192).

**ALR.** — Liability of corporation on contracts of promoters, 17 ALR 452; 49 ALR 673; 123 ALR 726.

Personal liability of person doing business in the name of a dormant corporation, 18 ALR 282.

Signing articles of incorporation as rendering one liable on contracts entered into prior to conclusion of incorporation, 44 ALR 776.

Stockholder's personal conduct of operations or management of assets as factor justifying disregard of corporate entity, 46 ALR3d 428.

## 14-2-205. Organization of corporation.

### (a) After incorporation:

(1) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting at the call of a majority of the directors to complete the organization of the corporation

by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting;

(2) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:

(A) To elect directors and complete the organization of the corporation; or

(B) To elect a board of directors who shall complete the organization of the corporation.

(b) Action required or permitted by this chapter to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator.

(c) An organizational meeting may be held in or out of this state. (Code 1981, § 14-2-205, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 2.05. This replaces former § 14-2-175.

Following incorporation, the organization of a new corporation must be completed so that it may engage in business. This usually requires adoption of bylaws, the appointment of officers and agents, raising of equity capital by the issuance of shares to the participants in the venture, and the election of directors. The Code's provisions are conditional: if no directors are named in the articles of incorporation, the incorporators complete the organization, or elect initial directors who complete the organization; if initial directors are named, the directors complete the organization.

Former law, § 14-2-171(a)(12), required initial directors to be named in the articles and provided that they must complete the organization of the corporation.

Sections 14-2-205(b) and (c) are limited to meetings of incorporators since Sections 14-2-821 and 822 permit the same actions by the board of directors.

#### Cross-References

Articles of incorporation, see § 14-2-202. Bylaws, see §§ 14-2-206 & 14-2-207. Director action without meeting, see § 14-2-821. Incorporators, see § 14-2-201.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 219-221.

**C.J.S.** — 18 C.J.S., Corporations, § 40.

#### 14-2-206. Bylaws.

(a) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation. Bylaws adopted by the incorporators or board of directors prior to or contemporaneously with the issuance of any of the corporation's shares shall constitute bylaws adopted by the shareholders for all purposes of this chapter.



(b) The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation. (Code 1981, § 14-2-206, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 3.)

### COMMENT

Source: Model Act § 2.06. The only departure from former law, § 14-2-176(a), is that it made no provision for action by incorporators.

#### Note to 1993 Amendment

A number of provisions of the Business Corporation Code reserve the authority to adopt specific bylaws to the shareholders (e.g. O.C.G.A. §§ 14-2-801(b); 14-2-806; 14-2-856 and 14-2-1021). The 1993 amendment is intended to clarify that bylaws adopted in connection with the initial organization of the corporation may include such provisions without requiring subsequent shareholder ratification.

#### Cross-References

Amendment of bylaws, see §§ 14-2-1020 et seq., 14-2-1113, and 14-2-1133. Directors: Action without meeting, see § 14-2-821. Committees, see § 14-2-825. Election by shareholders, see § 14-2-728. Emergency bylaws, see § 14-2-207. Majority vote at meeting, see § 14-2-824. Nominee registration of shares, see § 14-2-723. Notice of meeting, see § 14-2-822. Number, see § 14-2-803. Participation in meeting, see § 14-2-820. Qualifications, see § 14-2-802. Quorum for meeting, see § 14-2-824. Supermajority vote at meeting, see § 14-2-824 & 14-2-1022. Officers: Appointment, see § 14-2-840. Duties, see § 14-2-841. Organizing corporation, see § 14-2-205. Record date, see § 14-2-707. Share transfer restrictions, see § 14-2-627. Shareholders' meeting notice, see § 14-2-705. Shareholders' meetings, see §§ 14-2-701 & 14-2-702. Shares without certificates, see § 14-2-626. Subscriptions, see § 14-2-620. Supermajority vote at shareholders' meeting, see § 14-2-727.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-176, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Cited in** *Bloodworth v. Sandersville Prod. Credit Ass'n*, 245 Ga. 40, 262 S.E.2d 804 (1980).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 310-332.

**C.J.S.** — 18 C.J.S., Corporations, §§ 111-121.

**ALR.** — Validity and construction of corporate articles or bylaws relating to stock held by one retiring from corporate office or employment, 66 ALR 1295.

Bylaw of corporation authorizing removal of officer, agent, or employee at any time, as affecting contract of employment for a spec-

ified period, 145 ALR 312.

Enforceability of invalid corporate bylaw as contract, 159 ALR 290.

Provision of statute, charter, or bylaws respecting amendment of corporate bylaws as excluding waiver thereof, 169 ALR 1374.

Conflict of laws as to validity and effect of corporate bylaw, 27 ALR2d 435.

Construction and effect of corporate articles, charter, or bylaws limiting duration or maturity of its indebtedness, 55 ALR2d 949.



**14-2-207. Emergency bylaws.**

(a) Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt bylaws to be effective only in an emergency defined in subsection (d) of this Code section. The emergency bylaws, which are subject to amendment or repeal by the shareholders, may make all provisions necessary for managing the corporation during the emergency, including:

- (1) Procedures for calling a meeting of the board of directors;
- (2) Quorum requirements for the meeting; and
- (3) Designation of additional or substitute directors.

(b) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(c) Corporate action taken in good faith in accordance with the emergency bylaws:

- (1) Binds the corporation; and
- (2) May not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this Code section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event. (Code 1981, § 14-2-207, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Act, § 2.07. See former § 14-2-177.

The provisions permitting emergency bylaws have been broadened beyond former § 14-2-177, which covered nuclear attack "or other similar emergency", to cover any "catastrophic event" that means that a quorum of the board cannot be assembled (which could cover a crash of a corporate jet). Further, protection from liability for those acting pursuant to emergency bylaws has been changed. Formerly officers were liable only for willful misconduct; under the new provisions they are not liable for actions taken in good faith, which conforms the section with other liability provisions.

**Cross-References**

Amendment of bylaws, see §§ 14-2-1020 et seq., 14-2-1113 and 14-2-1133. Bylaws generally, see § 14-2-206. Emergency powers without bylaw provision, see § 14-2-303.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 316, 328.

**C.J.S.** — 18 C.J.S., Corporations, §§ 112, 113, 119.

**ALR.** — Conflict of laws as to validity and effect of corporate bylaw, 27 ALR2d 435.

## ARTICLE 3

## PURPOSES AND POWERS

**Law reviews.** — For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989). For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988).

**14-2-301. Purposes.**

Every corporation incorporated under this chapter has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation. (Code 1981, § 14-2-301, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For note, "Ultra Vires in Georgia," see 16 Mercer L. Rev. 320 (1964).

## COMMENT

Source: Model Act, § 14-2-301. Former law was contained in §§ 14-2-20 and 14-5-2.

Section 14-2-301 provides that every corporation automatically has the purpose of engaging in any lawful business unless a narrower purpose is described in the articles of incorporation. This departs from former Georgia practice under § 14-2-171, which required the corporation to set forth its purpose.

Subsection (b) of the Model Act, which dealt with corporations subject to regulation under another statute, was omitted. This matter is covered in Article 17 in a manner that reflects Georgia's particular structure of "Secretary of State" corporations.

**Cross-References**

Foreign corporations, see Article 15. Professional corporations, see Georgia Professional Corporation Act. Secretary of State Corporations, see § 14-2-1701 and Chapter 4 of title 14. Special purpose corporations, see Article 17. Statement of purpose in articles, see § 14-2-202.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 192-198.

**C.J.S.** — 18 C.J.S., Corporations, §§ 28, 29.

**ALR.** — Power of state to amend charter of a private incorporated charity, 62 ALR 573.

**14-2-302. General powers.**

Every corporation has perpetual duration and succession in its corporate name, unless its articles of incorporation adopted on or after April 1, 1969, or an amendment thereto adopted on or after April 1, 1969, provides otherwise. Unless its articles of incorporation provide otherwise, every corporation has the same powers as an individual to do all things necessary

or convenient to carry out its business and affairs, including without limitation power:

- (1) To sue, be sued, complain, and defend in its corporate name;
- (2) To have a corporate seal which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;
- (3) To make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for managing the business and regulating the affairs of the corporation;
- (4) To purchase, receive, lease, or otherwise acquire, own, hold, improve, use, and otherwise deal with real or personal property or any legal or equitable interest in property, wherever located;
- (5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;
- (6) To purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of, and deal in and with shares or other interests in, or obligations of, any other entity;
- (7) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;
- (8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;
- (9) To be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;
- (10) To conduct its business, locate offices, and exercise the powers granted by this chapter within or without this state;
- (11) To elect directors and appoint officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;
- (12) To pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents;
- (13) To make donations for the public welfare or for charitable, scientific, or educational purposes;
- (14) To transact any lawful business that will aid governmental policy;
- (15) To provide insurance for its benefit on the life or physical or mental ability of any of its directors, officers, or employees or any other



person whose death or physical or mental disability might cause financial loss to the corporation; or, pursuant to any contractual arrangement with any shareholder concerning the reacquisition of shares owned by him at his death or disability, on the life or physical or mental ability of that shareholder, for the purpose of carrying out such contractual arrangement; or, pursuant to any contract obligating the corporation, as part of compensation arrangements, or pursuant to any contract obligating the corporation as guarantor or surety, on the life of the principal obligor, and for these purposes the corporation is deemed to have an insurable interest in such persons; and

(16) To make payments or donations or do any other act not inconsistent with law that furthers the business and affairs of the corporation. (Code 1981, § 14-2-302, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 11; Ga. L. 1990, p. 257, § 3.)

**Law reviews.** — For article analyzing legal basis for corporate contributions to private educational institutions, see 5 Mercer L. Rev. 249 (1954). For article discussing issuance of debt securities under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service thereon, see 21 Mercer L. Rev. 457 (1970). For article, "Use of Limited Partnership to Invest in Depreciable Realty," see 21 Mercer L. Rev. 481 (1970). For article, "Foreign

Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973). For article discussing establishment and transaction of business in Georgia by a foreign corporation, see 27 Mercer L. Rev. 629 (1976). For article on the limit of corporate social responsibility, see 33 Mercer L. Rev. 519 (1982).

For note on statutory restrictions upon corporate ownership of real property, see 13 Mercer L. Rev. 410 (1962). For note, "Ultra Vires in Georgia," see 16 Mercer L. Rev. 320 (1964).

### COMMENT

Source: Model Act, § 14-2-302. The enumerated powers are similar but not identical to those found in the former law, § 14-2-21.

The law of corporations has always proceeded on the fundamental assumption that corporations are creations with limited power; such an assumption was articulated by the United States Supreme Court as early as 1804, *Head & Armory v. Providence Insurance Co.*, 6 U.S. (2 Cranch) 127, 169 (1804), and appears never to have been seriously questioned as a judicial matter. It is clear that narrow and limited power clauses are undesirable: they encourage litigation by bringing into question reasonable transactions that further the business and interests of the corporation and to the extent transactions are unauthorized, may defeat valid and reasonable expectations. Modern corporation law tends to view the corporation as a creature of contract, rather than as a creature of a state that zealously guards its powers through narrow grants to corporate entities.

The general philosophy of Section 14-2-302 is thus that corporations formed under the Code provisions should be automatically authorized to engage in all acts and have all powers that an individual may have.

The powers of a corporation under the Code exist independently of whether a corporation has a broad or narrow purpose clause.

Corporate powers to act as fiduciaries are limited by Code Section 7-1-242 to specific financial institutions and certain other corporations under limited circumstances.

#### Note to 1989 Amendment

The 1989 amendments added a new subsection (15) and renumbered former subsection (15) as subsection (16). Subsection (15) restored a specifically enumerated corporate power contained in former O.C.G.A. § 14-2-21(15) (1982). The language was expanded, following N.C. Gen. Stat. § 55-17(b)(4), to cover matters other than life insurance, and to specifically create insurable interests in corporations. The Model Act did not contain such language in its powers clause, and it was thought necessary to restore this language in view of the negative implications that might otherwise flow from the omission. Georgia common law creates doubts about the extent of the insurable interests of employers. *Turner v. Davidson*, 171 Ga. 736, 4 S.E.2d 814 (1939). While provisions in the Insurance Code attempt to create an insurable interest, they do so only for 'publicly owned' corporations, a term defined in neither the corporate nor insurance codes. See O.C.G.A. §§ 33-24-3(c) and 33-42-6(a)(4) (Supp. 1988).

#### Note to 1990 Amendment

The 1990 amendment clarifies that all corporations, including those formed before the adoption of the 1969 Corporate Code, have perpetual existence unless their articles (or an amendment thereto adopted after April 1, 1969) specify otherwise. The old Code, at Section 14-2-21(a), provided that each corporation existing on the date of adoption of the old Code (April 1, 1969) had perpetual duration unless its articles of incorporation were affirmatively amended after adoption of the 1969 Code to provide for a limited period of duration. Because old Section 14-2-21(a)(2) was arguably repealed by the new Code, the question arose whether the repeal of the 1969 Code's automatic grant of perpetual duration, when read with new Section 14-2-302, required a corporation formed prior to April 1, 1969 with a limited duration to refer to its pre-1969 articles of incorporation to determine its legal duration. Since such corporations may have passed the limit of their legal existence, the new 14-2-302 was amended to specify that any corporation existing on April 1, 1969 has perpetual duration unless its articles were subsequently amended to provide otherwise.

#### Cross-References

Bylaws, see §§ 14-2-206, 14-2-207, 14-2-1020, 14-2-1021, 14-2-1113 and 14-2-1133. Compensation of directors, see § 14-2-811. "Employee" defined, see § 14-2-140. "Entity" defined, see § 14-2-140. Fiduciary powers of corporations, see § 7-1-242. Foreign corporations, see § 14-2-1505. Indemnification, see § 14-2-850 et seq. Sale of assets, see Article 12. "State" defined, see § 14-2-140. Ultra vires, see § 14-2-304.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1872, § 1678, former Code 1882, § 1678, former Civil Code 1895, § 1851, former Civil Code 1910, § 2283, Ga. L. 1937-38, Ex. Sess., p. 214, § 10, former Code 1933, § 22-202 and Code Section 14-2-21, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this section.

**Rule of ejusdem generis not applied to this section.** — Although the rule of ejusdem

generis is accepted by Georgia courts, there appears to be no Georgia case applying this rule in the context of former Code 1933, § 22-202. *Schnorbach v. Fuqua*, 70 F.R.D. 424 (S.D. Ga. 1975) (decided under former Code 1933, § 22-202).

**Scope of corporation's powers.** — The powers of a corporation are limited to those which are common to all corporations, except such additional valid powers as may be specifically conferred by the authority creating it. *Clement A. Evans & Co. v. Waggoner*,



197 Ga. 857, 30 S.E.2d 915 (1944) (decided under Ga. L. 1937-38, Ex. Sess., p. 214, § 10).

**"Direct interest" includes more than participants.** — Judicial construction has not confined the meaning of the term "direct interest" to the participants alone, but has extended it to include others upon whom the determination of the subject matter may have a secondary effect, so long as the effect, as to them, is not merely contingent, uncertain or conjectural. *Choctaw Lumber Co. v. Atlanta Band Mill, Inc.*, 88 Ga. App. 701, 77 S.E.2d 333, cert. denied, 210 Ga. 166, 78 S.E.2d 515 (1953) (decided under Ga. L. 1937-38, Ex. Sess., p. 214, § 10).

**Specific joint undertaking.** — Corporation is not debarred from entering upon a specific joint undertaking, provided the nature of the enterprise comes within the scope of its ordinary and legitimate powers. *Clement A. Evans & Co. v. Waggoner*, 197 Ga. 857, 30 S.E.2d 915 (1944) (decided under Ga. L. 1937-38, Ex. Sess., p. 214, § 10).

**Corporation cannot lend credit for accommodation of third person.** — No corporation, whether public or private, organized under the laws of this state can, in absence of express charter authority so to do, lend its credit for mere accommodation of third persons. *Nalley Land & Inv. Co. v. Merchants' & Planters' Bank*, 178 Ga. 818, 174 S.E. 618 (1934), later appeal, 187 Ga. 142, 199 S.E. 815 (1938) (decided under former Civil Code 1910, § 2283).

**National bank in negotiating its paper** can bind itself for the payment thereof by its endorsement thereon; but it cannot guarantee the payment of the paper of others, or become surety thereon, solely for the benefit of the latter. *Nalley Land & Inv. Co. v. Merchants' & Planters' Bank*, 178 Ga. 818, 174 S.E. 618 (1934), later appeal, 187 Ga. 142, 199 S.E. 815 (1938) (decided under former Civil Code 1910, § 2283).

**Accommodation endorsement of commercial paper.** — Authority to make an accommodation endorsement of commercial pa-

per will not be implied from the power to lend or borrow money on such paper and generally to exercise the powers usually incident to corporations under the laws of this state. *Nalley Land & Inv. Co. v. Merchants' & Planters' Bank*, 178 Ga. 818, 174 S.E. 618 (1934), later appeal, 187 Ga. 142, 199 S.E. 815 (1938) (decided under former Civil Code 1910, § 2283).

**Credit union authorized to receive security deed from debtors.** — A credit union, like any other corporation organized under the laws of this state, is authorized to receive a security deed from its debtors. *Cole v. Georgia Cent. Credit Union*, 243 Ga. 60, 252 S.E.2d 485 (1979) (decided under former Code 1933, § 22-202).

**Effect of change in shareholders.** — The object of incorporation is to create an artificial being with perpetual life, or life for a term of years, and it does not cease to be such, although all of the natural persons who were first members of the organization die, sell their interest, or otherwise cease to be stockholders. *Mathis v. Morgan*, 72 Ga. 517, 53 Am. R. 847 (1884) (decided under former Code 1882, § 1678).

**Effect of bankruptcy.** — The bankruptcy of a corporation does not put an end to the corporate existence, nor vacate the office of its directors. *Holland v. Heyman & Bro.*, 60 Ga. 174 (1878); *National Sur. Co. v. Medlock*, 2 Ga. App. 665, 58 S.E. 1131 (1907) (decided under former Code 1872, § 1678, and former Civil Code 1895, § 1851).

**Effect of administrative dissolution.** — The general powers of a corporation exist independently of the purpose for continued existence stated in the provision for administrative dissolution. *Fulton Paper Co. v. Reeves*, 212 Ga. App. 341, 441 S.E.2d 881 (1994).

**Cited in Knickerbocker Tax Sys. v. Texaco, Inc.**, 130 Ga. App. 383, 203 S.E.2d 290 (1973); *Freeman v. Allstate Bus. Sys.*, 166 Ga. App. 249, 304 S.E.2d 97 (1983).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 68, 69. 18A Am. Jur. 2d, Corporations, §§ 300-305, 314, 327. 18B Am. Jur. 2d, Corporations, §§ 1341, 1342, 1360, 1362,

1363, 1483, 1523, 1743, 1924, 1957, 1990-2000, 2037, 2045, 2104-2107, 2113, 2117, 2118, 2122.

**C.J.S.** — 18 C.J.S., Corporations, §§ 52,



106, 108, 109, 112, 119. 19 C.J.S., Corporations, §§ 433-710.

**ALR.** — Right of business corporation to use its funds or property for humanitarian purposes, 3 ALR 443.

Liability of corporation on contracts of promoters, 17 ALR 452; 49 ALR 673; 123 ALR 726.

Conclusiveness of decision of corporate officers or directors that property is of sufficient value to warrant a loan under the powers of the corporation, 18 ALR 645.

Personal liability of directors as affected by terms of contract or form of signature, 33 ALR 1353; 51 ALR 319.

Power of corporation to pass title to real property which it holds in excess of its powers, 37 ALR 204; 62 ALR 494.

Corporation's payment of bonus to officers or employees, 40 ALR 1423; 88 ALR 751; 164 ALR 1125.

Right of corporation to sue on contract made by promoters before its organization, 66 ALR 1425.

Insurance on life of officer for benefit of private corporation, 75 ALR 1362; 143 ALR 293.

Right of officer or director of private corporation to purchase in his own interest at a judicial or other public sale of the corporate property, 76 ALR 439.

Personal liability on contract made by "trustees" or others in closing affairs of dissolved corporation, 76 ALR 1478.

Lien of mortgage securing corporate bonds as affected by exchange of bonds for those of reorganized or new corporations, 81 ALR 139.

Statutory added liability of stockholders of bank or other corporation as affected by sale of, or other transaction in relation to, assets, 100 ALR 1276.

Construction, application, and effect of statutory provision that directors or corporation may remove officer, agent, or employee at pleasure, 111 ALR 894.

Validity of contract between corporations as affected by directors or officers in common, 114 ALR 299; 33 ALR2d 1060.

Power of corporation to change obligations to stockholders, 117 ALR 1290.

Power of corporation to enforce a contract made after taking the steps necessary to put its corporate existence beyond collateral attack, as affected by limited amount of capital subscribed or paid in, 128 ALR 874.

Computation of fund to be provided by private employer for payment of pension or retirement allowance to employees, 153 ALR 818.

Competency of stockholder as a witness where corporation is a party to a suit prosecuted by or against the personal representative of a decedent, 163 ALR 1215.

Applicability of statutes regulating sale of assets or property of corporation as affected by purpose or character of corporation, 9 ALR2d 1306.

Conditions accompanying or following dissolution of lessee corporation, as breach of covenant against assignment or sublease, 12 ALR2d 179.

Requisites as to definiteness of agreement to pay employee share of profits, 18 ALR2d 211.

Validity of security for contemporaneous loan to corporation by officer, director, or stockholder, 31 ALR2d 663.

Power of a business corporation to donate to a charitable or similar institution, 39 ALR2d 1192.

Construction of "net profits," "earnings," or the like, in provision for profit-sharing bonus for corporate officers or employees, 49 ALR2d 1129.

Power of a particular officer or agent of business corporation to bind it by a donation to a charity or similar institution, 50 ALR2d 447.

Expenses incurred by competing factions within corporation in soliciting proxies as charge against corporation, 51 ALR2d 873.

Leasing of real estate by foreign corporation, as lessor or lessee, as doing business within state within statutes prescribing conditions of right to do business, 59 ALR2d 1131.

Corporation's power to enter into partnership or joint venture, 60 ALR2d 917.

Power of secretary or treasurer of corporation to institute litigation for it, 64 ALR2d 900.

Rights and liabilities as between employer and employee with respect to general bonus or profit-sharing plan, 81 ALR2d 1066.

Rights and liabilities as between employer and employee with respect to employee stock options, 96 ALR2d 176.

Liability of corporation for torts of subsidiary, 7 ALR3d 1343.

Failure to issue stock as factor in disregard of corporate entity, 8 ALR3d 1122.

Liability of corporation for contracts of subsidiary, 38 ALR3d 1102.

Foreign corporation's leasing of personal property as doing business within statutes prescribing conditions of right to do business, 50 ALR3d 1020.

Private pension plans: statements in literature distributed to employees as controlling over provisions of general plan, 50 ALR3d 1270.

Construction and operation of private

pension plan provision for distribution of pension funds upon termination of plan, 55 ALR3d 767.

Charitable contributions by public utility as part of operating expense, 59 ALR3d 941.

Power of corporation to make political contribution or expenditure under state law, 79 ALR3d 491.

Right of corporation to discharge employee who asserts rights as stockholder, 84 ALR3d 1107.

### 14-2-303. Emergency powers.

(a) In anticipation of or during an emergency defined in subsection (d) of this Code section, the board of directors of a corporation may:

(1) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

(2) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(b) During an emergency defined in subsection (d) of this Code section, unless emergency bylaws provide otherwise:

(1) Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio; and

(2) One or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(c) Corporate action taken in good faith during an emergency under this Code section to further the ordinary business affairs of the corporation:

(1) Binds the corporation; and

(2) May not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this Code section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event. (Code 1981, § 14-2-303, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 14-2-303. Former law was found in § 14-2-177.

Section 14-2-303 should be read in conjunction with Section 14-2-207, which authorizes a corporation to adopt emergency or standby bylaws. Section 14-2-303 grants every corporation limited powers to act in an emergency even though it has failed to



enact emergency bylaws under Section 14-2-207. The authority is more explicit than that granted by former § 14-2-177(h), which provided only that corporate action was valid "if it is substantially in compliance with this Code section or of it is otherwise practical and necessary for the emergency operation and management of the business."

Subsection (d) defines emergency more broadly than former § 177(a), to cover any catastrophic event that prevents a quorum from being assembled.

#### Cross-References

Corporate powers, see § 14-2-302. Emergency bylaws, see § 14-2-207. "Notice" defined, see § 14-2-141. Notice of directors' meeting, see § 14-2-822. "Principal office" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 316. 18B Am. Jur. 2d, Corporations, §§ 1457, 1493, 1585.

**C.J.S.** — 19 C.J.S., Corporations, §§ 464, 487.

**ALR.** — Conflict of laws as to validity and effect of corporate bylaw, 27 ALR2d 435.

#### 14-2-304. Ultra vires.

(a) Except as provided in subsection (b) of this Code section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged:

(1) In a proceeding by a shareholder against the corporation to enjoin the act;

(2) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or

(3) In a proceeding by the Attorney General under Code Section 14-2-1430.

(c) In a shareholder's proceeding under paragraph (1) of subsection (b) of this Code section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss, other than anticipated profits, suffered by the corporation or another party because of enjoining the unauthorized act. (Code 1981, § 14-2-304, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article analyzing legal basis for corporate contributions to private educational institutions, see 5 Mercer L. Rev.

249 (1954). For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation



Code, and as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971).

For note, "Ultra Vires in Georgia," see 16 Mercer L. Rev. 320 (1964).

### COMMENT

Source: Model Act, § 14-2-304. This generally follows former § 14-2-22.

The basic purpose of Section 14-2-304 is to eliminate all vestiges of the doctrine of inherent incapacity of corporations. Under this section it is unnecessary for persons dealing with a corporation to inquire into limitations on its purposes or powers that may appear in its articles of incorporation. A person who is unaware of these limitations when dealing with a corporation is not bound by them.

### Cross-References

Corporate powers, see § 14-2-302. Corporate purposes, see § 14-2-301. Derivative proceedings, see § 14-2-740 et seq. Director standards of conduct, see § 14-2-830 et seq. Dissolution, see Article 14. "Employee" defined, see § 14-2-140. "Proceeding" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 2225, former Code 1933, § 22-712, and former Code Section 14-2-22, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**When defense proper.** — The doctrine of ultra vires has no proper place in the law of private corporations, organized merely for the purpose of private gain, except in respect of contracts which are bad in themselves, the making of which is prohibited by a consideration of public morals or justice, or of sound public policy, or prohibited by the statute law on grounds connected with the public good. *Corbin Supply Co. v. Loftis*, 50 Ga. App. 309, 178 S.E. 185 (1934) (decided under former Code 1933, § 22-712).

**Public policy must be served by defense.** — Defense of ultra vires made by private corporation will be sustained only where imperative rule of public policy requires it. A contract partly executed will be enforced as against such a corporation where it has received benefits thereunder in its corporate capacity. *Corbin Supply Co. v. Loftis*, 50 Ga. App. 309, 178 S.E. 185 (1934) (decided under former Code 1933, § 22-712).

**Corporation cannot use defense and retain benefits of transaction.** — A corporation cannot interpose the defense that a transaction was ultra vires and retain the benefits of

the transaction. *In re Am. Ventures, Inc.*, 340 F. Supp. 279 (N.D. Ga. 1971), aff'd, 457 F.2d 974 (5th Cir. 1972) (decided under former Code 1933).

No application of doctrine of ultra vires will allow a corporation to retain and use benefits of the contract under which they were obtained. *Flatauer Fixture & Sales Corp. v. Garcia & Assocs.*, 99 Ga. App. 685, 109 S.E.2d 818 (1959) (decided under former Code 1933, § 22-712).

**Corporation may plead ultra vires although all stockholders acquiesced.** — A corporation is not estopped to plead an ultra vires act by which the corporation contracted to pay an individual debt of one of its officers, notwithstanding that all the stockholders of the corporation consented to or acquiesced in the execution of the contract. *Piedmont Feed & Grocery Co. v. Georgia Piedmont Feed & Grocery Co.*, 52 Ga. App. 847, 184 S.E. 899 (1936) (decided under former Code 1933, § 22-712).

**No defense to action for breach after performance by either party.** — After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract to recover compensa-

tion for a breach of the contract by the other party. *Flatauer Fixture & Sales Corp. v. Garcia & Assocs.*, 99 Ga. App. 685, 109 S.E.2d 818 (1959) (decided under former Code 1933, § 22-712).

**President cannot borrow money and bind corporation without authority.** — A corporation can only act by and through its proper and duly authorized officers, agents, and servants. The president of a corporation is its alter ego in many respects, and, without any special delegation of authority, is presumed to have power to act for it in matters within the scope of its ordinary business. However, the president of a corporation, who has no charter authority nor authority from the controlling board of directors, either general or special, to do so, cannot borrow money in the name of the corporation and execute a corporate promissory note binding upon such corporation, where the corporation received none of the proceeds of the loan, nor any benefit therefrom, nor ratified such action upon the part of its

president in any manner. *F & M Bank v. Stovall Inv. Co.*, 50 Ga. App. 277, 177 S.E. 882 (1934) (decided under former Civil Code 1910, § 2225).

**Corporation liable where fruits of contract are applied to corporate uses.** — Where the officers of a corporation, though without authority to do so, do in fact execute a contract on behalf of the corporation, and the fruits of it are received, retained, and applied to corporate uses, the corporation will be liable thereon notwithstanding any want of authority in its officers. *Flatauer Fixture & Sales Corp. v. Garcia & Assocs.*, 99 Ga. App. 685, 109 S.E.2d 818 (1959) (decided under former Code 1933, § 22-712).

**Cited in** *Free For All Missionary Baptist Church, Inc. v. Southeastern Beverage & Ice Equip. Co.*, 135 Ga. App. 498, 218 S.E.2d 169 (1975); *Shier v. Price*, 152 Ga. App. 593, 263 S.E.2d 466 (1979); *Fresh & Fancy Produce, Inc. v. Brantley*, 190 Ga. App. 128, 378 S.E.2d 379 (1989) (decided under former Code section 14-2-22).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 2009-2033.

**C.J.S.** — 19 C.J.S., Corporations, §§ 576-579.

**ALR.** — Liability of corporation on contracts of promoters, 17 ALR 452; 49 ALR 673; 123 ALR 726.

Right of obligor to challenge assignment or transfer by corporation as ultra vires, 45 ALR 1509.

Release by corporation resting for consideration on detriment to release without benefit to corporation as ultra vires the corporation, 52 ALR 579.

Contract in relation to corporate stock as binding upon the corporation or personally upon the officers who sign it, 54 ALR 1388.

Doctrine of ultra vires as applied to torts of private corporation, 57 ALR 302.

Contract by national bank for purchase of stock in another corporation as ultra vires, 89 ALR 1308.

Assumption of mortgage or lien by bank or other corporation as ultra vires, 91 ALR 177.

Right of corporation to perform or to hold itself out as ready to perform functions in the nature of legal services, 157 ALR 282.

Power of corporation or its officers with respect to payment of remuneration, bonus, and the like, to widow or family of deceased officer, 29 ALR2d 1262.

Right of corporation to indemnify for civil or criminal liability incurred by employee's violation of antitrust laws, 37 ALR3d 1355.

Validity of obligation given by corporation incident to purchase of entire stock by sole shareholder, 71 ALR3d 639.

Power of corporation to make political contribution or expenditure under state law, 79 ALR3d 491.



## ARTICLE 4

## NAME

**Law reviews.** — For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989). For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988).

## RESEARCH REFERENCES

**ALR.** — Construction and effect of statutes as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested, 45 ALR 198; 42 ALR2d 516.

Use of abbreviations of name of municipal

body or private corporation in designating party to judicial proceedings, 167 ALR 1217.

Right to protection of corporate name, as between domestic corporation and foreign corporation not qualified to do business in state, 26 ALR3d 994.

**14-2-401. Corporate name.**

(a) A corporate name:

(1) Must contain the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," or words or abbreviations of like import in another language;

(2) May not contain language stating or implying that the corporation is organized for a purpose other than that permitted by Code Section 14-2-301 and its articles of incorporation;

(3) May not contain anything which, in the reasonable judgment of the Secretary of State, is obscene; and

(4) Shall not in any instance exceed 80 characters, including spaces and punctuation.

(b) Except as authorized by subsections (c) and (d) of this Code section, a corporate name must be distinguishable upon the records of the Secretary of State from:

(1) The corporate name of a corporation incorporated or authorized to transact business in this state;

(2) A corporate name reserved or registered under Code Section 14-2-402 or 14-2-403;

(3) The fictitious name adopted by a foreign corporation authorized to transact business in this state because its real name is unavailable;

(4) The corporate name of a nonprofit corporation incorporated or authorized to transact business in this state;

(5) The name of a limited partnership or professional association filed with the Secretary of State; and



(6) The name of a limited liability company formed or authorized to transact business in this state.

(c) A corporation may apply to the Secretary of State for authorization to use a name that is not distinguishable upon his records from one or more of the names described in subsection (b) of this Code section. The Secretary of State shall authorize use of the name applied for if the other corporation consents to the use in writing and files with the Secretary of State articles of amendment to its articles of incorporation changing its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applying corporation.

(d) A corporation may use the name (including the fictitious name) of another domestic or foreign corporation that is used in this state if the other corporation is incorporated or authorized to transact business in this state and:

(1) The proposed user corporation has merged with the other corporation;

(2) The proposed user corporation has been formed by reorganization of the other corporation; or

(3) The other domestic or foreign corporation has taken the steps required by this chapter to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the foreign corporation applying to use its former name.

(e) This chapter does not control the use of fictitious or trade names. Issuance of a name under this chapter means that the name is distinguishable for filing purposes on the records of the Secretary of State pursuant to subsection (b) of this Code section. Issuance of a corporate name does not affect the commercial availability of the name. (Code 1981, § 14-2-401, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 12; Ga. L. 1995, p. 482, § 2.)

**Cross references.** — Permissible corporate names for financial institutions, § 10-1-490 et seq.  
§ 7-1-130. Registration of trade name used by corporation in lieu of corporate name,

### COMMENT

Source: Model Act, § 4.01, former § 14-2-40.

Section 14-2-401 deals with two basic name requirements: (1) the name must indicate "corporateness," and (2) the name must be distinguishable upon the records of the Secretary of State.

Subsections (a)(1) and (2) parallel former Sections 14-2-40(a)(1) and (2). Subsections (a)(3) and (4) were taken directly from former § 14-2-40(a)(2)(C) and (a)(4), respectively. The space limit on corporate names is required to facilitate computerization of the Secretary of State's records.

Subsection (b)(3) lists classes of "official names" that are not available. The Secretary of State becomes involved with fictitious or assumed names only in the situation where a foreign corporation, planning to transact business in a state, discovers that its name is not available in that state. To qualify it must adopt an assumed or fictitious name as its "official name" in the state, see Section 14-2-1506. Such a fictitious or assumed name is thereafter an "official" name and is unavailable to the same extent as any other "official name" in use is unavailable.

Subsection (c) varies considerably from the Model Act. The purpose of the revisions is to make certain that only one corporation is listed under a single name at any one time.

Certain restrictions on corporate names do not appear in the Code. Section 14-2-40(a)(2)(A) formerly provided that the corporate name shall not contain any word or phrase that implies the corporation is organized for any purpose other than those stated in its articles of incorporation. The modern practice of permitting incorporation for any lawful business purpose renders this obsolete. Perhaps more important is elimination of § 40(a)(2)(B), which provided that the corporate name shall not contain any word or phrase which implied that the corporation was "organized by, affiliated with, or sponsored by any fraternal, veterans', service, religious, charitable, or professional organization, unless that fact is certified in writing in a manner satisfactory to the Secretary of State by the organization with which affiliation or sponsorship is claimed." The Code views the duties of the Secretary of State as primarily ministerial; if the name is distinguishable upon the records of the Secretary of State from other entities the names of which are on file, that is enough.

#### **Note to 1989 Amendment**

The 1989 amendment added the last two sentences to subsection (e). This amendment reinforced the limited ministerial role of the Secretary of State — that a decision that a corporate name is available is based only on an inspection of the records of the Secretary of State, and has no broader commercial or legal implications.

#### **Cross-References**

"Deliver" includes mail, see § 14-2-140. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Foreign corporations, see Article 15. Professional corporations, see Georgia Professional Corporation Act. Reserved name, see § 14-2-402. Statement of name in articles, see § 14-2-202. Trade name, see § 10-1-490 et seq.

### **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-202 and former Code Section 14-2-401, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Jurisdiction to set aside incorporation because corporate name previously used.** — A motion to revoke and set aside an order of incorporation, on the grounds that movant had acquired a prior use to the name used by the corporation, that the use of the name by the corporation would cause confusion in the minds of the public and a cloud on the

title of petitioners' property, and that the order of incorporation had been improvidently granted because movant had not been given notice before the order of incorporation, and praying that the order of incorporation be set aside insofar as the use of the name claimed by movant was concerned, is not an equity case within the meaning used in Ga. Const. 1976, Art. VI, Sec. II, Para. IV (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III), defining the jurisdiction of the Supreme Court. The grounds of the motion are not such as are relievable only in equity. On the contrary, the motion is one to set aside an order of the court on an alleged



legal ground. A court of law has jurisdiction to entertain such a motion in a proper proceeding by petition, with rule nisi or process, and to grant the relief prayed. Methodist Episcopal Church, S., Inc. v. Decell, 187 Ga. 526, 1 S.E.2d 432 (1939) (decided under

former Code 1933, § 22-202).

Cited in Dundon v. Forehand, 152 Ga. App. 749, 263 S.E.2d 687 (1979); Dorfman v. Briah Assocs., 160 Ga. App. 359, 287 S.E.2d 75 (1981).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code 1933, § 22-301 and former Code Section 14-2-40, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Names of professional corporations.** —

The State Board of Examiners in Optometry (now the State Board of Optometry) has the authority to require optometrists who incorporate under the Professional Corporation Act to use only their personal names in naming the professional corporation. 1971 Op. Att'y Gen. No. 71-180 (decided under former Code 1933, § 22-301).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 273-280, 283, 289, 290, 297, 298.

**C.J.S.** — 18 C.J.S., Corporations, §§ 98-101.

**ALR.** — Right to enjoin use of name of defunct corporation, 27 ALR 1024.

Corporation doing business and making contracts under assumed name, 56 ALR 450.

Validity and construction of constitutional or statutory provisions which prohibit the use by a corporation or partnership, as a part of its name, of certain described words giving the impression that it is subject to governmental control, 63 ALR 1049.

Rights and remedies as between originator of uncopyrighted advertising plan or slogan, or his assignee, and another who uses or infringes the same, 157 ALR 1436.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 44 ALR2d 1156; 72 ALR3d 8.

Right to protection of corporate name, as between domestic corporation and foreign corporation not qualified to do business in state, 26 ALR3d 994.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

### 14-2-402. Reserved name.

(a) A person may apply to reserve a name for the purpose of incorporation by paying the fee specified in Code Section 14-2-122. If the Secretary of State finds that the corporate name applied for is available, he or she shall reserve the name for the applicant's use for 30 days or until articles of incorporation are filed, whichever is sooner. If the Secretary of State finds that the name applied for is not distinguishable for filing purposes upon the records of the Secretary of State, he or she shall notify the applicant who may then submit another reservation request within ten days of the date of the rejection notice without payment of an additional reservation fee.

(b) Upon expiration of a name reservation after 30 days without the filing of articles of incorporation, the name may again be reserved for another 30 day period by the same or another applicant under the same guidelines of subsection (a) of this Code section.



(c) A person who has in effect a name reservation under subsection (a) of this Code section may transfer the reservation to another person by delivering to the Secretary of State a signed notice of the transfer that states the name and address of the transferee. (Code 1981, § 14-2-402, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 13; Ga. L. 1990, p. 257, § 4; Ga. L. 2003, p. 883, § 2.)

**The 2003 amendment**, effective July 1, 2003, substituted the present provisions of subsection (a) for the former provisions which read: "A person may apply to reserve the use of a corporate name, including a fictitious name for a foreign corporation whose corporate name is not available. If the Secretary of State finds that the corporate name applied for is available, he shall reserve the name for the applicant's use for a nonrenewable 90 day period."; added subsection (b); and redesignated former subsection (b) as present subsection (c).

**Cross references.** — Reservation of corporate name by financial institutions, § 7-1-131.

**Administrative rules and regulations.** — Reservation of Corporate Name, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Commissioner of Corporations, Chapter 590-7-2.

**Law reviews.** — For article, "Comparison of Features of Old and New Business Corporation Laws Relating to Domestic Corporations," see 5 Ga. St. B.J. 13 (1968).

### COMMENT

Source: Model Act, § 4.02. This replaces former § 14-2-41.

There are no conditions on the reservation of a corporate name, unlike former Georgia law, § 14-2-41, which provided that a corporate name could only be reserved by persons and corporations holding specified intentions. Protection against reservation of a corporate name merely to block another's use of the name is obtained from the relatively short duration of the reservation.

Both the Model Act and former Georgia law, § 14-2-41(b), provide for reservation periods of four months (120 days in the Model Act). Former Georgia law also permitted the Secretary of State to extend the period "for good cause shown." The Code shortens the reservation period to one non-renewable 60-day period, which is sufficient to permit organization of a corporation under the procedures of the Code. Elimination of any possibility of renewal relieves the Secretary of State of a discretionary function not in keeping with the office, and the possibility of extortionate reservation of names for any significant period.

The Code eliminates the provisions of § 14-2-41(c) that permit a person acquiring the right to use the name of a domestic or qualified foreign corporation to reserve the right for five years. This Georgia provision was taken from prior North Carolina law and was intended to cover the situation in *Rome Machine & Foundry Co. v. Davis Foundry & Mach. Works*, 135 Ga. 17, 68 S.E. 800 (1910).

### Note to 1989 Amendment

The 1989 amendments changed subsection (a) to eliminate the requirement of "delivering an application to the Secretary of State for filing." Modern practice permits telephonic name reservations, and it is anticipated that computerized name reservations will soon be feasible. No fee will be charged for a name reservation under § 14-2-122. While the current practice of the Secretary of State is to send a written confirmation of a name reservation, entry in the Secretary of State's computer is prima facie evidence of a proper name reservation.

Further amendments to subsection (a) deleted the modifier "exclusive" before "use" in the first sentence. Subsection (b) was amended to delete the initial reference to "The owner of a reserved corporate name" and to replace it with "A person who has in effect a name reservation under subsection (a) of this Code section ...." These amendments conform the Code's language to similar language in the Limited Partnership Code.

#### Note to 1990 Amendment

The 1990 amendment extends the non-renewable name reservation period for corporations from 60 to 90 days.

#### Cross-References

Availability of names, see § 14-2-401. Consent to use corporate name, see § 14-2-401. "Deliver" includes mail, see § 14-2-140. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Foreign corporations, see Article 15. "Person" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code section 14-2-41 which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**No exclusive right to use of name.** — Under this section, a corporation is allowed to reserve a name before actual incorpora-

tion. However, this reservation does not always confer an exclusive right to the use of the name in trade or business or even for corporate purposes. *Elite Personnel, Inc. v. Elite Personnel Servs., Inc.*, 259 Ga. 192, 378 S.E.2d 117 (1989), overruled in part on other grounds, *Future Professionals v. Darby*, 266 Ga. 690, 470 S.E.2d 644 (1996) (decided under former § 14-2-41).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 281, 282.

**ALR.** — Right to enjoin use of name of defunct corporation, 27 ALR 1024.

Protection of business or trading corpora-

tion against use of same or similar name by another corporation, 66 ALR 948.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

#### 14-2-403. Registered name.

Repealed by Ga. L. 2002, p. 989, § 4, effective July 1, 2002.

**Editor's notes.** — This Code section was based on Code 1981, § 14-2-403, enacted by Ga. L. 1988, p. 1070, § 1.

### ARTICLE 5

#### OFFICE AND AGENT

**Cross references.** — Maintenance, change of registered offices by financial institutions, § 7-1-132.

**Law reviews.** — For article discussing as-

pects of third party practice (impleader) under the Georgia Civil Practice Act, see 4 Ga. St. B.J. 355 (1968).



## PART 1

## REGISTERED AGENTS AND SERVICE OF PROCESS

**Administrative rules and regulations.** — Georgia, Office of Secretary of State, Commission of Corporations, Chapter 590-7-9. Service of Process, Official Compilation of the Rules and Regulations of the State of

**14-2-501. Registered office and registered agent.**

Each corporation must continuously maintain in this state:

(1) A registered office that may be the same as any of its places of business; and

(2) A registered agent, who may be:

(A) A person who resides in this state and whose business office is identical with the registered office;

(B) A domestic corporation or nonprofit domestic corporation whose business office is identical with the registered office; or

(C) A foreign corporation or nonprofit foreign corporation authorized to transact business in this state whose business office is identical with the registered office. (Code 1981, § 14-2-501, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1999, p. 405, § 5.)

**Law reviews.** — For article, "The Georgia Long Arm Statute: A Significant Advance in the Concept of Personal Jurisdiction," see 4 Ga. St. B.J. 13 (1967). For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service thereon, see 21 Mercer L. Rev. 457 (1970).

For comment on *Lamex, Inc. v. Sterling*

*Extruder Corp.*, 109 Ga. App. 92, 135 S.E.2d 445 (1964), see 2 Ga. St. B.J. 127 (1965). For comment discussing the drawbacks of using the county of incorporation to determine the proper place for filing financial statement, in light of *In re Carmichael Enterprises, Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff'd per curiam*, 460 F.2d 1405 (5th Cir. 1972), see 9 Ga. St. B.J. 388 (1973).

## COMMENT

Source: Model Act, § 5.01. This replaces former § 14-2-60.

The requirement that a corporation continuously maintain a registered office and a registered agent at that office is based on the premises that at all times a corporation should have an office where it may be found and a person at that office on whom any notice or process required or permitted by law may be served. The street address of the registered office must appear in the public records maintained by the Secretary of State. A mailing address, such as a post office box, is not sufficient since the registered office is the designated location for service of process.

Section 14-2-501 eliminates the provision of former § 14-2-60, that expressly permitted more than one registered agent, and the provision that no registered agent shall be appointed without written consent of the agent. A corporation that appoints an agent without the agent's consent does so at its own peril; the law of agency will govern the relationship.



The Code assumes that formal communications to the corporation will normally be addressed to the registered agent at the registered office. If the communication itself deals with the registered office or registered agent, however, copies must be sent to one of the principal officers of the corporation, rather than to the principal office of the corporation. The Code consistently recognizes that the registered office may be a "legal" rather than a "business" office.

### Cross-References

Annual registration disclosure, see § 14-2-1622. Changing registered office or agent, see § 14-2-502. Effect of notice of intent to dissolve, see § 14-2-1405. Foreign corporations, see Article 15. Involuntary dissolution for failure to appoint and maintain registered agent and office, see § 14-2-1420. Naming registered agent and office in articles of incorporation, see § 14-2-202. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Resignation of registered agent, see § 14-2-503. Service on corporation, see § 14-2-504.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under Ga. L. 1946, p. 687, § 2 and former Code Section 14-2-60, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Personal jurisdiction of Georgia courts over a foreign corporation** is not secured by personal service on the defendant's president while that corporate officer is sojourning in Georgia, whether the officer came voluntarily or was lured into the state under false pretenses. *Lamex, Inc. v. Sterling Extruder Corp.*, 109 Ga. App. 92, 135 S.E.2d 445 (1964), commented on in 2 Ga. St. B.J. 127 (1965) (decided under former Ga. L. 1946, p. 687, § 2).

**Personal judgment against foreign corporation.** — It is essential to a legal rendition of a personal judgment against a foreign cor-

poration otherwise than by its voluntary appearance that the corporation be doing business within this state in such a manner and to such an extent as to warrant the inference that it is present in the state. *Lamex, Inc. v. Sterling Extruder Corp.*, 109 Ga. App. 92, 135 S.E.2d 445 (1964), commented on in 2 Ga. St. B.J. 127 (1965) (decided under former Ga. L. 1946, p. 687, § 2).

**Cited in** *Saint Francis Hosp. v. Dion*, 123 Ga. App. 360, 181 S.E.2d 72 (1971); *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971); *Hallmark Properties, Inc. v. Slater*, 229 Ga. 432, 192 S.E.2d 157 (1972); *Lukas v. Pittman Hwy. Contracting Co.*, 134 Ga. App. 305, 214 S.E.2d 398 (1975); *S. Donald Norton Properties, Inc. v. Triangle Pac., Inc.*, 253 Ga. 761, 325 S.E.2d 160 (1985); *Ticor Constr. Co. v. Brown*, 255 Ga. 547, 340 S.E.2d 923 (1986).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 307.

**C.J.S.** — 19 C.J.S., Corporations, § 580.

### 14-2-502. Change of registered office or registered agent.

(a) A corporation may change its registered office or registered agent by delivering to the Secretary of State for filing an amendment to its annual registration that sets forth:

- (1) The name of the corporation;
- (2) The street address of its current registered office;

(3) If the current registered office is to be changed, the street address of the new registered office;

(4) The name of its current registered agent;

(5) If the current registered agent is to be changed, the name of the new registered agent; and

(6) That after the change or changes are made, the street addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the street address of his business office, he may change the street address of the registered office of any corporation for which he is the registered agent by notifying the corporation in writing of the change and signing, either manually or in facsimile, and delivering to the Secretary of State for filing a statement of change setting forth the new address and all corporations for which he is the registered agent. (Code 1981, § 14-2-502, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For comment discussing the drawbacks of using the county of incorporation to determine the proper place for filing financial statement, in light of *In re*

*Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971), *aff'd*, 460 F.2d 1405 (5th Cir. 1972), see 9 Ga. St. B.J. 388 (1973).

#### COMMENT

Source: Model Act, § 5.02. This replaces former § 14-2-61.

Changes of registered office or registered agent are usually routine matters which do not affect the rights of shareholders. The purpose of this section is to permit these changes without a formal amendment of the articles of incorporation, without approval of the shareholders, and, indeed, even without approval of the board of directors.

The Model Act provisions were altered to make the statement of a change of registered office or registered agent an amendment to the annual registration. This has the effect of reducing the number of records that must be searched to provide information about corporations.

In the case of a change of registered agent, the Model Act required written consent of the new registered agent. This was eliminated in the Code as redundant. A corporation that names a new registered agent without the consent of the agent does so at its peril, since the absence of a legal agency relationship, caused by the lack of consent of the agent, will mean that the putative agent owes no duties to the corporate principal. Further, if a corporation names an agent without the agent's consent, it has created apparent authority in the agent to accept service, and is estopped to deny the agency.

The procedure in subsection (b) by which a registered agent may change the street address of the registered office applies to any location within the state. The Model Act requirement that the agent file a separate statement of change for each corporation for which it serves as registered agent was eliminated in Georgia, and replaced with a requirement that the statement list all corporations for which the agent serves as registered agent. This facilitates changes of location by those entities that typically serve as registered agent for multiple corporations.



**Cross-References**

Deletion of initial agent and office from articles of incorporation, see § 14-2-1002. "Deliver" includes mail, see § 14-2-140. Effect of dissolution of incorporation, see § 14-2-1408. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Involuntary dissolution for failure to file notice of change of registered agent or office, see § 14-2-1420. "Notice" defined, see § 14-2-141. Resignation of registered agent, see § 14-2-503.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under Ga. L. 1947, p. 1544, former Code 1933, § 22-1814.1 and former Code Section 14-2-61, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Filing annual report will not change principal office.** — Evidence that an annual report filed with the Secretary of State stated that corporation's principal office was in a certain county was not legally sufficient to show a compliance with the requirements of law which must be followed for the purpose

of obtaining amendments to a corporate charter, including one to change the location of its principal office. *Grimaud v. Knox-Georgia Homes, Inc.*, 210 Ga. 514, 81 S.E.2d 476 (1954) (decided under former Ga. L. 1947, p. 1544; former Code 1933, § 22-1814.1).

**Cited in** *Saint Francis Hosp. v. Dion*, 123 Ga. App. 360, 181 S.E.2d 72 (1971); *Hallmark Properties, Inc. v. Slater*, 229 Ga. 432, 192 S.E.2d 157 (1972); *Padgett Masonry & Concrete Co. v. Peachtree Bank & Trust Co.*, 130 Ga. App. 886, 204 S.E.2d 807 (1974); *Lukas v. Pittman Hwy. Contracting Co.*, 134 Ga. App. 305, 214 S.E.2d 398 (1975).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 308.

**C.J.S.** — 19 C.J.S., Corporations, § 580.

**ALR.** — Change in name, location, composition, or structure of obligor commercial

enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

**14-2-503. Resignation of registered agent.**

(a) A registered agent may resign his agency appointment by signing and delivering to the Secretary of State for filing a statement of resignation. The statement may include a statement that the registered office is also discontinued.

(b) On or before the date of the filing of the statement of resignation, the registered agent shall deliver or mail a written notice of the agent's intention to resign to the chief executive officer, chief financial officer, secretary of the corporation, or a person holding a position comparable to any of the foregoing, as named and at the address shown in the annual registration, or in the articles of incorporation if no annual registration has been filed.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the earlier of the filing by the corporation of an amendment to its annual registration designating a new registered agent and registered office if also discontinued or the thirty-first day after



the date on which the statement was filed. (Code 1981, § 14-2-503, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 5.03. This replaces former § 14-2-61.

The Model Act required delivery of two copies of a statement of resignation, to provide the Secretary of State with copies to send to both the principal and registered offices of the corporation. Georgia practice under § 14-2-61(c) did not require the Secretary of State to mail a second copy to the principal office, but required the registered agent to do so. The Code preserves the existing Georgia practice, but eliminates the requirement that the agent file an affidavit that he has notified the corporation.

The Code eliminates the circularity of having the registered agent mail a copy of the notice of intent to resign to the registered office, and requires mailing to one of the principal officers of the corporation, at the address shown in the annual registration. Section 14-2-1622(a)(4) requires the annual registration to list the "respective addresses" of these officers, which need not be identical with the principal office of the corporation. Thus the notice is expected to be sent to an address where a responsible officer will actually receive it.

#### Cross-References

Annual registration, see § 14-2-1622. Change of registered agent, see § 14-2-502. "Deliver" includes mail, see § 14-2-140. Effect of dissolution of corporation, see § 14-2-1408. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. "Mail" defined, see § 14-2-140. Notice, see § 14-2-141. "Principal office": defined, see § 14-2-140. Designated in annual registration, see § 14-2-1622.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 309. **C.J.S.** — 19 C.J.S., Corporations, § 580.

#### 14-2-504. Service on corporation.

(a) A corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

(b) If a corporation has no registered agent or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the secretary of the corporation at its principal office. Service is perfected under this subsection at the earliest of:

- (1) The date the corporation receives the mail;
- (2) The date shown on the return receipt, if signed on behalf of the corporation; or
- (3) Five days after its deposit in the mail, as evidenced by the postmark, if mailed postage prepaid and correctly addressed.

(c) This Code section does not prescribe the only means, or necessarily the required means, of serving a corporation. (Code 1981, § 14-2-504, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provided that the amendment to this Code section was applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service thereon, see 21 Mercer L. Rev. 457 (1970). For survey article on business associations, see 34 Mercer L. Rev. 13

(1982). For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986).

For comment on Rossville Crushed Stone, Inc. v. Massey, 219 Ga. 467, 133 S.E.2d 874 (1963), see 1 Ga. St. B.J. 116 (1964). For comment advocating a "single-act" jurisdictional statute as basis for jurisdiction over a foreign corporation, in light of Singer v. Walker, 21 A.D.2d 285, 250 N.Y.S.2d 216 (1964), see 2 Ga. St. B.J. 131 (1965).

### COMMENT

Source: Model Act, § 5.04. This replaces former § 14-2-62.

Somewhat the same circularity problem that arose in connection with the resignation of registered agents (see the Comment to Section 14-2-503) also sometimes arose in connection with service of process under former Georgia law, § 14-2-62(c). Under that provision, if service could not be made on the registered agent at its registered office, a duplicate of the process was forwarded to the Secretary of State who served it at the registered office (where the agent previously could not be found). It is unlikely that this arrangement resulted in the copy being forwarded routinely to the corporation. Instead of providing for service on the Secretary of State if service cannot be perfected on the registered agent, therefore, Section 14-2-504 provides for service by registered or certified mail addressed to the secretary of the corporation at its principal office shown in its most recent annual registration.

#### Cross-References

Annual registration, see § 14-2-1622. Foreign corporations, see Article 15. "Notice" defined, see § 14-2-141. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Registered office and agent: designated in annual registration, see § 14-2-1622; required, see § 14-2-501. "Secretary" defined, see § 14-2-140.

### JUDICIAL DECISIONS

#### ANALYSIS

GENERAL CONSIDERATION  
SERVICE UPON REGISTERED AGENT  
REASONABLE DILIGENCE  
EFFECT ON OTHER MANNER OF SERVICE  
FOREIGN CORPORATIONS

#### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 2258, former Code 1933, §§ 22-403 and 22-1101 and former Code Section 14-2-62, which were repealed by Ga.

L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**The true test of jurisdiction** is not residence or nonresidence of the plaintiff, or the place where the cause of action originated, but whether the defendant can be



found and served in the jurisdiction where the cause of action is asserted. A corporation can be found in any jurisdiction where it transacts business through agents located in that jurisdiction, and suits may be maintained against it in that jurisdiction if the laws of the jurisdiction provide a method for perfecting service on it by serving its agents. *Southern Ry. v. Parker*, 194 Ga. 94, 21 S.E.2d 34 (1942) (decided under former Code 1933, § 22-1101).

**Domestic corporations not denied equal protection.** — The statutory scheme providing different procedures for handling service upon foreign and domestic corporations does not deny domestic corporations equal protection under the state and federal constitutions. *Ticor Constr. Co. v. Brown*, 255 Ga. 547, 340 S.E.2d 923 (1986) (decided under former § 14-2-62).

**Substituted mode of service to be strictly construed.** — The substituted mode of service upon domestic corporations, in lieu of personal service, being a creature of statute and in derogation of common law must be strictly construed. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977) (decided under former Code 1933, § 22-403).

**Judgment void where service not in conformity with statute.** — In the absence of service in conformity with the statute, or the waiver thereof, no jurisdiction over defendant is obtained and the judgment is void. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977) (decided under former Code 1933, § 22-403).

Where the pleadings show the officer charged with executing the process does not comply with former by attempting "with reasonable diligence" to perfect service of the summons and complaint at the registered address, the service is not irregular but ineffective and the judgment is void. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977) (decided under former Code 1933, § 22-403).

**Service need not be during hours when corporation is open to public.** — The court is not restricted in perfecting service of its

processes on individuals or on corporations, whether by serving officers or agents or by substituted service, to the hours during which a corporation opens its doors to the public. *Clements v. Sims T.V., Inc.*, 105 Ga. App. 769, 125 S.E.2d 705 (1962) (decided under former Code 1933, § 22-1101).

**Summons proper where party appeared and answered.** — In suit against receiver of railroad for loss of hogs allegedly destroyed by negligent operation of a train, court properly overruled demurrer (motion to dismiss) on grounds that receiver did not have an agent or office upon whom service could be made and that it did not appear whether the action was brought against the receiver or the railroad, where the receiver appeared and pleaded in answer to the summons and would not be heard to say that the receiver and the railroad were not one and the same for the purposes of the suit. *Pidcock v. Stripling*, 66 Ga. App. 692, 19 S.E.2d 178 (1942) (decided under former Code 1933, § 22-1101).

**Cited in American Photocopy Equip. Co. v. Lew Deadmore & Assocs.**, 127 Ga. App. 207, 193 S.E.2d 275 (1972); *Padgett Masonry & Concrete Co. v. Peachtree Bank & Trust Co.*, 130 Ga. App. 886, 204 S.E.2d 807 (1974); *Lukas v. Pittman Hwy. Contracting Co.*, 134 Ga. App. 305, 214 S.E.2d 398 (1975); *Jere Power Car Land, Inc. v. Moss*, 134 Ga. App. 523, 215 S.E.2d 288 (1975); *Adams Drive, Ltd. v. All-Rite Trades, Inc.*, 136 Ga. App. 703, 222 S.E.2d 174 (1975); *Frazier v. HMZ Property Mgt., Inc.*, 161 Ga. App. 195, 291 S.E.2d 4 (1982); *KMM Indus., Inc. v. Professional Ass'n*, 164 Ga. App. 475, 297 S.E.2d 512 (1982); *S. Donald Norton Properties, Inc. v. Triangle Pac., Inc.*, 253 Ga. 761, 325 S.E.2d 160 (1985); *Bricks v. Walker Showcase, Inc.*, 255 Ga. 122, 336 S.E.2d 37 (1985); *Lovett Sports, Inc. v. Atlantic Exhibit Servs., Inc.*, 178 Ga. App. 278, 342 S.E.2d 726 (1986); *D & C Trading Co. v. Indian Prods., Ltd.*, 179 Ga. App. 198, 345 S.E.2d 865 (1986); *Due W. Assocs. v. Renfroe Mining & Grading Co.*, 194 Ga. App. 397, 391 S.E.2d 13 (1990); *Castellana v. Conyers Toyota, Inc.*, 200 Ga. App. 161, 407 S.E.2d 64 (1991); *Ritts v. Dealers Alliance Credit Corp.*, 989 F. Supp. 1475 (N.D. Ga. 1997); *Teledata World Servs. Inc. v. Tele-Mart, Inc.*, 242 Ga. App. 842, 531 S.E.2d 372 (2000); *Stephens v. McDonald's Corp.*, 245 Ga. App. 109, 536 S.E.2d 566 (2000).



### Service Upon Registered Agent

**Legislative intent.** — In creating registered agent service statute, the legislature intended to virtually eliminate the possibility of evasion of service of process by domestic corporations. *American Consol. Serv. Corp. v. Nationwide Mut. Ins. Co.*, 156 Ga. App. 193, 273 S.E.2d 898 (1980) (decided under former Code 1933, § 22-403).

**"Agent" taken in ordinary sense.** — Service of a corporation may be perfected by serving any agent of such corporation; and the word "agent" is to be taken in its ordinary sense, but the agent served must be an agent of the defendant company as distinguished from a mere servant or employee. *Georgia Power & Light Co. v. Wilson*, 48 Ga. App. 764, 173 S.E. 220 (1934) (decided under former Civil Code 1910, § 2258).

**Agent not mere employee or servant.** — The representative of a corporation, such as will meet the requirements of law governing service upon it by serving the representative personally, must be an officer of the corporation or any agent who has some sort of control or authority over some department or sphere of the corporation's business, but not a mere employee or servant. *Dowe v. Debus Mfg. Co.*, 49 Ga. App. 412, 175 S.E. 676 (1934) (decided under former Civil Code 1910, § 2258).

**Service is to give notice and afford hearing.** — Since the object of service is to give notice and afford a hearing, it will be sufficient if made upon an agent whose character and rank are such as to afford reasonable assurance that the agent will inform the company that such process has been served. *Louisville & N.R.R. v. Meredith*, 194 Ga. 106, 21 S.E.2d 101 (1942) (decided under former Code 1933, § 22-1101).

**An execution or process against named person,** with the added words "agent for" another, is a process against the person named, and not against the principal. *Georgia Power & Light Co. v. Wilson*, 48 Ga. App. 764, 173 S.E. 220 (1934) (decided under former Civil Code 1910, § 2258).

**Process to be handed to agent personally.** — In serving the corporation by serving an officer or agent, the process must be handed to the agent personally. Leaving the process at the agent's most notorious place of abode is not good service. *Clements v. Sims T.V., Inc.*, 105 Ga. App. 769, 125 S.E.2d 705

(1962) (decided under former Code 1933, § 22-1101).

It is mandatory that service upon the agent be personal. It follows that leaving a copy of the petition and process at the "most notorious place of abode" of the agent of the corporation constitutes no service upon the corporation. *Georgia Power & Light Co. v. Wilson*, 48 Ga. App. 764, 173 S.E. 220 (1934) (decided under former Civil Code 1910, § 2258).

**Service on proper officer or agent is considered personal service.** — In one sense, all service of process on corporations is either substituted or constructive, for the reason that the corporate entity is incapable of service other than through persons who represent it; but for practical purposes, service on the proper officer or agent of the corporation is considered personal, rather than substituted or constructive, service. *Clements v. Sims T.V., Inc.*, 105 Ga. App. 769, 125 S.E.2d 705 (1962) (decided under former Code 1933, § 22-1101).

**Service on agent employed to solicit business and perform duties.** — Where service is perfected on a corporation, otherwise doing business within the jurisdiction of the court, by serving an agent who is employed to solicit business and perform other duties for the corporation, such agent is an agent for service. *Southern Bell Tel. & Tel. Co. v. Jackson*, 102 Ga. App. 699, 117 S.E.2d 550 (1960) (decided under former Code 1933, § 22-1101).

**Casual salaried laborer not agent.** — A casual salaried laborer with neither discretionary power nor managing authority, hired as a service station attendant and working solely in that capacity, is not an agent in the sense contemplated by former Code 1933, § 22-403. *Thoni Oil Co. v. Tinsley*, 140 Ga. App. 887, 232 S.E.2d 162 (1977) (decided under former Code 1933, § 22-403).

**Company employees not agents of second company.** — Where a corporation, at its own expense, provided group insurance through certain master group policies, and, at its own expense, provided assistance to its employees in presenting their claims and collecting their benefits under such policies, the employees of such corporation rendering such assistance were not for that reason, agents of the insurance company upon whom process could be legally served. *Blaylock v. Pruden-*

tial Ins. Co. of Am., 84 Ga. App. 641, 67 S.E.2d 173 (1951) (decided under former Code 1933, § 22-1101).

**In a tort action** brought because of the alleged negligent construction and maintenance of rented property belonging to a corporation, the agent of the corporation in charge of its office in that county, and also in charge of the renting, repairing, and keeping in repair of such property, is the agent of the company to be served in that county, and the superior court of such county has jurisdiction of the suit. *Home Owners Loan Corp. v. Brazzeal*, 62 Ga. App. 683, 9 S.E.2d 773 (1940) (decided under former Code 1933, § 22-1101).

### Reasonable Diligence

**Who is authorized to determine whether agent can be found.** — Persons required to determine whether the "registered agent cannot with reasonable diligence be found at the registered office," are those persons authorized to serve the "summons and complaint" — those designated by the applicable statute. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977) (decided under former Code 1933, § 22-403).

The person designated by statute, and not the plaintiff, is to determine whether the defendant corporation or its registered agent can be found at the registered address. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977) (decided under former Code 1933, § 22-403).

**Court will presume regularity of proceedings.** — Although the record does not affirmatively reveal full compliance with the statutory provisions as to reasonable diligence, absent a contrary showing by the defendant, the court will presume the regularity of the proceedings. *Stesu, Inc. v. Roger Toole Drywall, Inc.*, 141 Ga. App. 636, 234 S.E.2d 102 (1977) (decided under former Code 1933, § 22-403).

**Failure to attempt service after summons issued.** — Where deputy marshal attempting service made no attempt to serve the defendant corporation or the registered agent at the registered address, after the summons had issued — which is the date the determi-

nation must be made as to whether defendant or its agent is at the registered location, and should be made by one designated in the statute — it was defective service. *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977) (decided under former Code 1933, § 22-403).

**Failure to fully investigate.** — In a personal injury action, where plaintiff failed to investigate fully and correctly identify the parent corporation of a corporation which leased and occupied the premises in question, a default judgment would be set aside because of the resulting ambiguity created by naming the wrong defendant or improperly serving the named defendant. *Charming Shoppes of Del., Inc. v. Parrish*, 214 Ga. App. 729, 448 S.E.2d 781 (1994).

**Service by mail.** — Even assuming that the plaintiff exercised the requisite diligence in attempting to serve the defendant's registered agent and was thereby entitled to employ service by mail on the corporate secretary, the plaintiff offered no admissible evidence that this was, in fact, accomplished since plaintiff offered no testimony or transcript of any proceeding and plaintiff's evidence of service was an unauthenticated document purporting to indicate that a law office attempted a certified mailing of some article to the corporate secretary at a specified cost. *Payne v. Mimms Enters., Inc.*, 234 Ga. App. 199, 505 S.E.2d 520 (1998).

### Effect on Other Manner of Service

**Former Code 1933, § 22-403 and Ga. L. 1966, p. 604** (see O.C.G.A. §§ 14-2-504 and 9-11-4(d)(1)) were cumulative and alternative methods of perfecting service upon domestic corporations, except former Code 1933, § 22-403 could be used notwithstanding any inconsistent provisions of Ga. L. 1966, p. 604 (see O.C.G.A. § 9-11-1 et seq.). *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 142 Ga. App. 434, 236 S.E.2d 98, rev'd on other grounds, 240 Ga. 376, 240 S.E.2d 856 (1977) (decided under former Code 1933, § 22-403).

**Former Code 1933, § 22-403** (see O.C.G.A. § 14-2-504) was designed to supplement Ga. L. 1966, p. 604 (see O.C.G.A. § 9-11-4(d)) by adding the registered agent to the list of those who may be served and



### Effect on Other Manner of Service (Cont'd)

thus virtually to eliminate the possibility of a domestic corporations evading service of process. *O'Neal Constr. Co. v. Lexington Developers, Inc.*, 240 Ga. 376, 240 S.E.2d 856 (1977) (decided under former Code 1933, § 22-403).

**Service on Secretary of State.** — Where it was shown that defendant corporation had vacated the addresses it had given the Secretary of State for both its principal and registered offices, plaintiff was authorized to effect substituted service under O.C.G.A. § 9-11-4(d)(1) without making any additional efforts to effect personal service. *Daly's Driving Sch., Inc. v. Scott*, 238 Ga. App. 443, 519 S.E.2d 1 (1999).

### Foreign Corporations

**This section has been held to embrace foreign corporations.** *Hirsch v. Shepherd Lumber Corp.*, 194 Ga. 113, 20 S.E.2d 575, answer conformed to, 67 Ga. App. 474, 21 S.E.2d 110 (1942) (decided under former Code 1933, § 22-1101).

A foreign corporation doing business in this state is subject to the jurisdiction of the courts of this state, if it can be served with process, and Georgia law provides for the service of process upon foreign as well as domestic corporations. *Louisville & N.R.R. v. Meredith*, 66 Ga. App. 488, 18 S.E.2d 51 (1941), *aff'd*, 194 Ga. 106, 21 S.E.2d 101 (1942) (decided under former Code 1933, § 22-1101).

A foreign corporation doing business in this state and having agents located therein for this purpose may be sued and served in the same manner as domestic corporations upon any transitory cause of action whether originating in this state or otherwise; and it is immaterial whether the plaintiff be a nonresident or a resident of this state, provided the enforcement of the cause of action would not be contrary to the laws and policy of this state. *Southern Ry. v. Parker*, 194 Ga. 94, 21 S.E.2d 94 (1942) (decided under former Code 1933, § 22-1101).

Having an agent within a county of such kind as could be served is alone sufficient to give jurisdiction of the nonresident corporation if service upon the agent is had, and maintaining an office within the county by

the corporation is not necessary in such a case. The rule is the same as to both resident and nonresident corporations except that in the case of resident corporations, jurisdiction of the corporation in contract actions requires that it have an agent transacting business and that it maintain an office. *Swift & Co. v. Lawson*, 95 Ga. App. 35, 97 S.E.2d 168 (1957) (decided under former Code 1933, §§ 22-1101 and 22-1102).

**When a corporation is engaged in the exercise of its franchises** in a state other than that of its creation, it cannot be said that the corporate entity is confined to its principal office in the latter; in fact, for the purpose of being sued, in personam, it may be treated as a resident of each state in which it does business under state laws. *Louisville & N.R.R. v. Meredith*, 66 Ga. App. 488, 18 S.E.2d 51 (1941), *aff'd*, 194 Ga. 106, 21 S.E.2d 101 (1942) (decided under former Code 1933, § 22-1101).

**If foreign corporation is not subject to equitable action** in county because it has no agent in that county, it cannot be made subject to the jurisdiction of the court because an agent of the corporation may come into the county and there be personally served with process. *Modern Homes Constr. Co. v. Mack*, 218 Ga. 795, 130 S.E.2d 725 (1963) (decided under former Code 1933, § 22-1101).

**Service on foreign insurer.** — The reference to other methods of service in former Code 1933, § 56-1204 (see O.C.G.A. § 33-4-4) included that of serving "any agent" of the company as provided in by former Code § 22-1101 (see O.C.G.A. § 14-2-504). *Aetna Cas. & Sur. Co. v. Sampley*, 108 Ga. App. 617, 134 S.E.2d 71 (1963) (decided under former Code 1933, § 22-1101).

**Service on foreign corporation's American subsidiary.** — Service upon the designated agent of a German corporation's wholly-owned American subsidiary did not constitute adequate service of process upon the German corporation. *May v. Volkswagen of Am., Inc.*, 125 F.R.D. 521 (N.D. Ga. 1989) (decided under former § 14-2-62).

Neither O.C.G.A. § 9-11-4, the general service of process statute, nor O.C.G.A. § 14-2-504 authorized service on an agent of a domestic subsidiary as constituting proper service on a foreign parent corporation.



Rovema Verpackungsmaschinen v. Deloache, 232 Ga. App. 212, 500 S.E.2d 647 (1998).

**Service on railroad through its freight agent.** — Legal service may be perfected on a defendant railroad corporation which does business in this state, i.e., has tracks in the state, by serving its soliciting freight agent

who has an office in the county in which the present suit is filed and service perfected, although the defendant does no business in the county other than that of the soliciting of freight. *Louisville & N.R.R. v. Meredith*, 66 Ga. App. 488, 18 S.E.2d 51 (1941), *aff'd*, 194 Ga. 106, 21 S.E.2d 101 (1942) (decided under former Code 1933, § 22-1101).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code 1933, § 22-403 and former Code Section 14-2-62, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Only feasible method for charging corporations with crimes** is through the return of an indictment by a grand jury. 1970 Op. Att'y Gen. No. 70-155 (decided under former Code 1933, § 22-403).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2192-2196.

**C.J.S.** — 19 C.J.S., Corporations, §§ 722, 724, 725, 728-730.

**ALR.** — What suits at domicile of corporation involving corporate stock or rights and obligations incident thereto are in rem jurisdiction which may rest upon constructive service of process against nonresidents, 145 ALR 1393.

Requisites of service upon, or delivery to, designated public official, as a condition of substituted service of process on him, 148 ALR 975.

Nonresident director or officer of domestic corporation as subject to constructive service of process in suit or proceeding to enforce duty or obligation to corporation, its stockholders, or creditors, 148 ALR 1251.

Who is "managing agent" of domestic corporation within statute providing for service of summons or process thereon, 71 ALR2d 178.

Who has possession, custody, or control of corporate books or records for purposes of order to produce, 47 ALR3d 676.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 ALR3d 636.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records—modern status, 87 ALR Fed. 177.

## PART 2

### VENUE

#### 14-2-510. Venue.

(a) Venue in proceedings against a corporation shall be determined in accordance with the pertinent constitutional and statutory provisions of this state in effect as of July 1, 1989, or thereafter.

(b) Each domestic corporation and each foreign corporation authorized

to transact business in this state shall be deemed to reside and to be subject to venue as follows:

(1) In civil proceedings generally, in the county of this state where the corporation maintains its registered office; or if the corporation fails to maintain a registered office, it shall be deemed to reside in the county where its last named registered office or principal office, as shown by the records of the Secretary of State, was maintained;

(2) In actions based on contracts, in that county in this state where the contract to be enforced was made or is to be performed, if the corporation has an office and transacts business in that county;

(3) In actions for damages because of torts, wrong, or injury done, in the county where the cause of action originated, if the corporation has an office and transacts business in that county;

(4) In actions for damages because of torts, wrong, or injury done, in the county where the cause of action originated. If venue is based solely on this paragraph, the defendant shall have the right to remove the action to the county in Georgia where the defendant maintains its principal place of business. A notice of removal shall be filed within 45 days of service of the summons. Upon motion by the plaintiff filed within 45 days of the removal, the court to which the case is removed may remand the case to the original court if it finds that removal is improper under the provisions of this paragraph. Upon the defendant's filing of a notice of removal, the 45 day time period for filing such notice shall be tolled until the remand, the entry of an order by the court determining that the removal is valid, or the expiration of the time period for the plaintiff to file a motion challenging the removal, whichever occurs first; and

(5) In garnishment proceedings, in the county of this state in which is located the corporate office or place of business where the employee who is the defendant in the main action is employed.

(c) Any residences established by this Code section shall be in addition to, and not in limitation of, any other residence that any domestic or foreign corporation may have by reason of other laws.

(d) Whenever this chapter either requires or permits a proceeding to be brought in the county where the registered office of the corporation is maintained, if the proceeding is against a corporation having a principal office as required under a prior general corporation law, the action or proceeding may be brought in the county where the principal office is located. (Code 1981, § 14-2-510, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2000, p. 228, § 4.)

**Cross references.** — Venue generally, Ga. Const. 1983, Art. VI, Sec. II.

**Editor's notes.** — Ga. L. 2000, p. 228, § 1, not codified by the General Assembly, pro-



vides: "The Act shall be known and may be cited as the 'Civil Litigation Improvement Act of 2000.'"

**Law reviews.** — For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service thereon, see 21 Mercer L. Rev. 457 (1970). For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973). For article, "Current Problems with Venue in Georgia," see 12 Ga. St. B.J. 71 (1975). For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B.J. 24 (1985).

For note discussing complications created by alternative places of venue for corporations, see 11 Ga. L. Rev. 149 (1976). For

note, "Venue in Multidefendant Civil Practice in Georgia," see 6 Ga. State U.L. Rev. 427 (1990). For note on 2000 amendment of O.C.G.A. § 14-2-510, see 17 Ga. St. U.L. Rev. 37 (2000).

For comment on *Rives v. Atlanta Newspapers, Inc.*, 110 Ga. App. 184, 138 S.E.2d 100 (1964), see 1 Ga. St. B.J. 236 (1964). For comment on *Lamex, Inc. v. Sterling Extruder Corp.*, 109 Ga. App. 92, 135 S.E.2d 445 (1964), see 2 Ga. St. B.J. 127 (1965). For comment advocating a "single-act" jurisdictional statute as basis for jurisdiction over a foreign corporation, in light of *Singer v. Walker*, 21 A.D.2d 285, 250 N.Y.S.2d 216 (1964), see 2 Ga. St. B.J. 131 (1965).

### COMMENT

Source: Former § 14-2-63.

These venue provisions are for specific actions, in addition to those specified elsewhere in the code. They preserve former law.

### Cross-References

Annual registration, see § 14-2-1622. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Registered office and agent: designated in annual registration, see § 14-2-1622; required, see § 14-2-501. Service of process: on domestic corporation, see § 14-2-504; on foreign corporation, see § 14-2-1510; on Secretary of State for surviving foreign corporation in a merger, see § 14-2-1107; on Secretary of State for withdrawn foreign corporation, see § 14-2-1520; on Secretary of State for foreign corporation with revoked certificate of authority, see § 14-2-1531. Venue: judicial appraisal of shares, see § 14-2-1330. Judicial dissolution of corporation, see § 14-2-1431.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### OFFICE

##### REGISTERED OFFICE

##### PRINCIPAL OFFICE

##### TORT ACTIONS

### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 22-404, 22-1102, Ga. L. 1946, p. 687, § 4 and former Code Section 14-2-63, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Legislative power to declare residence.** —

Legislature, under the Constitution, has the power to declare the residence of a corporation. *Jones v. Chandler*, 88 Ga. App. 103, 76 S.E.2d 237 (1953) (decided under Ga. L. 1946, p. 687, § 4).

**Legislative right to designate venue.** — The right of the General Assembly to create a corporation carries with it the power to designate its venue. *Davenport v. Petroleum Delivery Serv. of Ga., Inc.*, 134 Ga. App. 418,



**General Consideration (Cont'd)**

214 S.E.2d 692, aff'd, 235 Ga. 116, 218 S.E.2d 848 (1975) (decided under former Code 1933, § 22-404).

**Venue provisions of former § 14-2-63 were cumulative.** Savannah Laundry & Mach. Co. v. Owenby, 186 Ga. App. 130, 366 S.E.2d 787, cert. denied, 186 Ga. App. 918, 366 S.E.2d 787 (1988) (decided under former § 14-2-63).

**Special venue statutes not exclusive.** — There is no authority that special venue statutes are exclusive and the inference in the cases is that they are cumulative of other venue statutes. Jahncke Serv., Inc. v. Department of Transp., 134 Ga. App. 106, 213 S.E.2d 150 (1975), later appeal, 137 Ga. App. 179, 223 S.E.2d 228 (1976) (decided under former Code 1933, § 22-404).

**Residence of foreign corporation.** — A foreign railway company can have a residence in this state, which will subject it to suit in the courts; whenever it is present in any county of this state conducting therein a part of the business for which it was organized, it becomes a resident of such county. Jones v. Chandler, 88 Ga. App. 103, 76 S.E.2d 237 (1953) (decided under Ga. L. 1946, p. 687, § 4).

**Foreign corporation without agent or office to do business.** — In the event that a corporation does have an agent or office for the purpose of doing business within the state, the venue will be in the county where such office exists. However, where a foreign corporation doing business within this state does not have an agent or office for the purpose of doing business, but does have an agent for the purpose of service, venue may be laid in any county. Diamond Alkali Co. v. Godwin, 100 Ga. App. 799, 112 S.E.2d 365 (1959), aff'd, 215 Ga. 839, 114 S.E.2d 40 (1960) (decided under Ga. L. 1946, p. 687, § 4).

**Impleading of a third-party defendant** is an independent suit or case and must satisfy within itself the jurisdiction and venue requirements of the Constitution of the State of Georgia. Central of Ga. R.R. v. Georgia Kraft Co., 140 Ga. App. 8, 230 S.E.2d 74 (1976) (decided under former Code 1933, § 22-404).

**Presumption of continuing valid venue.** — When an action was brought against a con-

tractor alleging that it was an out-of-state corporation doing business in Rabun County, with such an allegation being admitted by the contractor, and thereafter the complaint was amended by adding additional party defendants, any contention by defendants that venue was lacking because contractor was not transacting business in Rabun County when the plaintiffs filed the amended complaint is without merit because under the doctrine of continuity, the transaction of business by the contractor is presumed to have continued in Rabun County, absent any evidence to the contrary. Tomberlin Assocs., Architects, Inc. v. Free, 174 Ga. App. 167, 329 S.E.2d 296 (1985) (decided under former § 14-2-63).

**The burden is on defendant to establish its plea to the jurisdiction** by a preponderance of the evidence. Rocker v. Windsor Forest, Inc., 112 Ga. App. 363, 145 S.E.2d 291 (1965) (decided under Ga. L. 1946, p. 687, § 4).

**Jurisdiction over corporation as joint defendant.** — A court otherwise without jurisdiction over a domestic corporation may acquire jurisdiction by virtue of the court's having jurisdiction of a joint defendant. Byrd v. Moore Ford Co., 116 Ga. App. 292, 157 S.E.2d 41 (1967) (decided under Ga. L. 1946, p. 687, § 4).

**No jurisdiction over nonresident absent determination of liability of resident.** — Absent a determination of liability of the resident defendant, the trial court had no jurisdiction to render a final judgment against the nonresident defendant corporation even if it was in default. Byrd v. Moore Ford Co., 116 Ga. App. 292, 157 S.E.2d 41 (1967) (decided under Ga. L. 1946, p. 687, § 4).

**Action against nonresident motor common carrier.** — Even though a nonresident interstate motor common carrier was registered in Georgia and had a registered agent for service of process, venue of a personal injury action against the carrier and nonresident driver was proper only in the county in which the accident occurred. Southern Drayage, Inc. v. Williams, 216 Ga. App. 721, 455 S.E.2d 418 (1995).

**Corporation subject to attachment when about to leave domicile county.** — Where a mercantile corporation does business in one county and has its principal office and place

of business, and therefore its domicile or residence in that county but where all the officers of the corporation reside in another county and the corporation has decided to discontinue its business in the county in which it is domiciled, and the business of the corporation and the stock of goods belonging to it are about to be removed to the other county and the principal office and place of business in the city of the corporation's domicile is to be discontinued, the inference is authorized that the corporation is actually removing or about to remove from the county of its domicile and it is therefore subject to attachment. *U.S. Fid. & Guar. Co. v. Lawrence*, 53 Ga. App. 111, 184 S.E. 922 (1936), *rev'd* on other grounds, 184 Ga. 83, 190 S.E. 346 (1937) (decided under former Code 1933, ch. 22-15).

**Indemnity action.** — In an indemnity action brought by a defendant in a third-party complaint, the cause of action originated in the place where the act or omission to act by the defendant occurred, not where the original suit was filed. *Central of Ga. R.R. v. Georgia Kraft Co.*, 140 Ga. App. 8, 230 S.E.2d 74 (1976) (decided under former Code 1933, § 22-404).

**Sale of product in county where suit brought.** — Venue may not be had over a manufacturer simply because a retailer, which is a separate legal entity, sells its product in the county in which suit is brought. *Barnes v. Destiny Indus., Inc.*, 185 Ga. App. 630, 365 S.E.2d 488 (1988).

**Suit against insurance company.** — Where administrator of insured's estate sued insurance company on alleged agreement to settle claim on behalf of its insured, the venue provisions of former § 56-1201 (see now O.C.G.A. § 33-4-1) rather than those of former § 22-404 were applicable even though it was not a claim between the insurer and its insured, since the suit arose out of the insurance company's role as insurer. *Liberty Mut. Ins. Co. v. Lott*, 246 Ga. 423, 271 S.E.2d 833 (1980) (decided under former Code 1933, § 22-404).

**Cited in** *Saint Francis Hosp. v. Dion*, 123 Ga. App. 360, 181 S.E.2d 72 (1971); *Hallmark Properties, Inc. v. Slater*, 229 Ga. 432, 192 S.E.2d 157 (1972); *Radcliffe v. Boyd Motor Lines*, 129 Ga. App. 725, 201 S.E.2d 4 (1973); *Orkin Exterminating Co. v. Gilland*, 130 Ga. App. 788, 204 S.E.2d 469 (1974);

*Europa Hair, Inc. v. Browning*, 133 Ga. App. 753, 212 S.E.2d 862 (1975); *Lukas v. Pittman Hwy. Contracting Co.*, 134 Ga. App. 305, 214 S.E.2d 398 (1975); *Citizens & S. Nat'l Bank v. Bougas*, 138 Ga. App. 706, 227 S.E.2d 434 (1976); *Campbell v. Jim Walter Homes, Inc.*, 140 Ga. App. 435, 231 S.E.2d 450 (1976); *Thoni Oil Co. v. Tinsley*, 140 Ga. App. 887, 232 S.E.2d 162 (1977); *Adams v. Upjohn Co.*, 142 Ga. App. 264, 235 S.E.2d 584 (1977); *Woods v. Long Mfg., N.C., Inc.*, 150 Ga. App. 499, 258 S.E.2d 592 (1979); *Lake Lanier Islands Dev. Auth. v. Village Harbor, Inc.*, 152 Ga. App. 705, 264 S.E.2d 23 (1979); *Fosgate v. American Mut. Liab. Ins. Co.*, 154 Ga. App. 510, 268 S.E.2d 780 (1980); *Evans v. Montgomery Elevator Co.*, 159 Ga. App. 834, 285 S.E.2d 263 (1981); *Ball v. Brunswick Pulp & Paper Co.*, 248 Ga. 106, 281 S.E.2d 571 (1981); *Cassells v. Bradlee Mgt. Servs., Inc.*, 161 Ga. App. 325, 291 S.E.2d 48 (1982); *Bradlee Mgt. Servs., Inc. v. Cassells*, 249 Ga. 614, 292 S.E.2d 717 (1982); *Southern Ry. v. Lawson*, 174 Ga. App. 101, 329 S.E.2d 288 (1985); *Gault v. National Union Fire Ins. Co.*, 208 Ga. App. 134, 430 S.E.2d 63 (1993); *Ford v. Uniroyal Goodrich Tire Co.*, 231 Ga. App. 11, 497 S.E.2d 596 (1998).

### Office

**"Office" defined.** — "Office," as that term was used in former § 22-404, is synonymous with "place of business." *Scott v. Atlanta Dairies Coop.*, 239 Ga. 721, 238 S.E.2d 340 (1977); *Gillis v. Orkin Exterminating Co.*, 155 Ga. App. 804, 272 S.E.2d 728 (1980) (decided under former Code 1933, § 22-404).

Where a corporation has a place where its business is being carried on, and has an agent in charge of it, performing such acts as are necessary in carrying on its business, it has an office and place of business within the meaning of former § 22-404. *Musgrove v. Kirksey Ford Sales, Inc.*, 159 Ga. App. 276, 283 S.E.2d 292 (1981) (decided under former Code 1933, § 22-404).

The term "office" as used in O.C.G.A. § 14-2-510(b) includes any place where a particular kind of business is transacted or a service is supplied by a corporation, and an office can be operated without being open to the public. *McLendon v. Albany Whse. Co.*, 203 Ga. App. 865, 418 S.E.2d 130 (1992).



**Office (Cont'd)**

**Corporation is deemed to reside in county** only if it has office and transacts business there. *Hagood v. Garner*, 159 Ga. App. 289, 283 S.E.2d 355 (1981) (decided under former Code 1933, § 22-404).

**Office and place of business within statute.** — If a corporation has a place where its business is being carried on, and has an agent in charge of it, performing such acts as are necessary in carrying on its business, it has an office and place of business within the meaning of the statute. *Gillis v. Orkin Exterminating Co.*, 155 Ga. App. 804, 272 S.E.2d 728 (1980) (decided under former Code 1933, § 22-404).

**Office need not be open to public.** — An office (place of business) may be operated to perform services for or transact a particular kind of business for the corporation without being open to the public. *Gillis v. Orkin Exterminating Co.*, 155 Ga. App. 804, 272 S.E.2d 728 (1980) (decided under former Code 1933, § 22-404).

The term "office," as used in paragraphs (2) and (3) of subsection (b) of former Code 1933, § 22-404, was any "place where a particular kind of business is transacted or a service is supplied" by a corporation, and which could be operated without being open to public. *Musgrove v. Kirksey Ford Sales, Inc.*, 159 Ga. App. 276, 283 S.E.2d 292 (1981) (decided under former Code 1933, § 22-404).

**Office must be maintained at time action filed.** — The fact that defendant corporation had an office in a county at the time the cause of action arose does not constitute grounds for venue in that county under paragraphs (2) and (3) of subsection (b) of former § 14-2-63 unless the corporation had an office at the time the action was filed. *Jernigan v. Patterson Contracting Co.*, 169 Ga. App. 963, 315 S.E.2d 679 (1984) (decided under former § 14-2-63).

**Dissolved corporation.** — The county in which a corporation maintained its registered office prior to its dissolution was the proper venue as to an action which is commenced against the corporation subsequent to its dissolution, and not the county in which the cause of action originated. *Savannah Laundry & Mach. Co. v. Owenby*, 186 Ga. App. 130, 366 S.E.2d 787, cert. denied,

186 Ga. App. 918, 366 S.E.2d 787 (1988).

**In a products liability action against a nonresident automobile manufacturer** where the manufacturer's agreement with a dealership provided that the agreement did not make either party the agent or legal representative of the other for any purpose whatsoever and the manufacturer's sales representatives came only when requested for consultation, intermittent visits by service representatives were not sufficient to establish that the manufacturer maintained an office and place of business and thus failed to establish that venue was proper in that county. *Barrow v. GMC*, 172 Ga. App. 287, 322 S.E.2d 900 (1984) (decided under former § 14-2-63).

**Uncontradicted sworn affidavit** of an officer of a corporation stating it maintains no office in the county where suit was filed is sufficient to establish lack of venue. *Barnes v. Destiny Indus., Inc.*, 185 Ga. App. 630, 365 S.E.2d 488 (1988) (decided under former § 14-2-63).

**Venue in a borrower's action for fraud** against a corporate lender was proper in Coffee County, where the lender was a foreign corporation registered to do business in Georgia, and although its registered office was in Fulton County, it transacted business in Coffee County. *Chrysler Credit Corp. v. Brown*, 198 Ga. App. 653, 402 S.E.2d 753 (1991).

**Office and transacting business.** — Venue for two lawsuits arising out of the collision of two vehicles was proper in the county where the lawsuits were originally filed not only because the accident occurred there, but also because no dispute existed but that the owner of the truck involved in the collision had an office and transacted business in that county, and, thus, the trial court in the county to which the lawsuits were removed did not err in entering an order that remanded the lawsuits back to the original county. *Mohawk Indus. v. Clark*, 259 Ga. App. 26, 576 S.E.2d 16 (2002).

**Registered Office**

**Registered office is in addition to other residences.** — The registered office shall be in addition to, and not in limitation of, any other residences that any domestic corporation may have by reason of other laws. Thus, if it has an office and transacts business or



has a principal office located in another county, service in the other county would establish venue there. *Victoria Corp. v. Fulton Plumbing Co.*, 150 Ga. App. 540, 258 S.E.2d 252 (1979), reversed on other grounds, 272 Ga. 188, 526 S.E. 2d 339 (2000) (decided under former Code 1933, § 22-404).

**Corporation generally sued in county of registered office.** — Generally, a corporation must be sued in the county wherein it has its registered office and if it has no registered office, it shall be deemed to reside in the county where its last registered office was located or where its place of business is located, or where it maintains its principal office and place of business. *Victoria Corp. v. Fulton Plumbing Co.*, 150 Ga. App. 540, 258 S.E.2d 252 (1979), reversed on other grounds, 272 Ga. 188, 526 S.E. 2d 339 (2000) (decided under former Code 1933, § 22-404).

In an action against a trucking company, venue was proper in the county in which the company had its office properly registered with the Secretary of State, not in the county of residence of the company's designated registered agent for service of process. *Rock v. Ready Trucking, Inc.*, 218 Ga. App. 774, 463 S.E.2d 355 (1995).

#### Principal Office

**"Principal office" applies to incorporations prior to 1968.** — The references in subsection (f) (now see subsection (d)) to "principal office" can apply only to corporations incorporated prior to the effective date of the 1968 Corporation Act. *Davenport v. Petroleum Delivery Serv. of Ga., Inc.*, 235 Ga. 116, 218 S.E.2d 848 (1975) (decided under former Code 1933, § 22-404).

**Office designated under prior law.** — The former statutory provisions did not mean a principal office in a factual sense, but meant the principal office which was designated by the corporation under the prior corporation law. *Davenport v. Petroleum Delivery Serv. of Ga., Inc.*, 235 Ga. 116, 218 S.E.2d 848 (1975) (decided under former Code 1933, § 22-404).

**Corporation incorporated under former Code 1933, § 22-404 did not have a "principal office"** as required under prior law. It only had a "registered office." *Davenport v. Petroleum Delivery Serv. of Ga., Inc.*, 235

Ga. 116, 218 S.E.2d 848 (1975) (decided under former Code 1933, § 22-404).

#### Tort Actions

**Where tort actions to be filed.** — As to corporations formed after the Corporation Act of 1968, tort actions must be filed either in the county where the corporate agent is registered or, under certain circumstances, in the county where the tort is committed. *Buice v. Satellite Sec. Corp.*, 156 Ga. App. 348, 274 S.E.2d 608 (1980) (decided under former § 22-404).

A foreign corporation's residence for purposes of venue in a tort action is both the county in which it has its registered office and the county in which the tort occurred if the corporation has an office and transacts business in that county. *WBC Holdings, Inc. v. Thornton*, 213 Ga. App. 48, 443 S.E.2d 686 (1994).

**Purpose of 1975 amendment to former § 14-2-63.** — The purpose of Ga. L. 1975, p. 583 (subsections (c) and (d) of former § 14-2-63 prior to the 1976 amendment to subsection (d), adding the requirement of an office) was to unify the venue requirements for suits against foreign and domestic corporations rather than to dramatically alter the requirement established by judicial construction under former Code 1933, § 22-5301 (repealed by Ga. L. 1975, p. 583), and that the corporation have an agent or a place of business in the county where the tort occurred. *C.W. Matthews Contracting Co. v. Capital Ford Truck Sales, Inc.*, 149 Ga. App. 354, 254 S.E.2d 426 (1979) (decided under former Code 1933, § 22-404).

**Venue of a civil action for libel against a corporate publisher to be laid in any county in which the newspaper is circulated is permitted under paragraph (3) of subsection (b), provided the corporation has an office and transacts business in that county.** *Carroll City/County Hosp. Auth. v. Cox Enters.*, 243 Ga. 760, 256 S.E.2d 443 (1979) (decided under former Code 1933, § 22-404).

In a suit against a newspaper for the publication of a libelous item, the cause of action arises in the county where the edition of the paper containing the item is first generally circulated. *Rives v. Atlanta Newspapers, Inc.*, 110 Ga. App. 184, 138 S.E.2d 100, rev'd on other grounds, 220 Ga. 485, 139 S.E.2d 395 (1964) (decided under former

**Tort Actions (Cont'd)**

Code 1933, § 22-1102).

**Venue of employee's action against railroad under the Federal Employer's Liability Act (45 U.S.C.A. § 51)** for injuries received in another state was properly transferred from the county of employee's residence to the county in which the railroad's registered representative and office were located. *Neal v. CSX Transp., Inc.*, 213 Ga. App. 707, 445 S.E.2d 766 (1994).

**Agent to be served in negligent construction and maintenance action.** — In a tort action brought because of the alleged negligent construction and maintenance of rented property belonging to a corporation, the agent of such corporation in charge of its office in that county, and also in charge of the renting, repairing, and keeping in repair of such property, is the agent of such company to be served in that county, and the superior court of the county has jurisdiction of the suit. *Home Owners Loan Corp. v. Brazzeal*, 62 Ga. App. 683, 9 S.E.2d 773 (1940) (decided under former Code 1933, § 22-1102).

**Negligent handling of toxic chemicals.** — Where homeowner's complaint against ex-

terminator, alleging negligent handling of toxic chemicals, sounded in tort, venue established pursuant to subsection (c) (now see paragraph (2) of subsection (b)) was inappropriate. *Orkin Exterminating Co. v. Morrison*, 187 Ga. App. 780, 371 S.E.2d 407, cert. denied, 187 Ga. App. 908, 371 S.E.2d 407 (1988) (decided under former § 14-2-63).

**Opportunity to amend complaints on venue in tort action.** — Legal guardians alleged sufficient facts to initially support venue of case involving two lawsuits arising from a pickup truck collision in the county where the collision occurred; thus, the trial court in the second county to which the case had been removed did not err in entering a remand order to remand the case to the county in which it was initially filed when the legal guardians amended their complaints to allege they had also learned that the truck owner had an office and transacted business in the county where the lawsuits were initially filed as the initial complaints were not deficient but informed the truck owner of the basis for venue regarding the initial county where the lawsuits were filed. *Mohawk Indus. v. Clark*, 259 Ga. App. 26, 576 S.E.2d 16 (2002).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2180-2191. 36 Am. Jur. 2d, Foreign Corporations, § 486 et seq.

**C.J.S.** — 19 C.J.S., Corporations, §§ 717, 718, 937.

**ALR.** — Prejudice against officer, stockholder, or employee of corporation as ground for change of venue on application of corporation, 63 ALR 1015.

Citizenship, domicile, residence, or location of national corporations, 69 ALR 1346; 88 ALR 873.

Business situs of intangible in state other than domicile of owner as excluding tax at domicile, 79 ALR 344.

Statutory or constitutional provisions as to venue as denial of equal protection of laws, 107 ALR 862.

Situs of corporate stock (or stock in joint stock company) for purpose of attachment, garnishment, or execution, 122 ALR 338.

What constitutes residence of foreign corporation in a county or judicial district within state venue statute, 129 ALR 1286.

Conclusiveness, as regards venue, of designation of place of business in incorporation papers, 175 ALR 1092.

Relationship between "residence" and "domicil" under venue statutes, 12 ALR2d 757.

Foreign corporation's purchase within state of goods to be shipped into other state or country as doing business within state for purposes of jurisdiction or service of process, 12 ALR2d 1439.

Waiver by national bank of statutory right to be sued in district where established or in which it is located, 1 ALR3d 904.

Place where corporation is doing business for purposes of state venue statute, 42 ALR5th 221.



## ARTICLE 6

## SHARES AND DISTRIBUTIONS

**Cross references.** — Regulation of securities generally, § 10-5-1 et seq. Requirement of approval by Public Service Commission prior to issuance of stocks and bonds by companies under jurisdiction of commission, § 46-2-28.

**Law reviews.** — For article, "Corporate Finance Under the Georgia Business Corporation Code of 1968," see 3 Ga. L. Rev. 11 (1968). For article, "Comparison of Features of Old and New Business Corporation Laws

Relating to Domestic Corporations," see 5 Ga. St. B.J. 13 (1968). For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988). For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989).

For note, "Exclusionary Tender Offers: A Reasonably Formulated Takeover Defense or a Discriminatory Attempt to Regain Control?," see 20 Ga. L. Rev. 627 (1986).

## RESEARCH REFERENCES

**ALR.** — Right of business corporation to use its funds or property for humanitarian purposes, 3 ALR 443.

Right of stockholder not a director, officer, or employee of the corporation to compensation for services in selling stock or corporate property in absence of express contract, 3 ALR 778.

Corporate stock without par value, 19 ALR 131; 36 ALR 791; 45 ALR 1501; 65 ALR 1347.

Guaranteeing future price of, or dividends on, corporate stock as contrary to public policy, 24 ALR 986.

Certificate of stock as conclusive and exclusive evidence of stockholder's rights, 31 ALR 1326.

Right of stockholder to set off indebtedness of corporation against statutory superadded liability, 40 ALR 1183; 98 ALR 659.

Duty of promoter to account for proceeds of sale of stock issued to him, 43 ALR 1363.

Liability of transferor of corporate stock for calls or assessments as affected by insolvency, fraud, or illegality in transfer, 45 ALR 99; 86 ALR 57.

Failure to enter transfer of stock on corporate books as affecting liability of transferor for calls or assessments, 45 ALR 137; 104 ALR 638.

Implied obligation of purchaser of corporate stock to indemnify vendor against future calls or assessments, 45 ALR 168; 141 ALR 1351.

Liability on stock subscription as affected by reorganization, consolidation, or merger of corporation, 45 ALR 1031; 89 ALR 770; 154 ALR 427.

Payments by stockholders applicable upon double liability, 45 ALR 1215; 56 ALR 527; 83 ALR 147; 120 ALR 511.

Pledge of unissued corporate stock, 51 ALR 1134.

Validity of restrictions by corporation on alienation or transfer of corporate stock, 65 ALR 1159; 61 ALR2d 1318.

Right of holders of preferred stock in respect of dividends, 98 ALR 1526; 133 ALR 653.

Liability as for conversion of stock or securities as affected by fact that party charged with conversion was in possession of other stock or securities of same type, 104 ALR 1114.

Rights, powers, and duties in respect of sale or transfer of corporate stock in which one holds a legal life estate, 126 ALR 1298.

Construction and application of provisions of articles, bylaws, statutes, or agreements restricting alienation or transfer of corporate stock, 2 ALR2d 745.

Presumption as to value of corporate stock or bonds, 6 ALR2d 189.

Right of corporate officer to purchase corporate assets from corporation, 24 ALR2d 71.

Application of "blockage rule" or "blockage discount theory" in determining stock valuation, for purposes of taxation of intangibles, 33 ALR2d 607.

Meaning of "book value" of corporate stock, 51 ALR2d 606.

Failure to issue stock as factor in disregard of corporate entity, 8 ALR3d 1122.

Awarding damages for delay, in addition



to specific performance, of contract for sale of corporate stock, 28 ALR3d 1401.

What constitutes waiver of stockholder's or corporation's right to enforce first-option stock purchase agreement, 55 ALR3d 723.

Corporation's measure of recovery against promoter who has made secret profit in sale of property to corporation, 84 ALR3d 162.

Lis pendens in suit to compel stock transfer, 48 ALR4th 731.

## PART I

### SHARES

**Law reviews.** — For note on 2000 amendment of O.C.G.A. §§ 14-2-601 and 14-2-602, see 17 Ga. St. U.L. Rev. 46 (2000).

#### 14-2-601. Authorized shares.

(a) The articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class and, prior to the issuance of shares of a class, the preferences, limitations, and relative rights of that class must be described in the articles of incorporation. Except to the extent otherwise permitted by Code Section 14-2-624, unless such class is divided into a series, all shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class; provided, however, that any of the voting powers, designations, preferences, rights, qualifications, limitations, or restrictions of or on the shares of a class, or the holders thereof, may be made dependent upon facts ascertainable outside the articles of incorporation or of any amendment thereto if the manner in which the facts shall operate upon the voting powers, designations, preferences, rights, qualifications, limitations, or restrictions of or on the shares, or the holders thereof, is clearly and expressly set forth in the articles of incorporation.

(b) The articles of incorporation may create one or more series of shares within a class of shares. If more than one series within a class of shares is authorized, the articles of incorporation must prescribe the number of shares of and a distinguishing designation for each series and, prior to the issuance of shares of a series, the preferences, limitations, and relative rights of that series must be described in the articles of incorporation. Except to the extent otherwise permitted by Code Section 14-2-624, all shares of a series must have preferences, limitations, and relative rights identical with those of other shares of the same series and, except to the extent otherwise provided in the description of the series, with those of other series of the same class; provided, however, that any of the voting powers, designations, preferences, rights, qualifications, limitations, or restrictions of or on the shares of a series, or the holders thereof, may be made dependent upon facts ascertainable outside the articles of incorporation or of any amendment thereto if the manner in which the facts shall operate upon the voting

powers, designations, preferences, rights, qualifications, limitations, or restrictions of or on the shares, or the holders thereof, is clearly and expressly set forth in the articles of incorporation.

(c) The articles of incorporation must authorize:

(1) One or more classes of shares that together have unlimited voting rights; and

(2) One or more classes of shares (which may be the same class or classes as those with voting rights) that together are entitled to receive the net assets of the corporation upon dissolution.

(d) The articles of incorporation may authorize one or more classes or series of shares that:

(1) Have special, conditional, or limited voting rights, or no right to vote, except to the extent prohibited by this chapter;

(2) Are redeemable, exchangeable, or convertible as specified in the articles of incorporation:

(A) At the option of the corporation, the shareholder, or another person or upon the occurrence of a designated event;

(B) For cash, indebtedness, securities, or other property; or

(C) In a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic data or events;

(3) Entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative; and

(4) Have preference over any other class or series within a class of shares with respect to distributions, including dividends and distributions upon the dissolution of the corporation.

(e) If at the time the corporation issues shares or other securities that are redeemable or exchangeable for or convertible into shares of another class or series, the corporation does not have authorized and unissued shares sufficient to satisfy the rights if and when exercised, the granting of the rights is not invalid solely by reason of the lack of sufficient authorized but unissued shares to honor the exercise of the rights.

(f) The description of the designations, preferences, limitations, and relative rights of share classes and series in subsection (d) of this Code section is not exhaustive.

(g) Solely for the purpose of any statute or regulation imposing any tax or fee based upon the capitalization of a corporation, all authorized shares of a corporation organized under this chapter shall be deemed to have a



nominal or par value of 1¢ per share. If any federal or other statute or regulation applicable to a particular corporation requires that the shares of the corporation have a par value, the shares shall be deemed to have the par value determined by the board solely for the purpose of satisfaction of the requirements of the statute or regulation imposing a tax or fee based upon the capitalization of the corporation.

(h) As used in this Code section, the term “facts” includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(i) Nothing contained in this Code section shall be deemed to limit the board of directors’ authority or discretion to determine the terms and conditions of rights, options, or warrants issuable pursuant to Code Section 14-2-624. (Code 1981, § 14-2-601, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 14; Ga. L. 2000, p. 1567, § 1; Ga. L. 2001, p. 4, § 14; Ga. L. 2003, p. 897, § 2.)

**The 2001 amendment**, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, deleted a comma following “described” in the second sentence of subsection (b).

**The 2003 amendment**, effective July 1, 2003, added subsection (h) and redesignated former subsection (h) as present subsection (i).

**Law reviews.** — For article discussing issuance and characteristics of shares of stock under the Georgia Business Corporation

Code, see 3 Ga. L. Rev. 11 (1968). For article discussing the issuance and characteristics of convertible shares under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article discussing the issuance of and limitations on redeemable shares under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article, “Some Distinctive Features of the Georgia Business Corporation Code,” 28 Ga. St. B.J. 101 (1991).

## COMMENT

Source: Model Act, § 6.01. This replaces former § 14-2-80.

Subsection (a) omits the reference of former § 14-2-80(a) to creating shares with or without par value. The Code also eliminates the legal capital conditions on conversion formerly contained in § 14-2-80(b)(5). Old statutory distinctions between common and preferred shares have been abandoned, in favor of complete contractual flexibility.

The language contained in the proviso was intended to negate any inference of invalidity of provisions that treat holders of shares of the same class differently, such as dual class voting provisions, or that grant greater or lesser voting or redemption rights, which are often based either on size or duration of holdings. Such provisions were explicitly approved by the Delaware Supreme Court in *Providence & Worcester Co. v. Baker*, 378 A.2d 121 (1977). This language was intended to permit the approach of the Delaware Supreme Court in permitting distinctions to be made among holders of securities, rather than the approach of some Federal courts, which have held that distinctions made on the basis of the identity of the holder of the securities are prohibited. See *Asarco Inc. v. Court*, 611 F. Supp. 468 (D. N.J. 1985).

Subsection (b) is new to Georgia law. Following the approach outlined above, of not distinguishing between preferred and common, it simply mandates that the corporation must authorize one or more classes of shares that have unlimited voting rights and one or more classes that are to receive the net assets of the corporation upon dissolution.



These fundamental characteristics need not be placed in a single class of shares but may be divided as desired. It is nevertheless essential that the corporation always have authorized shares with these two characteristics, and Section 14-2-603 requires that shares having in the aggregate these characteristics always be outstanding.

Subsection (c) lists the principal features that are customarily incorporated into classes of shares. Subsection (d) makes clear that this listing is not exhaustive.

Subsection (c) authorizes creation of classes of shares with limited or residual rights without significant limitation. Subsection (c)(1) contains new language authorizing shares with "special, conditional or limited voting rights. . . ." This contemplates voting rights triggered by the passage of a specified number of dividends, but it could be used to validate the use of various super-voting provisions, such as giving common shares super-voting rights when held for a specified time, or limiting voting power when accumulated in large blocks by single holders and their associates.

Subsection (c)(1) provides that any class of shares may be granted multiple or fractional votes per share without limitation. See Section 14-2-721. Shares of any class may also be made nonvoting "except to the extent prohibited by this chapter." This "except" clause refers to the provisions in the Code that permit shares that are designated to be nonvoting to vote on amendments to articles of incorporation and mergers or share exchanges that directly affect that class (Sections 14-2-726, 1004 and 1103).

Subsection (c)(2) authorizes shares that are redeemable or convertible. This permits common shares that are redeemable at the option of the corporation, the holder, a third party, or upon the occurrence of a designated event. This repeals Georgia's prohibition of redeemable common shares, contained in former § 14-2-93(a). Shares redeemable at the option of the corporation are sometimes called "callable shares," while shares redeemable at the option of the shareholder are sometimes described as involving a "put." The Code permits either type of redemption for any class of shares and thereby permits the creation of redeemable or callable shares without limitation (subject only to the provisos that the class or classes of shares described in subsection (b) must always exist and that at least one share of each class with those rights or powers must be outstanding under Section 14-2-603).

Subsection (c)(2) also eliminates the provision in former § 14-2-80(b)(5) that shares may be convertible into shares of a class having prior or superior rights only when so provided in the articles of incorporation. This has the effect, among others, of prohibiting so-called "upstream" conversions, that is, shares convertible into debt securities or into a class of shares having prior or superior preference rights. This restriction was eliminated because the power to make shares redeemable at the option of the shareholder for cash (see subsection (c)(2)(ii)) should logically permit the shares to be redeemable or convertible at the option of the shareholder into other shares with senior preferential rights. Creditors of the corporation and holders of shares with preferential rights are less seriously affected by a conversion of shares into debt or into shares with preferential rights than they would be by the redemption of the shares for money, which is permitted by the Code, subject to the limitations of Section 14-2-640. Shares made "redeemable" for debt under subsection (c)(2)(ii), achieve the same effect as a right to "convert" shares into debt securities.

Subsection (d) was added to the Model Act provisions. It eliminates the requirement of former § 14-2-80(b)(5) that convertible securities may not be issued unless a sufficient number of authorized but unissued or treasury shares were reserved by the board to be issued only in satisfaction of the conversion rights. It expressly validates the issuance of shares with certain conversion or redemption rights even where the corporation currently lacks sufficient authorized shares to honor such rights if they are triggered. In effect it provides that issuance of shares convertible or redeemable into

shares presently not authorized is not ultra vires, and that enforcement of these conversion or redemption rights is a matter of contract, not of corporate power.

Subsection (f) has been taken from Calif. Gen. Corp. L. § 205, to provide a basis for calculating any franchise or other taxes that may be based on par value.

#### **Note to 1989 Amendment**

The 1989 amendments to section 14-2-601 were intended to be clarifying. Changes in subsection (a) were intended to clarify that its provisions relate to classes of shares generally. The exception, relating to the treatment of series in section 14-2-602, was moved to the beginning of the sentence to separate it from the proviso. References to "class or series" of shares were replaced with more general references to "the shares" to clarify that the provisions of section 14-2-601 apply to shares generally, while the provisions of section 14-2-602 apply to series within a class.

Subsection (c)(2) was amended by including authorization of classes of shares that are exchangeable, as distinguished from convertible, to clarify that exchange rights into shares of another corporation may be created.

Subsection (d) was amended by adding the phrase "or other securities" following the reference to shares, to clarify the breadth of the corporation's power to issue securities. A reference to "exchangeable" was added to the phrase "redeemable or convertible" to clarify that any form of transaction involving securities is covered by this subsection.

Subsection (f) was amended by the addition of the last clause, to clarify that if the board designates a par value for the purpose of complying with a particular statute, that designation applies for that purpose only.

#### **Note to 2000 Amendment**

Subsection (a) has been amended to clarify that shares of a series within a class which has been designated, either in accordance with this Code section or in accordance with Code Section 14-2-602, may have preferences, limitations, and relative rights different from those of shares of other series within the same class. This subsection has also been amended to add a reference to Code Section 14-2-624, which clarifies that compliance with the provisions of Code Section 14-2-624 shall not result in a conflict with this subsection.

Subsection (b) was added to the Code by the 2000 amendment to eliminate any question that, in addition to the procedures set forth in Code Section 14-2-602, a class of shares may be divided into series in the original articles of incorporation or by amendment to the articles of incorporation pursuant to board and shareholder action under Code Section 14-2-1003. The new subsection also contains provisions regarding the preferences, limitations and relative rights within a series similar to those set forth in Code Section 14-2-602(c).

The 2000 amendments redesignated former subsection (b) as subsection (c). Subsections (c), (d) and (e), which have been redesignated as subsections (d), (e) and (f), have been amended to add references to series of shares within a class, consistent with the other amendments to this Code section. Former subsection (f) has been redesignated as subsection (g). The 2000 amendments to Code Section 14-2-601 are not intended to limit the authority of the board of directors to create and fix the terms of a series of shares under Code Section 14-2-602.

Subsection (h) has been added to Code Section 14-2-601 to further clarify that the provisions of 14-2-601 shall not limit the authority or discretion of the board of directors to determine the terms of rights, options or warrants pursuant to Code Section 14-2-624.



### Note to 2003 Amendment

The amendment to Code Section 14-2-601 adds a definition of "facts" ascertainable outside the articles of incorporation or any amendment thereto. It is based on Section 151 of the Delaware General Corporation Law and expressly allows for a determination or action by any person or body, including the corporation. This is also consistent with the definition of extrinsic "facts" objectively ascertainable found in Section 1.20(k) of the Model Business Corporation Act. Common examples of facts outside of the control of the corporation are references to an interest rate such as the federal funds rate or to securities market prices. The facts on which powers, designations, preferences, rights, qualifications, limitations or restrictions may be made dependent also include facts within the control of the corporation and do not need to occur independently. In addition to a determination or action by the corporation, references to extrinsic facts may also include, without limitation, references to determinations or actions by the board of directors, a committee of the board, an officer or agent of the corporation, or other person.

### Cross-References

Amendment of articles: generally, see § 14-2-1001 et seq.; terms of series or class, see § 14-2-602. Articles of incorporation generally, see § 14-2-202. Certificateless shares, see § 14-2-626. Close corporations, see Article 9. Consideration for shares, see § 14-2-621. Debt securities, see § 14-2-302. Distributions, see § 14-2-640. Fractional shares, see § 14-2-604. Nonvoting shareholders' right to notice, see §§ 14-2-704, 14-2-1003, 14-2-1103. Options, see § 14-2-624. Outstanding shares, see § 14-2-603. Preemptive rights, see § 14-2-630. Redemption, see § 14-2-631. Series of shares, see § 14-2-602. Voting by nonvoting shares, see §§ 14-2-1004, 14-2-1103. Voting by voting groups of shares, see §§ 14-2-140, 14-2-725, & 14-2-726. Voting rights generally, see § 14-2-721.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 436-444, 1015. 18B Am. Jur. 2d, Corporations, §§ 1259, 1260.

**C.J.S.** — 18 C.J.S., Corporations, §§ 148-150, 152-161, 375-377. 19 C.J.S., Corporations, § 876.

**ALR.** — Corporate stock without par value, 19 ALR 131; 36 ALR 791; 45 ALR 1501; 65 ALR 1347.

Priority as between creditors and holders of preferred stock, 29 ALR 254.

Construction and effect of provision for preference or redemption of preferred stock in respect of capital value, 33 ALR 1257; 124 ALR 1069.

Payments by stockholders applicable upon double liability, 45 ALR 1215; 56 ALR 527; 83 ALR 147; 120 ALR 511.

Right of corporation itself, in absence of fraud against it, to complain that stock issued as fully paid was based on overvaluation of property, or receipt of less than par value, 56 ALR 396.

Duty of corporation upon presentation for transfer of stock standing in one's name as trustee or other fiduciary, 56 ALR 1199.

Issuance by corporation of new stock certificates without requiring surrender of old, 61 ALR 436; 150 ALR 148.

Validity and construction of contract or option, on purchase of corporate stock by employee, for resale thereof to original seller on termination of employment, 66 ALR 1182.

Voting power of corporation stock as confined to issued and outstanding stock to exclusion of authorized unissued stock or stock which has been reacquired by the corporation, 90 ALR 315.

Implied obligation of purchaser of corporate stock to indemnify a vendor against future calls and assessments, 141 ALR 1351.

Power of board of directors to rescind or modify its action in calling stock for redemption or retirement, 148 ALR 839.

Construction and application of provisions of statute, charter, bylaws, or stock certificate conferring upon holders of preferred or other specified class of stock a right to vote in event of nonpayment of dividends or other specified conditions, 154 ALR 418.



Statutory requirements respecting issuance of corporate stock as applicable to foreign corporation, 8 ALR2d 1185.

Delay of stockholders in exercising their right to convert their stock into other class of stock or corporate obligation, 10 ALR2d 587.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stock, 22 ALR2d 12.

Patent rights, copyrights, trademarks, secret processes, formulas, or the like, as "property" within provisions of law or char-

ter forbidding issuance of corporate stock except for money paid or property received, 37 ALR2d 913.

Validity, construction, and effect of provisions of articles of incorporation or stock certificates relating to call, redemption, or retirement of common stock, 48 ALR2d 392.

Power of corporation to change existing redemption rights of common stock shareholders, 70 ALR2d 843.

Corporations: validity of charter provision for nonvoting common stock, 52 ALR3d 1131.

#### **14-2-602. Terms of class or series determined by board of directors.**

(a) If the articles of incorporation so provide, the board of directors may determine, in whole or in part, the preferences, limitations, and relative rights of (1) any class of shares before the issuance of any shares of that class or (2) one or more series within a class, and designate the number of shares within that series, before the issuance of any shares of that series.

(b) Each series of a class must be given a distinguishing designation.

(c) Except to the extent otherwise permitted by Code Section 14-2-624, all shares of a class or, if applicable, series within a class must have preferences, limitations, and relative rights identical with those of other shares of the same class or series and, except to the extent otherwise provided in the description of the series, all shares of a series must have preferences, limitations, and relative rights identical with those of other series of the same class; provided, however, that any of the voting powers, preferences, designations, rights, qualifications, limitations, or restrictions of or on the class or series of shares, or the holders thereof, may be made dependent upon facts ascertainable outside the articles of incorporation if the manner in which the facts shall operate upon the voting powers, designations, preferences, rights, qualifications, limitations, or restrictions of or on the shares, or the holders thereof, is clearly and expressly set forth in the articles of incorporation. As used in this Code section, the term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(d) Before issuing any shares of a class or series created under this Code section, the corporation must deliver to the Secretary of State for filing articles of amendment, which are effective without shareholder action, that set forth:

(1) The name of the corporation;

(2) The text of the amendment determining the terms of the class or series of shares;

(3) The date it was adopted; and

(4) A statement that the amendment was duly adopted by the board of directors.

(e) After the board of directors has established a series in accordance with the terms of this Code section, the board of directors at any time and from time to time may increase or decrease the number of shares contained in the series, but not below the number of shares then issued, or eliminate the series where no shares are issued by filing articles of amendment, which are effective without shareholder action, in the manner provided in subsection (d) of this Code section.

(f) Nothing contained in this Code section shall be deemed to limit the board of directors' authority or discretion to determine the terms and conditions of rights, options, or warrants issuable pursuant to Code Section 14-2-624. (Code 1981, § 14-2-602, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 15; Ga. L. 2000, p. 1567, § 2; Ga. L. 2003, p. 897, § 3.)

**The 2003 amendment**, effective July 1, 2003, added the last sentence in subsection (c).

**Law reviews.** — For article discussing issuance and characteristics of shares of stock under the Georgia Business Corporation

Code, see 3 Ga. L. Rev. 11 (1968). For article discussing the issuance of and limitations on redeemable shares under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968).

### COMMENT

Source: Model Act, § 6.02; former § 14-2-81(b)(1) and (2).

Section 14-2-602 permits the board of directors, if authority to do so is contained in the articles of incorporation, to fix the terms of a class of shares to meet corporate needs, including current requirements of the securities market or the exigencies of negotiations for acquisition of other corporations or properties, without the necessity of holding a shareholders' meeting to amend the articles of incorporation. This section therefore permits prompt action and gives desirable flexibility. The articles of incorporation may also create "series" of shares within a class (rather than designating that "series" as a separate class) if that is deemed desirable.

The board of directors may set the terms of a class only if there are not outstanding shares of that class. Similarly, the board may designate the terms of a series only if there are not outstanding shares of that series.

The power to vary the terms of "blank stock" for series of the same class extends to all the permitted variables set forth in Section 14-2-601(c). The proviso added to subsection (c) parallels that added to Section 14-2-601(a).

Subsection (d) requires a simple official filing to amend the articles so there will be a public record of the class or series the corporation intends to issue. The amendment may be made without shareholder action. Under former § 14-2-81(c), the effect of a certificate filed by the board was not clear. Subsection (d) eliminates that ambiguity, and is intended to avoid the outcome of *Telvest v. Olson*, Del. Ch., (C.A. No. 5798, 1979), where the court held that the certificate of directors' action constituted an unauthorized charter amendment altering common voting rights. See Section 14-2-1002.



Subsection (e) was added to the Model Act by the Code. It restores the ability to reduce the number of shares authorized in a series where not all shares of the series are issued, formerly contained in § 14-2-81(b)(1).

Subparagraph (f) is a transition rule to provide authority similar to that formerly granted by § 14-2-81(b)(2), where the articles fail to grant the board authority to determine rights and preferences of series.

One significant change from former law is elimination of the provision of § 14-2-80(b)(3), which prohibited issuance of shares with priority over dividends or on assets at liquidation, over any currently outstanding class entitled to such priority over other shares. Holders of senior securities obtain such protection from the provisions of the articles of incorporation designating their rights and preferences, rather than from an absolute statutory prohibitions.

#### **Note to 1989 Amendment**

The 1989 amendment to subsection (a) eliminated a cross reference to the limits contained in section 14-2-601 that was thought to be superfluous. Section 14-2-601 deals with classes of shares, while section 14-2-602 deals with series within a class.

The 1989 amendment to subsection (c) deleted the phrase "or any amendment thereto" following the phrase "the articles of incorporation" as redundant.

#### **Note to 2000 Amendment**

The 2000 amendments to subsection (c) clarify that the preferences, limitations and relative rights of shares within a class or a series, determined by the board of directors under this Code section, are subject to the requirements consistent with those that are set forth in Code Section 14-2-601(a) and (b). Consistent with the 2000 amendments to Code Section 14-2-601(a) and (b), this subsection has also been amended to clarify that compliance with the provisions of Code Section 14-2-624 shall not result in a conflict with this subsection.

Subsection (e) was amended to empower the board of directors, without shareholder action, to eliminate a series of shares where no shares of that series are issued.

Former subsection (f), which allowed the rights and preferences of a series of stock to be established by shareholder vote for corporations formed prior to July 1, 1989, was eliminated by the 2000 amendment, because the 2000 amendments to Code Section 14-2-601 eliminate any question that the board of directors and shareholders may divide a class of shares into series through an amendment to the articles of incorporation under Code Section 14-2-1003. The amendments to Code Section 14-2-601 make clear that, in the absence of board authority to determine the preferences, limitations and relative rights of a class or series of shares or to designate a series of shares, the proper procedure for taking such action is set forth in Code Section 14-2-1003. New subsection (f) was added to clarify that the provisions of Code Section 14-2-602 shall not limit the authority or discretion of the board of directors to determine the terms of rights, options or warrants issuable pursuant to Code Section 14-2-624.

#### **Note to 2003 Amendment**

The amendment to Code Section 14-2-602 adds the same definition of 'facts' ascertainable outside the articles of incorporation as was added to Code Section 14-2-601 in order to make the two sections consistent with each other.

#### **Cross-References**

Amendment to articles of incorporation, see § 14-2-1003 and Article 10, Part 1. Authorized shares, see § 14-2-601. Certificateless shares, see § 14-2-626. Certificates for



shares, see § 14-2-625. Committees, see § 14-2-825. "Deliver" includes mail, see § 14-2-140. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Distributions, see § 14-2-640. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Options, see § 14-2-624. Redemption, see §§ 14-2-601 & 14-2-631. Series or class as voting group, see §§ 14-2-140, 14-2-725, 14-2-726, & 14-2-1004. Voting by voting group, see §§ 14-2-725 & 14-2-726. "Voting group" defined, see § 14-2-140.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 439-442.

**C.J.S.** — 18 C.J.S., Corporations, § 154.

**ALR.** — Right to issue corporate stock without voting power, 21 ALR 643.

Construction and effect of provision for preference or redemption of preferred stock in respect of capital value, 33 ALR 1257; 124 ALR 1069.

Power to create preferred stock as against existing preferred stock, 44 ALR 72.

Rights of holders of preferred stock to have receiver appointed, 50 ALR 261.

Issuance by corporation of new stock certificates without requiring surrender of old, 61 ALR 436; 150 ALR 148.

Rights of holders of preferred stock in respect of dividends, 67 ALR 765; 98 ALR 1526; 133 ALR 653.

Validity and effect of agreement by a corporation contemporaneously with issue or sale of stock, to repurchase or redeem the stock or to cancel the subscription therefor

and refund consideration paid, 101 ALR 154.

Instrument issued by a corporation as certificate of preferred stock or as evidence of indebtedness, 123 ALR 856.

Power of board of directors to rescind or modify its action in calling stock for redemption or retirement, 148 ALR 839.

Preferred stockholders' rights, upon liquidation or dissolution, to dividends, 25 ALR2d 788.

Rights of preferred stockholders as to passed or accumulated dividends in going concern, 27 ALR2d 1073.

Patent rights, copyrights, trademarks, secret processes, formulas, or the like, as "property" within provisions of law or charter forbidding issuance of corporate stock except for money paid or property received, 37 ALR2d 913.

Minority stockholders' right to enjoin further or additional issuance of stock, 38 ALR2d 1366.

### 14-2-603. Issued and outstanding shares.

(a) A corporation may issue the number of shares of each class or series authorized by the articles of incorporation. Shares that are issued are outstanding shares until they are reacquired, redeemed, converted, or canceled.

(b) The reacquisition, redemption, or conversion of outstanding shares is subject to the limitations of subsection (c) of this Code section and to Code Section 14-2-640.

(c) At all times that shares of the corporation are outstanding, one or more shares that together have unlimited voting rights and one or more shares (which may be of the same class or classes as those with voting rights) that together are entitled to receive the net assets of the corporation upon dissolution must be outstanding. (Code 1981, § 14-2-603, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Model Act, § 6.03. There was no counterpart to this section in former Georgia law.

Subsection (c) requires that at all times the corporation must have outstanding shares of one or more classes with unlimited voting rights and rights to receive the net assets on dissolution.

The provisions of the Code are consistent with the specialized class of corporation known as the open-end investment company, which permits unlimited redemptions of shares at net asset value at the request of shareholders. Sections 14-2-601 and 603 permit the classes of shares with voting and dissolution rights to be made redeemable without limitation. The requirement of subsection (c) that at least one share be outstanding is also consistent with an unlimited right of redemption since that section only applies while there are shares of stock outstanding.

## Cross-References

Cancellation of shares, see §§ 14-2-621 & 14-2-1004. Certificateless shares, see § 14-2-626. Certificates for shares, see § 14-2-625. Classes of shares generally, see § 14-2-601. Consideration for shares, see § 14-2-621. Dissolution of corporation, see Article 14. Reacquisition of shares, see § 14-2-631. Redemption of shares, see §§ 14-2-601 & 14-2-631. Share dividends, see § 14-2-623. Voting by nonvoting class of shares, see §§ 14-2-1004 & 14-2-1103. Voting by voting groups, see §§ 14-2-140, 14-2-725 & 14-2-726. "Voting group" defined, see § 14-2-140.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 463, 485.

**C.J.S.** — 18 C.J.S., Corporations, §§ 129-131.

**14-2-604. Fractional shares.**

(a) A corporation may:

(1) Issue fractions of a share or pay in money the value of fractions of a share;

(2) Arrange for disposition of fractional shares by or for the account of the shareholders;

(3) Issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share.

(b) Each certificate representing scrip must be conspicuously labeled "scrip" and must contain the information required by subsection (b) of Code Section 14-2-625.

(c) The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon liquidation. The holder of scrip is not entitled to any of these rights unless the scrip provides for them.

(d) The board of directors may authorize the issuance of scrip subject to any condition considered desirable, including:

(1) That the scrip will become void if not exchanged for full shares before a specified date; and

(2) That the shares for which the scrip is exchangeable may be sold and the proceeds paid to the scripholders. (Code 1981, § 14-2-604, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article discussing shares under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968).

### COMMENT

Source: Model Act, § 6.04. This replaces former § 14-2-88.

Subsection (a) authorizes handling fractional shares in various ways, including:

(1) The corporation may issue scrip instead of fractional shares. As subsection (c) provides, scrip confers none of the substantive rights of shares, but only authorizes holders to combine scrip certificates in amounts aggregating a full share and then to exchange them for a full share. This aggregation must occur within the time and subject to the conditions set initially by the board of directors and stated in the scrip certificate. Scrip that is not combined and exchanged may become void, authorized by subsection (d).

(2) The corporation may authorize the immediate sale of all fractional share interests, thereby avoiding the expense and delay of scrip and the inconvenience of recognizing fractional shares.

Under this section fractional shares may be certificated or uncertificated. There is no difference in treatment of certificated or uncertificated shares for this purpose. See Sections 14-2-625 and 626.

### Cross-References

Redemption, see §§ 14-2-601 & 14-2-631. Share dividends, see § 14-2-623.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 463, 484-488.

**C.J.S.** — 18 C.J.S., Corporations, §§ 129-132.

**ALR.** — Right to issue corporate stock without voting power, 21 ALR 643.

Issuance by corporation of new stock certificates without requiring surrender of old, 61 ALR 436; 150 ALR 148.

Voting of jointly held or fractional shares in corporation, 98 ALR2d 357.

## PART 2

### ISSUANCE OF SHARES

#### 14-2-620. Subscription for shares before incorporation.

(a) A written subscription for shares entered into before incorporation is irrevocable for six months unless the subscription agreement provides a longer or shorter period or all the subscribers agree to revocation.



(b) The board of directors may determine the payment terms of subscriptions for shares that were entered into before incorporation, unless the subscription agreement specifies them. A call for payment by the board of directors must be uniform so far as practicable as to all shares of the same class or series, unless the subscription agreement specifies otherwise.

(c) Shares issued pursuant to subscriptions entered into before incorporation are fully paid and nonassessable when the corporation receives the consideration specified in the subscription agreement.

(d) If a subscriber defaults in payment of money or property under a subscription agreement entered into before incorporation, the corporation may collect the amount owed as any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may sell the shares if the debt remains unpaid more than 20 days after the corporation sends written demand for payment to the subscriber.

(e) A subscription agreement entered into after incorporation is a contract between the subscriber and the corporation subject to Code Section 14-2-621. (Code 1981, § 14-2-620, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article discussing guidelines governing share subscription agreements, see 3 Ga. L. Rev. 11 (1968).

#### COMMENT

Source: Model Act, § 6.20. This replaces former § 14-2-83.

Subsection (a) is substantially identical to former § 14-2-83(a). It provides that preincorporation subscriptions in writing are irrevocable for six months unless the subscription agreement provides that they are revocable or that they are irrevocable for some other period, or unless all the subscribers agree to revocation. In essence, there is an irrevocability agreement among all of the subscribers. The terms of this contract are set forth in subsections (b) and (d).

Subsection (b) is substantially similar to former § 14-2-83(c). Subsection (b) provides that after incorporation the board of directors may determine the payment terms of subscriptions, but that calls must be uniform so far as practicable as to all shares of the same class or series unless the subscriptions provide otherwise. Subsection (d) provides alternative methods of enforcement of preincorporation subscriptions by the corporation.

Subsection (c) is clarifying, and states that shares are fully paid and nonassessable when the consideration called for in the subscription agreement is paid. This represents a major departure from the old legal capital rules of former § 14-2-84(a), which required shares with par value to be issued for consideration not less than the par value of the shares.

Subsection (e) clarifies that post-incorporation subscription agreements are also valid.

### Cross-References

Consideration for shares, see § 14-2-621. Effective date of notice, see § 14-2-141. "Notice" defined, see § 14-2-141.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1993, § 22-504 and former Code Section 14-2-83, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Stock subscription agreements enforceable only if written.** — An alleged oral promise to pay for stock is unenforceable

under former Code 1933, § 22-504 (see O.C.G.A. § 14-2-620), which requires enforceable stock subscription agreements to be in writing. *Super Valu Stores, Inc. v. First Nat'l Bank*, 463 F. Supp. 1183 (M.D. Ga. 1979) (decided under former Code 1933, § 22-504).

Cited in *Putnam v. Williams*, 652 F.2d 497 (5th Cir. 1981).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 578-580, 584, 586, 592, 643-653, 660.

**C.J.S.** — 18 C.J.S., Corporations, §§ 184, 188, 212.

**ALR.** — Liability of corporation on contracts of promoters, 17 ALR 452; 49 ALR 673; 123 ALR 726.

Binding effect of subscription to stock in corporation to be formed, 61 ALR 1463.

Infant's rights and liabilities on subscription to or purchase of corporate stock, 64 ALR 972.

Liability under trust-fund doctrine of subscribers to stock of corporation the charter of which has been canceled for reasons other than insolvency, 71 ALR 103; 90 ALR 1350.

Necessity and sufficiency of notice of withdrawal of subscription to stock in projected corporation, 71 ALR 1345.

Liability of promoters for fraud or misrepresentation to persons subscribing for shares after formation of corporation, 72 ALR 355.

Fraud: necessity for knowledge of falsity of representation as to value, inducing subscription to or purchase of corporate stock, or other securities, 73 ALR 1120.

Construction, application, and effect of statutes giving corporation a lien on shares of its stockholders for debts due from stockholders to corporation, 80 ALR 1338.

Validity and effect of extrinsic agreement absolving one, in whole or part, from liability on subscription to corporate stock, 81 ALR 198.

Right of action to recover purchase price under sale of corporate stock where title has not passed as affected by provision of Sales Act, 99 ALR 275.

Validity of release, cancellation, or compromise of unpaid subscription for stock by corporation or its representatives, 101 ALR 231.

Disposition of interest or rights in corporation represented by stock the owners of which cannot be found, 101 ALR 670.

Consideration for subscription agreements, 151 ALR 1238.

Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations, 11 ALR2d 1380.

Applicability of Blue Sky Laws to preincorporation subscriptions, 50 ALR2d 1103.

### 14-2-621. Issuance of shares.

(a) The powers granted in this Code section to the board of directors may be reserved to the shareholders by the articles of incorporation.



(b) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

(c) Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. That determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid, and nonassessable, and the authorization by the board of directors of the issuance of shares constitutes such determination.

(d) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(e) The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the note is paid, or the benefits received. If the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed or restricted and the distributions credited may be canceled in whole or in part. (Code 1981, § 14-2-621, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 4.)

**Law reviews.** — For article discussing the consideration required by the issuance of par and no-par shares under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article discussing issuance of

debt securities under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article discussing treasury shares and restrictions placed upon their use by the corporation, see 3 Ga. L. Rev. 11 (1968).

#### COMMENT

Source: Model Act, § 6.21. This replaces former §§ 14-2-84 & 14-2-85.

Subsection (a) is roughly comparable to former § 14-2-84(d), in allowing the articles to reserve to the shareholders the power to fix consideration for shares.

Subsection (b) specifically authorizes receipt of promissory notes and contracts for services to be performed, reversing the prohibition of former § 14-2-85(b). Shares may also be issued for "any tangible or intangible property or benefit to the corporation," as consideration for the present issue of shares. The term "benefit" should be broadly construed to include, for example, a reduction of a liability, a release of a claim, or benefits obtained by a corporation by contribution of its shares to a charitable organization or as a prize in a promotion.

Subsection (c) merely requires the board to determine that the consideration received for shares to be issued is adequate, in fulfillment of its general fiduciary duties to the existing shareholders. Accounting principles are not specified in the Code, and the board of directors is not required by the statute to determine the "value" of noncash



consideration received by the corporation (as was the case in former § 14-2-84(h), requiring each corporation to keep a record of the consideration for all shares issued, and of the number and par value, if any, of the shares issued therefor). Thus, the board need not make a value determination for purposes of accounting entries on the balance sheet, although it may elect to do so. In many instances, property or benefit received by the corporation will be of uncertain value; if the board of directors determines that the issuance of shares for the property or benefit is an appropriate transaction that protects the shareholders from dilution, that is sufficient under Section 14-2-621. But subsection (c) only protects the validity of shares issued; it does not protect such decisions from charges that they unfairly dilute the investment of existing shareholders. The board of directors does not have to make an explicit "adequacy" determination by formal resolution; that determination may be inferred from a determination to authorize the issuance of shares for a specified consideration.

Section 14-2-621 reflects the elimination of the legal capital concepts of former Georgia law. Thus, payment of par value is not required to make shares fully paid and nonassessable; only payment of the agreed consideration. Since shares need not have a par value, there can be no "watered stock" liability for issuing shares at too low a price. As subsection (d) provides, shares are fully paid and nonassessable when issued for the consideration authorized by the board of directors. Creditor protection no longer rests on formalistic notions of capital dedicated through a legal capital system to the firm; creditors obtain their protections from the more realistic limitations on distributions contained in Section 14-2-640.

Where shares are issued for notes or promised future services, subsection (e) authorizes, but does not require, placing the shares in escrow until the payment is received, and canceling them to the extent payment is not received.

The subsection also defines the rights of the corporation with respect to these shares. If the shares are issued without being restricted as provided in this subsection, they are validly issued insofar as the adequacy of consideration is concerned. See Section 14-2-622 and its Comment.

#### **Note to 1993 Amendment**

The 1993 amendment adds statutory authority to the interpretation formerly noted only in comments that the board of directors does not have to make an explicit determination as to the adequacy of consideration and that such a conclusion may be inferred from the determination to issue shares.

#### **Cross-References**

Certificateless shares, see § 14-2-626. Certificates for shares, see § 14-2-625. Committees of the board, see § 14-2-825. Director standards of conduct, see § 14-2-830 et seq. Distributions, see § 14-2-640. Liability of subscribers and shareholders, see § 14-2-622. Par value shares, see § 14-2-202. Preincorporation subscriptions for shares, see § 14-2-620. Share dividends, see § 14-2-623. Share options, see § 14-2-624. Share transfer restrictions, see § 14-2-627.

### **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-506 and former Code Section 14-2-85, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Full payment presumed following board resolutions.** — Although a corporation may issue shares and share certificates to a person who is not entitled to them by reason of a full payment, full payment becomes conclusively presumed when, in the absence of bad faith, the board of directors issues a

resolution as to the fair value of the consideration to the corporation. In re Delk Rd. Assocs., 37 Bankr. 354 (Bankr. N.D. Ga. 1984) (decided under former § 14-2-85).

**Board must value property given for stock on transfer or stock issuance.** — Board of directors of a corporation must by resolution place a value upon property contributed by a stockholder in payment of stock upon the date of transfer or stock issuance. *Super Valu Stores, Inc. v. First Nat'l Bank*, 463 F. Supp. 1183 (M.D. Ga. 1979) (decided under former Code 1933, § 22-506).

**Failure to value property at time of transfer.** — Where stock in corporation is issued in consideration of transfer of patent rights

to the corporation, and no resolution is made by the directors setting a value in dollars on the patent rights, and where the corporation later comes into a court of equity seeking to cancel such shares, it is necessary for the court to make a determination as to the relative value of the stock issued and the property transferred, as of the time of the transaction. In such action by the corporation against the stockholder, the burden would be on the corporation to show that the property transferred to the corporation by the stockholder was overvalued. *Crowder v. Electro-Kinetics Corp.*, 228 Ga. 610, 187 S.E.2d 249 (1972) (decided under former Code 1933, § 22-506).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 494-508.

**C.J.S.** — 18 C.J.S., Corporations, §§ 164-171.

**ALR.** — Bona fide holder of negotiable paper given in payment of a subscription to corporate stock in violation of law, 4 ALR 1330.

Liability upon stock subscription payable in services which are rendered unnecessary by the insolvency of corporation, or other cause, 6 ALR 277.

Effect upon the validity of subscription to corporate stock, of failure to comply with statutory requirement of payment at the time of subscribing, 6 ALR 1116.

Power to require nonassenting creditors or bondholders to accept securities of, or shares in, new or reorganized corporation, 28 ALR 1196; 88 ALR 1238.

Corporate stock without par value, 36 ALR 791; 45 ALR 1501; 65 ALR 1347.

Construction of contract which fixes compensation of officer or employee with reference to dividends, 41 ALR 871.

Right of corporation itself, in absence of fraud against it, to complain that stock issued as fully paid was based on overvaluation of property, or receipt of less than par value, 56 ALR 396.

Duty of corporation upon presentation for transfer of stock standing in one's name as trustee or other fiduciary, 56 ALR 1199.

Note as consideration for issuance of corporate stock under statute forbidding issuance of stock except for money paid, property received, etc., 58 ALR 708.

Infant's rights and liabilities on subscription to or purchase of corporate stock, 64 ALR 972.

Right of corporation to deny validity of stock issued by it in violation of statutory or constitutional provisions respecting receipt of consideration, as against subsequent bona fide purchasers or pledgees for value, 73 ALR 1435.

Accrued dividends on preferred stock, 75 ALR 1150.

Construction, application, and effect of statutes giving corporation a lien on shares of its stockholders for debts due from stockholders to corporation, 80 ALR 1338.

Right of action to recover purchase price under sale of corporate stock where title has not passed as affected by provision of Sales Act, 99 ALR 275.

Validity of release, cancelation, or compromise of unpaid subscription for stock by corporation or its representatives, 101 ALR 231.

Instrument issued by a corporation as certificate of preferred stock or as evidence of indebtedness, 123 ALR 856.

Implied obligation of purchaser of corporate stock to indemnify a vendor against future calls and assessments, 141 ALR 1351.

Issuance by corporation of new stock certificates without requiring surrender of old, 150 ALR 148.

Rights and liabilities of promoters or incorporators inter se under their contract for issuance of stock to them in return for services, 8 ALR2d 722.



Meaning of "book value" of corporate stock, 51 ALR2d 606.

Stock purchase or stock bonus plan as within provisions of federal labor relations acts requiring employer to bargain collectively, 58 ALR2d 843.

Construction and effect of constitutional or statutory provisions precluding issuance of corporate stock in consideration of promissory notes, 78 ALR2d 834.

Validity of agreement in conjunction with sale of corporate shares that majority of

directors will be replaced by purchaser's designees, 13 ALR3d 361.

Valuation of corporate stock under "buy-out" or "first option" agreement giving option to or requiring corporation or other stockholders to purchase stock of deceased or withdrawing stockholders, 54 ALR3d 790.

Validity of obligation given by corporation incident to purchase of entire stock by sole shareholder, 71 ALR3d 639.

### 14-2-622. Liability of shareholders.

(a) A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued (Code Section 14-2-621) or specified in the subscription agreement (Code Section 14-2-620).

(b) Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debt of the corporation except that he may become personally liable by reason of his own acts or conduct. (Code 1981, § 14-2-622, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "Liability Their Fellow Shareholders Misbehave?," see 15 Ga. St. U.L. Rev. 1047 (1999).  
 Limbo: Are Incorporated Lawyers in Georgia Really Free from Personal Liability When

### COMMENT

Source: Model Act, § 6.22. This replaces former § 14-2-110.

Subsection (a) simplifies the provisions of former § 14-2-110(a), making subscribers and shareholders liable only for unpaid consideration. The major change is elimination of the obligation to pay, as the "full consideration" for shares, a minimum price equal to par value, as required by former § 14-2-84(a). Further, all reference to liability of successor transferees formerly provided in § 14-2-110(b) is omitted; this is left to the provisions of Article 8 of the Uniform Commercial Code.

Subsection (b) makes clear that no shareholder, whether original purchaser or transferee, becomes personally liable for corporate debts except through personal conduct, unless otherwise provided in the articles of incorporation.

### Cross-References

Articles of incorporation, see § 14-2-202. Consideration for shares, see § 14-2-621. Share transfer restrictions, see § 14-2-627. Subscriptions for shares, see § 14-2-620.



## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-601 and former Code Section 14-2-110, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Period of limitations as to contract between subscribers and corporation.** — Rights and liabilities existing between corporation and its stockholders arise out of contract entered into between the subscribers and the corporation, a right of action which is barred after a period of six years from the accrual of the right. *C & S Land, Transp. & Dev. Corp. v. Yarbrough*, 153 Ga. App. 644, 266 S.E.2d 508 (1980) (decided under former Code 1933, § 22-601).

**Shareholders of a professional corpora-**

**tion.** — Lawyers may practice their profession as shareholders in a professional corporation with the same rights and responsibilities as shareholders in other professional corporations; thus, lawyers in a professional corporation were not jointly and severally liable for the professional misconduct of the majority shareholder; overruling *First Bank & Trust Co. v. Zagoria*, 250 Ga. 844, 302 S.E.2d 674 (1983). *Henderson v. HSI Fin. Servs., Inc.*, 266 Ga. 844, 471 S.E.2d 885 (1996).

**Cited in Continental Cas. Co. v. Continental Rent-A-Car of Ga., Inc.**, 349 F. Supp. 666 (N.D. Ga.); *Super Valu Stores, Inc. v. First Nat'l Bank*, 463 F. Supp. 1183 (M.D. Ga. 1979); *In re Delk Rd. Assocs.*, 37 Bankr. 354 (Bankr. N.D. Ga. 1984).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 850-853, 855-857, 863-877, 898.

**C.J.S.** — 18 C.J.S., Corporations, §§ 414, 417, 418.

**ALR.** — Liability of one whose name appears upon corporate books as a stockholder without his consent, 3 ALR 1049.

Personal liability of officers or stockholders for debts of corporation which has made an unauthorized change in its name, 8 ALR 583.

Liability as on unpaid subscription, of transferees of stock issued in exchange for property or services at an overvaluation, 12 ALR 449.

Statutory liability of stockholder for tort of corporation, 14 ALR 267.

Liability to creditors of stockholders whose stock is forfeited or sold for nonpayment of assessments, 19 ALR 1096.

Payments by stockholders applicable upon double liability, 23 ALR 1367; 45 ALR 1215; 56 ALR 527; 83 ALR 147; 120 ALR 511.

Disregarding corporate existence, 34 ALR 597.

When does statute of limitations begin to run against an action by, or in behalf of, creditors of a corporation on unpaid stock or subscriptions, 35 ALR 832.

Validity of provision in contract with cor-

poration waiving liability of stockholders, 40 ALR 371.

Right of stockholder to set off indebtedness of corporation against statutory superadded liability, 40 ALR 1183; 98 ALR 659.

Stockholders' liability as covering interest on claims of corporate creditors after bankruptcy, declared insolvency, or appointment of a receiver, 41 ALR 564.

Insolvency of corporation as barring stockholder's right to rescind subscription on ground of fraud, 41 ALR 674; 46 ALR 484.

Liability of transferor of corporate stock for calls or assessments as affected by insolvency, fraud, or illegality in transfer, 45 ALR 99; 86 ALR 57.

Fraud inducing subscription or purchase of stock as defense against statutory superadded liability, 51 ALR 1203.

Liability of member of mutual fire insurance company as affected by period of membership, 53 ALR 343.

Liability of stockholder as affected by business of corporation being turned over to an officer of the court or other persons, 55 ALR 327.

Right of stockholders contributing to make good losses to be reimbursed by, or out of assets of, corporation, 55 ALR 794.

Constitutional provision fixing liability of

stockholders as limitation of power of legislature in that regard, 63 ALR 870.

Right of corporation to refuse to register transfer of stock because of stockholder's indebtedness to it, where transfer is by operation of law, 65 ALR 220.

Sale, or surrender of stock for sale, to pay assessment, as relieving stockholder from further liability, 66 ALR 436.

Right of pledgee of corporate stock in respect of dividends declared thereon, 67 ALR 485; 103 ALR 849.

Liability as stockholder of one purchasing stock for, or transferring stock to, infant, 69 ALR 661.

Creditor's knowledge that stock is unpaid as affecting stockholders' liability, 69 ALR 881.

Applicability of constitutional or statutory provisions relating to added liability of stockholders to holders of stock issued, or stockholders of corporations organized, before their enactment, 72 ALR 1252.

Infant, his estate or property held in trust for him, as subject to statutory added liability of stockholder, 78 ALR 431; 120 ALR 956.

Right of a third person who has paid corporation's indebtedness to be subrogated to creditors' right to enforce stockholders' statutory liability, 78 ALR 611.

Stockholder's statutory added liability as affected by death of stockholder, 79 ALR 1537; 96 ALR 1466.

Validity and effect of extrinsic agreement absolving one, in whole or part, from liability on subscription to corporate stock, 81 ALR 198.

Liability of pledgee of stock as shareholder, 82 ALR 565.

Stockholders' statutory liability as assignable or subject to sale, 82 ALR 1285; 159 ALR 1114.

Transfer of bank or other corporate stock to corporation issuing it, as releasing transferrer from stockholders' statutory added liability, 86 ALR 72.

Statutory added liability of holders of bank stock or other corporate stock the issue of which was ultra vires, invalid, or irregular, 86 ALR 816.

Conveyance or transfer by stockholder as fraudulent as regards his liability as stockholder to creditors of corporation, 89 ALR 751.

Statutory superadded liability of stock-

holders as affected by reorganization, consolidation, or merger of corporation, 89 ALR 770; 154 ALR 427.

Statutory added liability of stockholders of bank or other corporation as affected by sale of, or other transaction in relation to, assets, 89 ALR 790; 100 ALR 1276.

Liability under trust-fund doctrine of subscribers to stock of corporation the charter of which has been canceled for reasons other than insolvency, 90 ALR 1350.

Liability on stock held by one as trustee or in other fiduciary capacity, 91 ALR 257; 97 ALR 1250; 117 ALR 655.

Setoff as between dividends from assets of insolvent bank or other corporation and liability of creditors as stockholders, 91 ALR 326.

Rank or preference of claim against estate in respect of superadded liability on corporate stock owned by decedent whose estate is insolvent, 92 ALR 1040.

Right of an officer whose power and authority to enforce liability of stockholders of insolvent corporation is derived from statute, without intermediary court action, to maintain action in that regard in another state, 94 ALR 904.

Statutory liability of stockholder of bank or other corporation as affected by change in or renewal of corporation's obligation, 97 ALR 630.

Life interest and remainder in corporate stock as affecting stockholder's statutory liability, 99 ALR 505.

Validity and effect of agreement by a corporation contemporaneously with issue or sale of stock, to repurchase or redeem the stock or to cancel the subscription therefor and refund consideration paid, 101 ALR 154.

Validity of release, cancellation, or compromise of unpaid subscription for stock by corporation or its representatives, 101 ALR 231.

Stockholders' statutory liabilities as affected by alleged defects or irregularities in organization of corporation, 102 ALR 327.

Statutory added liability of stockholders of bank or other corporation as affected by transfer of stock after closing thereof or appointment of receiver therefor, 103 ALR 689.

Agreement by creditors of bank or other corporation postponing payment of their



claims as affecting statutory liability of stockholders, 103 ALR 754.

Stockholders' statutory liability as affected by fact that stock is in name of a holding company, 103 ALR 921; 151 ALR 1165.

Failure to enter transfer of stock on corporate books as affecting liability of transferor for calls or assessments, 104 ALR 638.

Applicability of constitutional or statutory provisions relating to added liability of stockholders to corporate debts contracted prior to the adoption of the provision, 105 ALR 165.

Power of corporation to change obligations to stockholders, 105 ALR 1452; 117 ALR 1290.

Recovery against corporate directors or officers for fraud or mismanagement as affected by releases, ratification, waiver, or consent by some, but not for all, of the stockholders, 120 ALR 238.

When limitation begins to run against action to enforce stockholder's superadded liability, 137 ALR 788.

Implied obligation of purchaser of corporate stock to indemnify a vendor against future calls and assessments, 141 ALR 1351.

Conflict of laws as to period of limitation to enforce stockholders' statutory liability, 143 ALR 1442.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500; 48 ALR4th 1094.

Enforceability in another jurisdiction of personal liability of stockholders for debts of corporation whose organization is incomplete or defective, 42 ALR2d 659.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Stockholder's personal conduct of operations or management of assets as factor justifying disregard of corporate entity, 46 ALR3d 428.

Liability of director or dominant shareholder for enforcing debt legally owed him by corporation, 56 ALR3d 212.

Controlling stockholder's duty to investigate intent and motive of purchaser before selling stock, 77 ALR3d 1005.

Personal liability of stockholder, officer, or agent for debt of foreign corporation doing business in the state, 27 ALR4th 387.

### 14-2-623. Share dividends.

(a) Unless the articles of incorporation provide otherwise, shares may be issued pro rata and without consideration to the corporation's shareholders or to the shareholders of one or more classes or series. An issuance of shares under this subsection is a share dividend.

(b) Shares of one class or series may not be issued as a share dividend in respect of shares of another class or series unless:

(1) The articles of incorporation so authorize;

(2) A majority of the votes entitled to be cast by the class or series to be issued approve the issue; or

(3) There are no outstanding shares of the class or series to be issued.

(c) If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend.

(d) If a corporation which has treasury shares declares a share dividend, such dividend shall not be deemed to include a dividend on treasury shares unless the resolution declaring the dividend expressly so provides. (Code 1981, § 14-2-623, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1997, p. 1165, § 2.)



**Law reviews.** — For article discussing the payment of dividends to shareholders, see 3 Ga. L. Rev. 11 (1968). For article discussing 'earned' surplus and "capital" surplus concepts under Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article discussing the statute of limitations applicable to shareholders' rights to unclaimed

dividends and distributions, see 3 Ga. L. Rev. 11 (1968). For article discussing treasury shares and restrictions placed upon their use by the corporation, see 3 Ga. L. Rev. 11 (1968).

For note discussing effect of Georgia law on dividend restrictions, see 24 Ga. B.J. 254 (1961).

### COMMENT

Source: Model Act, § 6.23. This replaces former §§ 14-2-84(e) & 14-2-90.

Since the Code has eliminated the concept of par value, the distinction between a share "split" and a share "dividend" has not been retained and both types of transactions are referred to simply as "share dividends." A share dividend is solely a paper transaction: No assets are received by the corporation for the shares and any "dividend" paid in shares does not involve the distribution of property by the corporation to its shareholders. Section 14-2-623 therefore recognizes that such a transaction involves the issuance of shares "without consideration," and Section 14-2-140(6) excludes it from the definition of a "distribution." Such transactions are treated in a fictional way under the former "par value" and "stated capital" statute, which treated a share dividend as involving transfers from a surplus account to stated capital, under former § 14-2-90(a)(4), and assumed that par value shares could be issued without receiving any consideration by reason of that transfer of surplus under former § 14-2-84(e). All share dividends will issue shares that are fully paid and nonassessable, as a result of this change.

Subsection (a) simply provides that stock dividends may be issued pro rata and without consideration, recognizing this as a paper transaction. These shares are then fully paid and nonassessable. Share dividends may create problems when a corporation has more than a single class of shares. The requirement that a share dividend be "pro rata" only applies to shares of the same class or series; if there are two or more classes entitled to receive a share dividend in different proportions, the dividend will have to be allocated appropriately.

Subsection (b) prohibits dividends to one class or series of stock from being made in shares of another class or series, thus preventing dilution of one class by another, unless authorized by the articles of incorporation or the vote of the holders of the class to be issued, or when there are no holders of the class being distributed. Section 14-2-90(a)(5) of the former law is consistent with clauses (1) and (2); clause (3) is new.

Subsection (c) provides a default rule for record date for determination of shareholders entitled to dividends, in the absence of a record date set by the board.

#### Note to 1997 Amendments

Subsection (d) was added in 1997. The amendment, which allows dividends on treasury shares, allows a listed company to preserve the relative value of its treasury shares. While some stock splits will be handled under O.C.G.A. §14-2-1002(4), others may be dealt with as share dividends.

#### Cross-References

Action by shareholders, see § 14-2-701 et seq. Class of shares, see §§ 14-2-601 & 14-2-602. Consideration for shares, see § 14-2-621. Distributions generally, see § 14-2-640. Fractional shares, see § 14-2-604. Record date, see § 14-2-707. Series of shares, see § 14-2-602.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-90, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, is included in the annotations for this Code section.

**Cited in** G.A. Thompson & Co. v. Partridge, 636 F.2d 945 (5th Cir. 1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1177-1184, 1204-1206, 1210, 1223, 1234, 1247, 1258.

**C.J.S.** — 18 C.J.S., Corporations, §§ 132, 159, 294, 297-304.

**ALR.** — Income tax in relation to stock

dividends (including character of corporate distributions as stock dividends), 143 ALF 230; 144 ALR 1337; 167 ALR 554.

Modern status of rules governing allocation of stock dividends or splits between principal and income, 81 ALR3d 876.

## 14-2-624. Share options.

(a) A corporation may issue rights, options, or warrants with respect to the shares of the corporation whether or not in connection with the issuance and sale of any of its shares or other securities. The board of directors shall determine the terms upon which the rights, options, or warrants are issued, their form and content, the consideration for which they are to be issued, and the terms and conditions relating to their exercise, including the time or times, the conditions precedent, and the prices at which and the holders by whom the rights, options, or warrants may be exercised.

(b) If at the time the corporation issues rights, the corporation does not have authorized and unissued shares sufficient to satisfy the rights if and when exercised, the granting of the rights is not invalid solely by reason of the lack of sufficient authorized but unissued shares to honor the exercise of the rights.

(c) The terms of the rights, options, or warrants, including the time or times, the conditions precedent, and the prices at which and the holders by whom the rights, options, or warrants may be exercised, as well as their duration, (1) may preclude or limit the exercise, transfer, or receipt of such rights, options, or warrants or invalidate or void any rights, options, or warrants and (2) may be made dependent upon facts ascertainable outside the documents evidencing the rights, or the resolution providing for the issue of the rights, options, or warrants adopted by the board of directors if the manner in which the facts shall operate upon the exercise of rights is clearly and expressly set forth in the document evidencing the rights or in the resolution. Such terms and conditions need not be set forth in the articles of incorporation. As used in this Code section, the term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation



(d) The terms and conditions of rights, options, or warrants issuable pursuant to this Code section may include provisions that:

(1) Preclude or limit the exercise, transfer, or receipt of such rights, options, or warrants by, or invalidate or void any such rights, options, or warrants held by, any person that is a beneficial owner of a specified amount of the outstanding equity securities or percentage of the outstanding voting power of the corporation, or by any transferee of such person, except that such provisions shall not affect any person whose beneficial ownership at the date of adoption of any such provision exceeds such specified amount or percentage, unless the amount of outstanding equity securities beneficially owned by such person is subsequently increased; and

(2) Limit, restrict, or condition the power of a future director to vote for the redemption, modification, or termination of the rights, options, or warrants for a period not to exceed 180 days from the initial election of the director, provided that such 180 day time limitation shall not apply to any such limitation, restriction, or condition that is based solely on a director's current or former status as an employee or officer of the corporation; as a director, officer, employee, affiliate, or associate of any interested shareholder or person seeking to become an interested shareholder; or as a director, officer, or employee of an affiliate of an interested shareholder or person seeking to become an interested shareholder.

(e) The provisions of subsection (d) of this Code section shall be applied as follows:

(1) The definition of "beneficial owner" contained in Code Section 14-2-1110 shall be applicable to this Code section, except (A) any exclusion from such definition shall be permitted, and (B) that the effective date of this paragraph shall be December 31, 2000, insofar as it may be deemed to apply to any right, option, or warrant issued or issuable at the date of enactment of this paragraph;

(2) The definition of "affiliate," "associate," and "interested shareholder" contained in Code Section 14-2-1110 shall be applicable to this Code section; provided, however, that the inclusion of a person as a nominee for election as a director of the corporation by an interested shareholder or person seeking to become an interested shareholder shall not create an implication that such nominee is an affiliate of an interested shareholder or person seeking to become an interested shareholder; and

(3) Any rights, options, or warrants issued or issuable pursuant to this Code section that contain a provision otherwise permitted by paragraph (2) of subsection (d) of this Code section but which do not purport to comply with the 180 day time limitation specified therein shall not be



rendered invalid, but any such provision shall be deemed to be effective only to the extent permitted by paragraph (2) of subsection (d) of this Code section. (Code 1981, § 14-2-624, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 16; Ga. L. 2000, p. 1567, § 3; Ga. L. 2001, p. 4, § 14; Ga. L. 2003, p. 897, § 4.)

**The 2001 amendment**, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, substituted "director, provided that" for "director; provided that," in paragraph (d)(2); in subsection (e), substituted "Code Section 14-2-1110" for "Code section 14-2-1110" in paragraph (2) and substituted "do not purport" for "does not purport" in paragraph (3).

**The 2003 amendment**, effective July 1, 2003, added the last sentence in subsection (c).

**Law reviews.** — For article discussing treasury shares and restrictions placed upon their use by the corporation, see 3 Ga. L.

Rev. 11 (1968). For article discussing corporate authority to create and issue share rights and options, see 3 Ga. L. Rev. 11 (1968). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

For note on 2000 amendment of O.C.G.A. § 14-2-624, see 17 Ga. St. U.L. Rev. 46 (2000).

For comment on the survivability of the dead hand provision in corporate America, see 48 Emory L.J. 991 (1999). For comment, "Poison Pills: Are Dead Hand Pills Dead in Georgia?," see 50 Mercer L. Rev. 809 (1999).

## COMMENT

Source: Model Act, § 6.24. This replaces former § 14-2-86.

Subsection (a) is a simplification and liberalization of rules concerning rights and options. It merely authorizes the corporation, by its board, to issue rights, options, or warrants and set their terms.

The phrase "for the purchase of shares" in the first sentence of the 1984 Model Act was changed to "with respect to the shares" in subsection (a) of the Code to emphasize the breadth of the corporate powers given to directors in issuing rights, which are not intended to be limited to rights to purchase shares. The second sentence of the Model Act was amended in the Code to add the phrase "the terms and conditions relating to the exercise of such rights, options or warrants." This language is intended to eliminate any possible negative inference that the particular reference to determination of terms on which rights are issued might imply that the board lacked the power to set exercise conditions.

Subsection (b) is new, and corresponds to § 14-2-601(d). It validates the issuance of rights, options, or warrants even if there are not currently sufficient authorized but unissued shares to satisfy all such rights, options, or warrants if exercised. Former § 14-2-86(a) provided that no options could be issued unless there were sufficient authorized but unissued shares or treasury shares reserved at the time of issuance. Elimination of this language was intended to clarify that whether sufficient shares are reserved does not raise questions of the validity of the rights, options, or warrants issued, but rather raises questions of contract law and of duties of directors.

### Note to 1989 Amendment

Subsection (a) was amended to clarify that rights, options or warrants are permitted to be issued by a corporation whether or not in connection with the issuance of other securities of the corporation. The listing of items that may be covered in rights was expanded, by adding a reference to the time of exercise, the prices and the holders by whom the rights may be exercised. This was intended to clarify the intent of the 1988 Revised Code.

The concluding sentences of subsection (c) were added to the Model Act language to clarify the fact that the discretion granted to the board of directors to issue rights, options, or warrants and set their terms under subsection (a) is intended to be limited only by the directors' fiduciary obligations to the corporation. As such, any restrictions placed on the issuance of shares by Code Section 14-2-601 should not be interpreted as applying to the issuance of rights, options, or warrants and the determination of their terms and conditions by the board of directors under subsection (a). The language was intended to permit the approach of courts interpreting Delaware law, including the Delaware Supreme Court in *Moran v. Household International, Inc.*, 500 A.2d 346 (Del. 1985), which have held that the board of directors is authorized to issue rights pursuant to shareholder rights plans. See, e.g. *Dynamics Corporation of America v. CTS Corp.*, 637 F. Supp. 406 (N.D.Ill.), *aff'd*, 794 F.2d 250 (7th Cir. 1986), reversed on other grounds, 107 S.Ct. 1637 (1987). The language rejects the holding of the Federal District Court for the Northern District of Georgia in *West Point Pepperell, Inc. v. Farley Inc.* (Nov. 14, 1988) and was intended specifically to permit the use by Georgia corporations of shareholder rights plans incorporating both so-called "flip-over" and discriminatory "flip-in" provisions.

#### Note to 2000 Amendment

The 2000 amendments to Code Section 14-2-624 and the related changes to Code Sections 14-2-601, 14-2-602 and 14-2-801 are intended to resolve uncertainties that have arisen following the decision in *Invacare Corp. v. Healthdyne Technologies, Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997). In that case, the court upheld the board of directors' adoption of a "dead-hand" provision in a "poison pill" shareholder rights plan (the effect of which is to limit the ability of newly elected directors to withdraw or change the plan). Commentators have raised issues concerning that decision in light of subsequent contrary authority in Delaware. See *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998); *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998). Commentators have also questioned whether the inclusion of the words "in its sole discretion" in Code Section 14-2-624(c) should be read as overriding the requirements of not only Code Section 14-2-601 (which was specifically referred to in Code Section 14-2-624(c)) but also other sections of the Code, particularly Code Section 14-2-801.

By deleting the "sole discretion" language from Code Section 14-2-624(c), the amendments contemplate that Code Section 14-2-624 must be read in a manner consistent with other provisions of the Code. The 2000 amendments to subsection (d) authorize in more specific terms the use of "poison pill" shareholder rights plans (Code Section 14-2-624(d)(1)) and, contrary to the Delaware authority, permit limitations on the ability of newly elected directors to withdraw or change such a plan. Such limitations on a director's authority may only remain in effect for a maximum of 180 days from the initial election of such director, unless the limitations are based solely on certain current or former positions or relationships with the corporation, an interested shareholder or person seeking to become an interested shareholder, or an affiliate of an interested shareholder or person seeking to become an interested shareholder.

The 2000 amendments added subsection (e), which incorporates into this Code section the definitions of "beneficial owner," "affiliate," "associate," and "interested shareholder" contained in Code Section 14-2-1110, with the following exceptions: first, any exclusion from the definition of beneficial ownership is permitted (i.e., a "poison pill" need not cover all persons otherwise meeting the definition of "beneficial owner"), and, second, the beneficial ownership definition does not apply to previously existing plans until December 31, 2000. The amendments also expressly provide that the inclusion of a person as a nominee for election as a director by an interested shareholder or person seeking to become an interested shareholder does not create an implication that the nominee is an affiliate of such interested shareholder or person seeking to become an interested shareholder. Subsection (e) also preserves the validity



of provisions in rights, options or warrants which contain a limitation on the authority of newly elected directors that does not purport to comply with the time limitations of subsection (d)(2), but allows such provisions to be effective only to the extent permitted by subsection (d)(2).

#### Note to 2003 Amendment

The amendment to Code Section 14-2-624(c) adds the same definition of "facts" ascertainable outside the documents evidencing the rights, or the resolution providing for the issue of the rights, options or warrants, as was added to Code Section 14-2-601.

#### Cross-References

"Affiliate" defined, see § 14-2-1110. "Associate" defined, see § 14-2-1110. Authorized shares, see § 14-2-601. "Beneficial Owner" defined, see § 14-2-1110. Committees of the board, see § 14-2-825. Consideration for shares, see § 14-2-621. Director standards of conduct, see § 14-2-830 et seq. Distributions, see § 14-2-640. "Interested Shareholder" defined, see § 14-2-1110. Report to shareholders on certain consideration for shares, see § 14-2-1621. Requirement for and duties of board of directors, see § 14-2-801. Share option plans, see § 14-2-302. Terms of class or series determined by board of directors, see § 14-2-601.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-86, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Strict compliance not necessary if corporation benefits.** — A stock purchase warrant was not void even though it was not issued in strict compliance with former § 14-2-86(a) (i.e., when the issuance of the warrant was ratified, the corporation had not reserved a sufficient number of authorized but unissued shares to cover the potential exercise of the warrant). The corporation prepared the warrant and received and benefited from the consideration therefor. *Jackson v. Southern Pan & Shoring Co.*, 258 Ga. 401, 369 S.E.2d 239 (1988) (decided under former § 14-2-86).

**Shareholders rights plan adopted.** — Board of directors had authority to adopt a shareholders rights plan with a continuing director feature to protect against hostile takeovers without amendment of the articles of incorporation or bylaws. *Invacare Corp. v. Healthdyne Technologies, Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997).

**Board of directors authority wrongly limited.** — A proposed bylaw amendment to require the board of directors to eliminate a continuing director feature from a shareholders rights plan was contrary to O.C.G.A. § 14-2-624(c), giving the board authority to set the terms and conditions of the rights plan. *Invacare Corp. v. Healthdyne Technologies, Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 735. 18B Am. Jur. 2d, Corporations, § 1957 et seq.

**C.J.S.** — 18 C.J.S., Corporations, §§ 188, 239, 240, 305, 375-377.

**ALR.** — Implied authority of general manager or superintendent of corporation to contract with employee for share in profits of business, 47 ALR 1015.

Time factor in purchase or sale of corporate stock under contract not fixing a definite time for demand or performance, 144 ALR 895.

Construction and application of provisions of articles, bylaws, statutes, or agreements restricting alienation or transfer of corporate stock, 2 ALR2d 745.

Validity of stock-option plan under which



selected personnel of corporation may acquire stock interest therein, 34 ALR2d 852.

Rights and liabilities as between employer and employee with respect to employee stock options, 96 ALR2d 176.

Transfer of, and voting rights in, stock of co-operative apartment association, 99 ALR2d 236.

Construction and effect of "dilution" provision of employee's stock-option contract, dealing with rights where stock structure of

corporation changes before option is exercised, 59 ALR3d 1030.

Restrictions on transfer of corporate stock as applicable to testamentary dispositions thereof, 61 ALR3d 1090.

Divorce and separation: treatment of stock options for purposes of dividing marital property, 46 ALR4th 640.

Valuation of stock options for purposes of divorce court's property distribution, 46 ALR4th 689.

### 14-2-625. Form and content of certificates.

(a) Shares may but need not be represented by certificates. Unless this chapter or another statute expressly provides otherwise, there shall be no differences in the rights and obligations of shareholders based on whether or not their shares are represented by certificates.

(b) At a minimum each share certificate must state on its face:

(1) The name of the issuing corporation and that it is organized under the law of this state;

(2) The name of the person to whom issued; and

(3) The number and class of shares and the designation of the series, if any, the certificate represents.

(c) If the issuing corporation is authorized to issue different classes of shares or different series within a class, a reference on the certificate to the state of incorporation shall be deemed to be a reference to the articles of incorporation and its provisions governing the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences, and limitations determined for each series (and the authority of the board of directors to determine variations for future series). Alternatively, each certificate may describe the designations, relative rights, preferences, and limitations, or may state conspicuously on its front or back that the corporation will furnish the shareholder this information on request in writing and without charge.

(d) Each share certificate:

(1) Must be signed, either manually or in facsimile, by one or more officers designated in the bylaws or by the board of directors; and

(2) May bear the corporate seal or its facsimile.

If the certificate is signed in facsimile, then it must be countersigned by a transfer agent or registered by a registrar other than the corporation itself or an employee of the corporation. The transfer agent or registrar may sign either manually or by facsimile.

(e) If the person who signed a share certificate, either manually or in facsimile, no longer holds office when the certificate is issued, the certificate is nevertheless valid.

(f) No certificate valid when issued shall cease to be valid by reason of any changes in the information required or permitted to be stated on the certificate and, in the event of a change in the capital structure of a corporation, it shall not be necessary to recall any previously issued share certificate for revision of the information placed thereon pursuant to this Code section. (Code 1981, § 14-2-625, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 17.)

**Law reviews.** — For article discussing requirements governing the issuance of share certificates, see 3 Ga. L. Rev. 11 (1968). For article discussing rights granted owners of unpaid and partly paid shares under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968).

### COMMENT

Source: Model Act, § 6.25. This replaces former § 14-2-87.

Certificateless shares are permitted under subsection (a) upon compliance with Section 14-2-626. There was no comparable provision in former Georgia law. There are no differences in the rights and obligations of shareholders, whether or not their shares are represented by certificates, other than mechanical differences. If share transfer restrictions are imposed, conspicuous references must appear on the certificate if they are to be binding on third persons without knowledge of the restrictions. See Section 14-2-627.

Subsection (a) of the Model Act was amended by replacing the phrase "the rights and obligations of shareholders are identical" with "there shall be no differences in the rights and obligations of shareholders based on" to eliminate any implication that all shareholders' rights are identical, regardless of class or series. Consistent with changes in § 14-2-601, no implication is intended that all holders of shares of the same class will have the same rights, regardless of whether conditions are different with respect to different holders.

Subsection (b) sets forth the minimum requirements for share certificates.

Subsection (c) of the Model Act required detailed descriptions of the relative rights and preferences of each class and series on the certificate, or a statement that the corporation would furnish this information without charge. This is similar to former § 14-2-87(d), requiring that, where there is more than one class or series of shares, the certificate must set forth or summarize such rights or contain a statement offering to furnish them. The Code eliminates this requirement as impracticable and unnecessary, by providing that a reference to the state of incorporation is sufficient, because it places a holder on notice of the location of the provisions governing his rights. Under Section 14-2-1602, a shareholder is entitled to inspect and copy the articles of incorporation and all amendments. A complete description of the relative rights and preferences of various classes and securities on a certificate is generally impossible, and a notice that this information can be obtained from the corporation is redundant. All investors in shares are charged with notice that their rights are determined by the articles of incorporation. The Model Act requirements remain a permissible alternative.

Special rules govern disclosure of restrictions on transfer of shares, under Section 14-2-627, and disclosure of statutory close corporation status, under Section 14-2-910. A



reference to the state of incorporation is not sufficient notice of these special facts relating to share ownership.

Subsection (d) provides only that certificates must be signed by two officers designated in the bylaws or by the board, a simplification of former law, § 14-2-87(b), which required the signature of specified officials.

Under subsection (d) of the Model Act, all signatures on a share certificate may be facsimiles. This change gives recognition to the fact that a purchaser of publicly traded shares will hardly ever be in a position to determine whether a manual signature on a stock certificate is in fact the authorized signature of an officer of the transfer agent or registrar. From the standpoint of the issuing corporation of publicly traded securities, if a share certificate requiring a manual signature is stolen and the signature thereafter forged, the corporation may defend on lack of genuineness under section 8-202(3) of the Uniform Commercial Code. But this defense is not effective against a bona fide purchaser when the forged signature has been placed on the certificate by an employee of the issuer or registrar or transfer agent entrusted with handling the certificates (UCC § 8-205). Comparable provisions relating to bonds, that preserve the authorization of former law, § 14-2-87(f), are found in Section 14-2-150 of the Code.

Subsection (f) is taken from § 14-2-87(e) & (h) of former Georgia law, and is clarifying.

#### Note to 1989 Amendment

The 1989 amendment changed subsection (d) to provide expressly that all signatures on a share certificate may be facsimiles, as the Model Act permits. This eliminated any ambiguity in the prior Georgia law. Comparable provisions relating to bonds, that preserve the authorization of former law, § 14-2-87(f), in Section 14-2-150, were also amended in 1989.

#### Cross-References

Certificateless shares, see § 14-2-626. Classes of shares, see §§ 14-2-601 & 14-2-602. Close corporations, see § 14-2-910. "Conspicuously" defined, see § 14-2-140. Descriptions of classes, see § 14-2-601. Facsimile signatures on bonds and debentures, see § 14-2-150. Officers, see § 14-2-840. Series of shares, see § 14-2-602. Share transfer restrictions, see § 14-2-627. Signatures, see § 14-2-150.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-87, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Certificate as some evidence of ownership.** — A share certificate does not comprise conclusive, irrebuttable evidence of ownership rights. *In re Delk Rd. Assocs.*, 37 Bankr. 354 (Bankr. N.D. Ga. 1984) (decided under former § 14-2-87).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 487, 488.

**C.J.S.** — 18 C.J.S., Corporations, §§ 172, 174.

**ALR.** — Corporate stock without par value, 36 ALR 791; 45 ALR 1501; 65 ALR 1347.

Refusal of corporation to issue, convert, or transfer stock as conversion, 54 ALR 1157.

Constitutionality, construction, and application of statute relating to lost, destroyed, or stolen certificate of corporate stock, 125 ALR 997.

Necessity of delivery of stock certificate to



complete valid gift of stock, 23 ALR2d 1171. Corporation's delivery of stock certificate to stockholder as prerequisite of its issuance to him, 16 ALR3d 1015.

### 14-2-626. Shares without certificates.

(a) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issue of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(b) Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates by subsection (b) of Code Section 14-2-625 and, if applicable, Code Section 14-2-627. (Code 1981, § 14-2-626, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 6.26. This replaces former § 14-2-87.

Subsection (a) authorizes the creation of uncertificated shares either by original issue or in substitution for shares previously represented by certificates. No such authority was formerly granted by Georgia law. This subsection gives the board of directors the widest discretion so that a particular class and series of shares might be entirely represented by certificates, entirely uncertificated, or represented partly by each. The second sentence ensures that a corporation may not treat as uncertificated, and accordingly transferable on its books without due presentation of a certificate, any shares for which a certificate is outstanding.

The statement required by subsection (b) ensures that holders of uncertificated shares will receive from the corporation the same information that the holders of certificates receive when certificates are issued. There is no requirement that this information be delivered to purchasers of uncertificated shares before purchase.

#### Cross-References

Certificates for shares, see § 14-2-625. Information on share certificates, see § 14-2-625. Share transfer restrictions, see § 14-2-627.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 487.

**C.J.S.** — 18 C.J.S., Corporations, § 172.

### 14-2-627. Restriction on transfer of shares and other securities.

(a) The articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation. A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction.

(b) A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this Code section and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by subsection (b) of Code Section 14-2-626. Unless so noted, a restriction is not enforceable against a person without knowledge of the restriction. A restriction authorized under this Code section, whether or not so noted, is enforceable against a person with knowledge of the restriction.

(c) A restriction on the transfer or registration of transfer of shares is authorized:

(1) To maintain the corporation's status when it is dependent on the number or identity of its shareholders;

(2) To preserve exemptions under federal or state securities law;

(3) For any other reasonable purpose.

(d) A restriction on the transfer or registration of transfer of shares may:

(1) Obligate the shareholder first to offer the corporation or other persons (separately, consecutively, or simultaneously) an opportunity to acquire the restricted shares;

(2) Obligate the corporation or other persons (separately, consecutively, or simultaneously) to acquire the restricted shares;

(3) Require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable;

(4) Prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable.

(e) For purposes of this Code section, the term "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares. (Code 1981, § 14-2-627, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 18.)

#### COMMENT

Source: Model Act, § 6.27. There was no comparable provision in former Georgia law. Former § 14-2-171(b)(1) permitted articles of incorporation to set forth "any provision, not inconsistent with law, for the regulation of the internal affairs of the corporation and for the restriction of the transfer of shares." No further rules were provided.

Subsection (a) provides (1) that transfer restrictions may appear in articles, bylaws or shareholders' agreements, and (2) that restrictions do not affect previously issued shares unless the holders vote affirmatively for the restriction or are parties to the agreement.



Subsection (b) parallels provisions of the UCC concerning enforcement against subsequent holders. The terms of a restriction on transfer do not need to be set forth in full or summarized in detail on a certificate or information statement required by Section 14-2-626(b) for uncertificated securities. Rather, subsection (b) provides that in the case of a certificated security, the existence of the restriction must be conspicuously set forth on the front or back of the certificate; in the case of an uncertificated security, the existence of the restriction must be noted in the information statement. There is no requirement that the notation on an information statement be conspicuous. If a transferee knows of the restriction he is bound by it even though the restriction is not noted on the certificate or information statement. The last sentence of subsection (b) was added to the Model Act; it is intended to be clarifying.

Subsection (c) sets out grounds for justifying restrictions as being for a reasonable purpose, specifying (1) maintenance of corporate status, whether Subchapter S status or some other status depending on number or identity of shareholders (such as professional corporations), (2) maintenance of exemptions under securities laws, and (3) a general "any other reasonable purpose" clause that incorporates traditional doctrines about reasonable restraints on alienation. Thus subsection (c) does not limit permissible purposes, recognizing the variety of possible reasons for restrictions. The variety of purposes that have been permitted have increasingly emphasized the nature of share ownership as contractual, rather than as regulated by external doctrines about transferability.

Subsection (d) specifies forms of restrictions that are permitted, thus clarifying a murky area in Georgia and elsewhere: (1) rights of first refusal; (2) buy-sell agreements; (3) consent restraints ("if the requirement is not manifestly unreasonable") and (4) prohibitions of transfers to specified classes of persons or to designated persons if not manifestly unreasonable. The types of restrictions referred to in subsections (d)(1) (option agreements) and (2) (buy-sell agreements) are imposed as a matter of contractual negotiation and do not prohibit the outright transfer of shares. Rather, they designate to whom shares or other securities must be offered at a price established in the agreement or by a formula or method agreed to in advance. By contrast, the restrictions described in subsections (d)(3) and (4) may permanently limit the market for shares by disqualifying all or some potential purchasers. As a result the restrictions imposed by these two provisions must not be "manifestly unreasonable."

The reasonableness of a restriction on transfer can be justified either by its procedure or its execution. Thus, where a consent restraint requiring unanimous consent might be considered unreasonable because it provides a veto, it could be saved by a showing either that the corporation had characteristics of a partnership, where unanimous consent is required for admission of new members, so that there can be "no greater objection to retaining the right of choosing one's associates in a corporation than in a firm" (Holmes, J., in *Barrett v. King*, 8 Mass. 476, 479, 63 N.E. 934, 935 (1902)), or by a showing that consent had not been unreasonably withheld. This liberal treatment is consistent with the Code's general approach of maximizing the freedom of participants in corporations to choose their own arrangements, even where they resemble those found in partnerships.

#### Cross-References

Certificates for shares, see § 14-2-625. Classes of shares, see § 14-2-601. Close corporations, see Article 9. Consideration for shares, see § 14-2-621. "Conspicuously" defined, see § 14-2-140. Debt securities, see § 14-2-302. Dissenters' rights, see § 14-2-1324. Information statement, see §§ 14-2-625 & 14-2-626. Notice of statutory close corporation status, see § 14-2-910. Professional corporations, see Georgia Professional Corporation Act.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 683-708, 717.

**C.J.S.** — 18 C.J.S., Corporations, §§ 219-225, 275.

**ALR.** — Construction and application of articles, bylaws, statutes, or agreements restricting alienation or transfer of corporate stock, 2 ALR2d 745.

**14-2-628. Expense of issue.**

A corporation may pay the expenses of selling or underwriting its shares and of organizing or reorganizing the corporation from the consideration received for shares. (Code 1981, § 14-2-628, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Model Act, § 6.28. This replaces former § 14-2-85(e).

Section 14-2-628 permits a corporation to pay underwriting and legal expenses, and the organization expenses of the corporation, from consideration received from shares.

**Cross-References**

Consideration for shares, see § 14-2-621. Fully paid shares, see § 14-2-621. Liability for share consideration, see § 14-2-622.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, § 128. 19 Am. Jur. 2d, Corporations, § 2697.

**C.J.S.** — 18 C.J.S., Corporations, § 88.

## PART 3

## SUBSEQUENT ACQUISITION OF SHARES BY SHAREHOLDERS AND CORPORATION

**14-2-630. Shareholders' preemptive rights.**

(a) The shareholders of all corporations, other than those described in subsection (b) of this Code section, do not have a preemptive right to acquire the corporation's unissued or treasury shares, if any, except to the extent the articles of incorporation so provide.

(b) The shareholders of the following corporations shall have preemptive rights as provided in subsection (c) of this Code section, unless the articles of incorporation expressly provide otherwise:

- (1) Corporations electing statutory close corporation status; and
- (2) Corporations in existence on July 1, 1989, whose:
  - (A) Shareholders had such rights as of that date; or

(B) Articles of incorporation have been restated or amended on or after July 1, 1989, with notice to the shareholders that such restatement or amendment would cause the shareholders of the corporation to have preemptive rights.

(c) A statement included in the articles of incorporation that the corporation elects to have preemptive rights (or words of similar import) means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

(1) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors to provide a fair and reasonable opportunity to exercise the right, to acquire proportional amounts of the corporation's unissued or treasury shares upon the decision of the board of directors to issue them;

(2) There is no preemptive right with respect to the issuance of:

(A) Shares issued as a share dividend;

(B) Fractional shares;

(C) Shares issued to effect a merger or share exchange;

(D) Shares issued as compensation to directors, officers, agents, or employees of the corporation, its subsidiaries, or affiliates upon terms and conditions approved or ratified by the affirmative vote of the holders of a majority of the shares entitled to vote thereon;

(E) Shares issued to satisfy conversion or option rights created to provide compensation to directors, officers, agents, or employees of the corporation, its subsidiaries, or affiliates upon terms and conditions approved or ratified by the affirmative vote of the holders of a majority of the shares entitled to vote thereon;

(F) Shares authorized in articles of incorporation that are issued within one year from the effective date of incorporation;

(G) Shares issued under a plan of reorganization approved in a proceeding under any applicable act of Congress relating to the reorganization of corporations;

(H) Shares sold otherwise than for money, deemed by the board of directors in good faith to be advantageous to the corporation's business, other than shares sold pursuant to subparagraph (A) or (B) of this paragraph; or

(I) Shares released by waiver from their preemptive right by the affirmative vote or written consent of the holders of two-thirds of the shares of the class to be issued. Any vote or consent shall be binding on all shareholders and their transferees for the time specified in the vote or consent up to but not exceeding one year from the date thereof and

shall protect the corporation, its management, and all persons who may within that time acquire the shares so released;

(3) A shareholder may waive his individual preemptive right at any time, and the holders of a class of shares may waive the preemptive rights of the class by the affirmative vote or written consent of the holders of two-thirds of the shares of the class with preemptive rights. The waiver of preemptive rights with respect to past issuances of shares shall be effective if made by the person who was the shareholder at the time the shares were issued. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration;

(4) Holders of shares of any class without general voting rights or with preferential rights to distributions or assets have no preemptive rights with respect to shares of any class;

(5) Holders of shares of any class with general voting rights but without preferential rights to distributions or assets have no preemptive rights with respect to shares of any class with preferential rights to distributions or assets unless the shares with preferential rights are convertible into or carry a right to subscribe for or acquire shares without preferential rights; and

(6) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person at a consideration set by the board of directors that is not lower than the consideration set for the exercise of preemptive rights.

(d) For purposes of this Code section, the term "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

(e) Shares that are otherwise validly issued and outstanding shall not be affected by reason of any violation of preemptive rights with respect to their issuance.

(f) No action shall be maintained to enforce any liability for violation of preemptive rights unless brought within three years of the discovery or notice of the violation, but in no event shall any action be brought to enforce a liability for violation of preemptive rights more than five years after the issuance giving rise to the violation. (Code 1981, § 14-2-630, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 19; Ga. L. 1993, p. 1231, § 5.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

#### COMMENT

Source: Model Act, § 6.30. This replaces former § 14-2-111.



Subsection (a) adopts an "opt in" provision for preemptive rights: Unless an affirmative reference to these rights appears in the articles of incorporation, no preemptive rights exist.

Because subsection (a) reverses the presumption of former § 14-2-111(b) that preemptive rights exist unless denied in the articles, a new subsection (b) has been added to the Model Act provisions to make clear that it does not change preemptive rights for corporations created under the existing act. Subsection (b) preserves previously existing preemptive rights that existed by virtue of the silence of a corporation's articles of incorporation under the former "opt out" provision of § 14-2-111(b).

Similarly, corporations electing statutory close corporation status under Article 9 of this chapter are dealt with separately under subsections (a) and (b) so as to provide preemptive rights on an "opt out" basis. This preserves the provisions of former law for those corporations most likely to value such a rule.

Subsection (c) provides a standard model for preemptive rights if the corporation desires to exercise the "opt in" alternative of subsection (a). The simple phrase, "the corporation elects to have preemptive rights," or words of similar import, results in the rest of subsection (c) becoming applicable to the corporation. But a corporation may qualify or limit any of the rules set forth in subsection (c) by express provisions in the articles of incorporation if the rules are felt to be undesirable or inappropriate for the specific corporation.

The provisions of subsection (c) establish rules for most of the problems involving preemptive rights. Thus subsection (c)(1) defines the general scope of the preemptive right giving appropriate recognition to the discretion of the board of directors in establishing the terms and conditions for exercise of that right. Subsection (c)(2) lists the principal exceptions to preemptive rights, including a one year period during which initial capital can be raised by a newly formed corporation without regard to the preemptive rights of persons who have previously acquired shares. The exceptions now contained in subsection (c)(2) have been amended to conform them to the approach of former Georgia law. Thus, subsections (c)(2)(A), (B), (C), (G) and (I) are taken in their entirety from former law. Stock dividends, excepted in subsection (c)(2)(A), must be pro rata and to the holders of the same class under most circumstances, and cannot alter relative ownership claims. While issuance of fractional shares, excepted under subsection (c)(2)(B), may alter relative ownership claims, in most instances the alteration will be insignificantly small. An exception for mergers and share exchanges, in subsection (c)(2)(C), is traditional, and reflects the belief that acquiring another business is of sufficient importance that it should not be blocked by preemptive rights claims. This is consistent with the approach to protection of class rights under Section 14-2-1004, where they obtain separate protection and veto powers over internal reorganizations, but not under Section 14-2-1103, where class rights are aggregated in mergers and share exchanges. The Code is consistent in not giving small claim holders veto powers over business transactions with third parties.

Subsections (c)(2)(D) and (E) provide standardized exceptions to the preemptive rights doctrine. They cover shares and rights issued to officers and directors as compensation. Because issuance of such shares in a close corporation can have a large impact on voting control of the corporation, it is appropriate to require shareholder approval. This restores the requirement of former law, contained in § 14-2-111(d)(7).

Subsection (c)(2)(F) was amended to extend the original issue exception from the six months provided in the Model Act to restore the one year period of former Georgia law. Subsection (c)(2)(H) was amended to limit the exception for shares issued otherwise than for money by incorporating the language of former Georgia law, in § 14-2-111(d)(3), which contained an implicit "business purpose" test.

Subsection (c)(2)(I) follows former law, and provides a means for group waiver of preemptive rights, by the holders of two-thirds of the shares of the class of shares to be issued. This waiver is only for as long as specified in the resolution, and may not be for longer than one year. This exception provides flexibility in arranging financing for a corporation, but poses dangers for the distribution of power in close corporations.

Subsection (c)(3) creates rules with respect to the waiver of these rights. The Model Act provision was amended to clarify the rule that a shareholder can waive preemptive rights "at any time," whether before or after any proposed issuance of shares in which such rights are not to be or have not been honored. Further, these rights can be waived by the holders of the entire class, acting in effect as a voting group, by the affirmative vote of the holders of two-thirds of the class. The second sentence codifies existing law, that generally, absent a specific assignment of a chose in action to a transferee of shares, the right to sue remained with the person who was the shareholder at the time any preemptive rights are violated, and the right to waive claims resides in that person as well. If a specific assignment of claims arising by reason of violations of preemptive rights has been made, of course, the assignee is the person who can waive the rights that were violated.

Preemptive rights may be an important means of protecting the allocation of voting control within a corporation. Preemptive rights also may serve in part the function of protecting the equity participation of shareholders. This combination of functions creates no problem in a corporation that has authorized only a single class of shares but may occasionally create problems in corporations with more complex capital structures. Thus, issuance of voting preferred stock may dilute the voting power of common shares, and dilute the dividend and liquidation claims of preferred stock. The Code resolves this conflict by protecting voting power rather than dividend and liquidation rights, and thus denies preemptive rights to all classes without general voting rights, as well as to all classes with preferential rights to distributions and assets, in subsection (4). The presumption is that rights of preferred are a creature of contract, while common rights are residual, and should receive greater protection from standard form default provisions of law.

Subsection (c) is primarily designed to protect voting power within the corporation from dilution, except under subsection (c)(5) where preemptive rights are granted with respect to convertible preferred, regardless of whether the class of common stock into which the preferred is convertible is voting or not. Former § 14-2-111(e) denied preemptive rights to common with respect to any other class.

Subsection (c)(6), as it appeared in the Model Act, originally provided that when shareholders have failed to exercise preemptive rights, those shares may be sold freely for one year without reoffering them to existing shareholders. This is shorter than the provision of § 14-2-111(d)(9), which provided that shares could be offered at any later time, provided the price was no lower. This provision was retained in the Code.

Subsection (d) expands preemptive rights through a special definition of "shares" to apply to all securities that are convertible into or carry a right to acquire shares subject to preemptive rights. Former § 14-2-111(e) provided "no holder of shares of any class shall have any preemptive right with respect to shares of any other class which may be issued...."

Subsection (e) is new. It clarifies the status of shares issued in violation of preemptive rights; they are validly issued, and not subject to cancellation by reason of the preemptive rights violation.

Subsection (f) is new. The approach is based on Section 13 of the Securities Act of 1933. It provides a statute of limitations for all violations of preemptive rights, whether before or after adoption of this statute. No notice is required to cut off rights after five



years. The statute is intended to limit equitable tolling claims to no more than two years. There are strong public policies, to facilitate further business financing, that justify these limits. These limitations apply to existing claims based on violations of preemptive rights, as well as to those that arise after the effective date of the Code. See Section 14-2-1704.

#### Note to 1989 Amendment

The 1989 amendment amended subsection (a) by adding a reference to "treasury shares ..., if any..." Treasury shares were not contemplated by the Model Act, but were restored in the 1989 amendments to Code Section 14-2-631, for those corporations electing to provide for them. This provision clarifies that treasury shares are to be treated in the same manner as unissued shares for purposes of preemptive rights. Accordingly, for these corporations electing preemptive rights, no standard exception from these rights is provided for treasury shares under subsection (c). This preserves the approach of the 1988 Code, and strengthens preemptive rights for electing corporations, since under former O.C.G.A. § 14-2-111(a) preemptive rights applied only to unissued shares.

#### Note to 1993 Amendment

The 1993 amendment added language to subsections (a) and (b) referring to shareholders who did not have preemptive rights as of the effective date of the revised Code (i.e. July 1, 1989). If a corporation formed prior to 1989 restated its articles of incorporation under the new Code without including an express denial of preemptive rights, it was not clear whether the omission of such explicit language in the restated articles created preemptive rights because of the change in presumption effected by the revised Code. The amendment makes clear that such restatements did not create preemptive rights where none existed before, simply by virtue of such omission.

#### Cross-References

Articles of incorporation, see § 14-2-202. Close corporations, statutory, see Article 9. Consideration for shares, see § 14-2-621. Debt securities, see § 14-2-302. Director standards of conduct, see § 14-2-830 et seq. Directors' conflicting interest transactions, see § 14-2-860 et seq. Distributions, see §§ 14-2-140 & 14-2-640. Fractional shares, see § 14-2-604. Share classes and series, see §§ 14-2-601 & 14-2-602. Shares qualified to vote upon directors' conflicting interest transactions, see § 14-2-863.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 525-540.

**C.J.S.** — 18 C.J.S., Corporations, §§ 132-136.

**ALR.** — Power to require nonassenting creditors or bondholders to accept securities of, or shares in, new or reorganized corporation, 28 ALR 1196; 88 ALR 1238.

Right of stockholder to set off indebtedness of corporation against statutory superadded liability, 40 ALR 1183; 98 ALR 659.

Stockholders' privilege as to acquisition of new issue of stock by corporation, 52 ALR 220; 138 ALR 526.

Reimbursement of stockholder or officer of corporation for expenses incurred in con-

nection with transaction conducted in his name but in interest of corporation, 56 ALR 973.

Provision of articles, bylaws, or agreement regarding future determination by parties other than owner of price at which corporate stock is to be taken over by corporation or stockholders upon specified event, 117 ALR 1359.

Failure of purchaser of stock from existing corporation, or of subscriber thereto, to pay for same as affecting his right to dividends, 122 ALR 1048.

Validity of stock-option plan under which selected personnel of corporation may acquire stock interest therein, 34 ALR2d 852.

Minority stockholders' right to enjoin fur-



ther or additional issuance of stock, 38 of shares of close corporation, 69 ALR3d 1327.  
ALR2d 1366.

Validity of "consent restraint" on transfer

### 14-2-631. Corporation's acquisition of its own shares.

(a) A corporation may acquire its own shares and shares so acquired constitute authorized but unissued shares, unless the articles of incorporation provide that reacquired shares become treasury shares or prohibit the reissue of reacquired shares.

(b) If the articles of incorporation prohibit the reissue of acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon amendment of the articles of incorporation.

(c) The board of directors may adopt articles of amendment under this Code section without shareholder action. The articles must set forth:

(1) The reduction in the number of authorized shares, itemized by class and series; and

(2) The total number of authorized shares, itemized by class and series, remaining after reduction of the shares.

(d) The board of directors may adopt articles of amendment providing that reacquired shares become treasury shares without shareholder action.

(e) A corporation may create security interests in treasury shares. (Code 1981, § 14-2-631, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 20; Ga. L. 1997, p. 1165, § 3.)

**Law reviews.** — For article discussing the rights of a corporation to acquire, encumber, and dispose of its own shares under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article discussing treasury shares and restrictions placed upon their use by the corporation, see 3 Ga. L. Rev. 11 (1968). For article discussing "earned" surplus and "capital" surplus concepts under Georgia Business Corporation

Code, see 3 Ga. L. Rev. 11 (1968). For article discussing the issuance of and limitations on redeemable shares under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article, "Estate Planning: The Use of Insurance to Fund Stock Purchase Agreements," see 9 Ga. St. B.J. 303 (1973). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

### COMMENT

Source: Model Act, § 6.31. This replaces former §§ 14-2-92 & 94.

Subsection (a) restates the fundamental power of a corporation to reacquire its own shares. Such a transaction constitutes a "distribution" by the corporation (see the definition of that term in Section 14-2-140) and is subject to the limitations of Section 14-2-640. Repurchased shares do not become treasury shares, as they did under former § 14-2-94(b); they are returned to the status of authorized but unissued shares.

Subsection (b) requires cancellation only where articles of incorporation prohibit reissue of acquired shares. Former § 14-2-94(a) required that if shares were acquired out of stated capital they must be canceled. No comparable provision exists in the Code.

Subsection (c) requires a simplified official filing to reflect the reduction of authorized shares. This provision is included in order that there be a public record of the number of authorized shares that a corporation may issue. The amendment may be made without shareholder action. See Section 14-2-1002. Until the amendment is effective, the corporation has power to reissue the reacquired shares despite a prohibition in the articles of incorporation. In such a case, the action of the directors in issuing the shares may be challengeable but the shares so issued would be fully paid and nonassessable if issued in conformity with Section 14-2-621.

#### Note to 1989 Amendment

Subsection (a) was amended in 1989 to restore the concept of treasury shares to the Code on an optional basis. For corporations with shares listed on stock exchanges, listing fees may be avoided where treasury shares are sold by a corporation, while fees may be incurred if authorized but unissued shares are sold, even though they represent shares previously purchased by the corporation. Subsection (c) was amended by striking requirements that the articles of amendment be delivered to the Secretary of State for filing and that they contain the name of the corporation, since these matters are covered in Code Section 14-2-1006. Subsection (d) was added to permit directors to adopt articles of amendment providing for treasury shares without shareholder approval.

#### Note to 1997 Amendments

Subsection (f) [subsection (e)] was added in 1997. It is intended to allow a corporation to pledge its own treasury shares as collateral for corporate obligations.

#### Cross-References

Acquisition as "distribution," see § 14-2-140. Amendment of articles of incorporation, see Article 10, Part 1. Amendment of articles of incorporation by board of directors, see § 14-2-1002. Annual registration, see § 14-2-1622. "Deliver" includes mail, see § 14-2-140. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Distributions generally, see § 14-2-640. Effective time and date of amendment, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Issuance of shares, see § 14-2-621.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-513 and former Code Section 14-2-92, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Former Code 1933, § 22-513 (see O.C.G.A. § 14-2-631) merely sanctioned corporate purchase of its own shares** to eliminate any conflict with the legal principle in some jurisdictions that such a purchase is never permissible without an express grant of authority, and does not grant a corporation an absolute right to purchase its own stock regardless of the circumstances. *Comolli v. Comolli*, 241 Ga. 471, 246 S.E.2d 278 (1978) (decided under former Code 1933, § 22-513).

**Where issuance of debenture is prohibited**

by law, repurchasing contract is void and cannot be enforced. *Hullender v. Acts II*, 153 Ga. App. 119, 264 S.E.2d 486 (1980) (decided under former Code 1933, § 22-513).

**Specific performance of stock repurchase agreement with insolvent corporation.** — Where the book value of the stock in question is \$0.00 and no creditors or other shareholders could be injured by the enforcement of a stock repurchase agreement because no actual payment of corporate funds would be required thereunder, a decree of specific performance would not be erroneous notwithstanding the corporation's insolvency. *McCreery v. RSA Mgt., Inc.*, 249 Ga. 43, 287 S.E.2d 203 (1982) (decided under former Code 1933, § 22-513).

**Cited in** *Bridges v. 20th Century Travel, Inc.*, 149 Ga. App. 837, 256 S.E.2d 102 (1979); *Scroggins v. Powell, Goldstein*,



Frazer & Murphy (In re Kaleidoscope, Inc.), 25 Bankr. 729 (N.D. Ga. 1982); Corporate Jet Aviation, Inc. v. Vantress, 82 Bankr. 619 (N.D. Ga. 1987), aff'd, 838 F.2d 1220 (11th Cir. 1988).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 478. 18B Am. Jur. 2d, Corporations, §§ 2061-2065.

**C.J.S.** — 18 C.J.S., Corporations, § 146. 19 C.J.S., Corporations, § 561-563.

**ALR.** — Unwarranted payment of dividends as ground for ousting foreign corporation, 41 ALR 997.

Transfer of bank or other corporate stock to corporation issuing it, as releasing transferrer from stockholders' statutory added liability, 86 ALR 72.

Validity, construction, and effect of provisions of articles of incorporation or certificates of stock relating to redemption or retirement of stock, 88 ALR 1131.

Voting power of corporation stock as confined to issued and outstanding stock to exclusion of authorized unissued stock or stock which has been reacquired by the corporation, 90 ALR 315.

Validity and effect of agreement by a corporation contemporaneously with issue or

sale of stock, to repurchase or redeem the stock or to cancel the subscription therefor and refund consideration paid, 101 ALR 154.

Issuance by corporation of new stock certificates without requiring surrender of old, 150 ALR 148.

Reduction of capital stock and distribution of capital assets upon reduction, 35 ALR2d 1149.

Minority stockholders' right to enjoin further or additional issuance of stock, 38 ALR2d 1366.

Rights of creditors of corporation with respect to its purchase or acquisition of its own stock, 47 ALR2d 758.

Transfer of, and voting rights in, stock of co-operative apartment association, 99 ALR2d 236.

Construction and operation of statute restricting corporation's right to purchase its own stock to purchase from surplus, 61 ALR3d 1049.

## PART 4

### DISTRIBUTIONS

#### 14-2-640. Distributions to shareholders.

(a) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (c) of this Code section.

(b) If the board of directors does not fix the record date for determining shareholders entitled to a distribution (other than one involving a purchase, redemption, or other reacquisition of the corporation's shares), it is the date the board of directors authorizes the distribution.

(c) No distribution may be made if, after giving it effect:

(1) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at



the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(d) The board of directors may base a determination that a distribution is not prohibited under subsection (c) of this Code section either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(e) Except as provided in subsection (g) of this Code section, the effect of a distribution under subsection (c) of this Code section is measured:

(1) In the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of:

(A) The date money or other property is transferred or debt incurred by the corporation; or

(B) The date the shareholder ceases to be a shareholder with respect to the acquired shares;

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) In all other cases, as of:

(A) The date the distribution is authorized if payment occurs within 120 days after the date of authorization; or

(B) The date the payment is made if it occurs more than 120 days after the date of authorization.

(f) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this Code section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent subordinated by agreement or except to the extent secured.

(g) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations under subsection (c) of this Code section if its terms provide that payment of principal and interest are to be made only if and to the extent that payment of a distribution to shareholders could then be made under this Code section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is actually made. (Code 1981, § 14-2-640, enacted by Ga. L. 1988, p. 1070, § 1.)

**Cross references.** — Criminal responsibility of corporations, § 16-2-22. Personal liability of corporate officer or employee for tax delinquency, § 48-2-52.

**Law reviews.** — For article discussing distributions from capital surplus to shareholders, see 3 Ga. L. Rev. 11 (1968). For article discussing "earned" surplus and "capital"

surplus concepts under Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article discussing corporation director's liability for improper payments to shareholders, see 3 Ga. L. Rev. 11 (1968). For article discussing liability of corporate directors, officers, and shareholders under

the Georgia Business Corporation Code, and as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971).

For note discussing effect of Georgia law on dividend restrictions, see 24 Ga. B.J. 254 (1961).

### COMMENT

Source: Model Act, § 6.40. This replaces former §§ 14-2-90, 14-2-91, 14-2-92(e), & 14-2-154(c).

Former rules limiting dividends to earned surplus or current earnings, and limiting distributions in partial liquidation to capital surplus, thus preserving stated capital as a "fund" (unless stated capital was reduced by the shareholders) have been entirely eliminated in the Code. It has long been recognized that the traditional "par value" and "stated capital" statutes do not provide significant protection against distributions of capital to shareholders.

The financial provisions of the Code sweep away all the distinctions among the various types of surplus but retain restrictions on distributions built around the traditional equity insolvency test of earlier statutes, and adds a balance sheet test designed to give protection to long-term creditors. Former law did impose an equity insolvency test on distributions that prohibited distributions of assets if the corporation was insolvent or if the distribution had the effect of making the corporation insolvent or unable to meet its obligations as they were projected to arise. See former §§ 14-2-90(a), 91(a)(1) and 92(e).

Subsection (a) imposes a single, uniform test on all distributions. It eliminates the former distinctions between dividends (§ 14-2-90) (payable only from earned surplus or current earnings, except in the case of wasting asset corporations), distributions in partial liquidation (§ 14-2-91) (payable from capital surplus), and share repurchases (§ 14-2-92) (payable from earned surplus, and from capital surplus if permitted in the articles or approved by the shareholders).

Subsection (b) provides a default rule for determining the record date for distributions, in the absence of specification by the board of directors.

Subsection (c) restricts "distributions" (the new generic term defined in § 14-2-140(6) to cover any transfer of money or property, or incurrence of indebtedness to shareholders, thus covering repurchases, dividends and returns of capital) with two basic tests:

(1) an equity insolvency test (inability to pay debts as they become due in the usual course of business, which preserves the rule formerly found in §§ 14-2-90(a), 91(a)(1) and 92(e).

(2) a balance sheet test that requires remaining assets to be sufficient to cover all creditors plus preferences on senior securities on liquidation. This is similar to the limitation on distributions in partial liquidation contained in former § 14-2-91(a)(4), where no earned surplus was available, and in § 14-2-92(e), governing share repurchases. Under former law, dividends were also governed by a surplus test under § 14-2-90(a)(1).

In most cases involving a corporation operating as a going concern in the normal course, information generally available will make it quite apparent that no particular inquiry concerning the equity insolvency test is needed. It is only when circumstances indicate that the corporation is encountering difficulties or is in an uncertain position



concerning its liquidity and operations that the board of directors or, more commonly, the officers or others upon whom they may place reliance under Section 14-2-830(b), may need to address the issue.

Subsection (c)(2) requires that, after giving effect to any distribution, the corporation's assets equal or exceed its liabilities plus (with some exceptions) the dissolution preferences of senior equity securities.

Subsection (c)(2) provides that a distribution may not be made unless the total assets of the corporation exceed its liabilities plus the amount that would be needed to satisfy any shareholder's superior preferential rights upon dissolution if the corporation were to be dissolved at the time of the distribution. The treatment of preferential rights mandated by this section may always be eliminated by an appropriate provision in the articles of incorporation.

The provisions of former § 14-2-91(a)(3), prohibiting distributions to common unless all cumulative dividends on preferred have been paid are not contained in the Model Act. This is a matter of contract rather than corporate law.

Subsection (d) authorizes asset and liability determinations to be made for this purpose on the basis of either (1) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or (2) a fair valuation or other method that is reasonable in the circumstances. This is similar to the language of former § 14-2-154(c) governing liability of directors for dividends which excused directors who rely on financial statements, except that § 154(c) permitted a director in good faith to consider the assets to be worth their book value. The concept of "reappraisal surplus" in § 14-2-2(4) of the former law, which was designed to alleviate the formalism of the old legal capital requirements, was eliminated as unnecessary, with the abandonment of the other categories of surplus. This leaves boards free to revalue assets to their current values at the time of a proposed distribution. See, e.g., the leading "balance sheet" case of *Randall v. Bailey*, 288 N.Y. 280, 43 N.E.2d 43 (1942).

In a corporation with subsidiaries, the board of directors may rely on unconsolidated statements prepared on the basis of the equity method of accounting (see American Institute of Certified Public Accountants, APB Opinion No. 18 (1971)) as to the corporation's investee corporations, including corporate joint ventures and subsidiaries, although other evidence would be relevant in the total determination. While a board is expressly permitted to rely upon unconsolidated statements, it may, in its discretion, continue to rely upon consolidated statements, in accordance with former law under § 14-2-97.

Subsection (e) sets out rules for testing the legality of distributions involving delayed or deferred payments, such as executory agreements to repurchase shares, or the issuance of corporate debt as consideration for share repurchases. Former § 14-2-92(e) provided that an executory agreement to purchase was permitted only when "such purchase or payment would not violate the insolvency or net assets tests, and 92(f) forgave a violation only if, at the time payment was required, the corporation would not violate those tests. Commentary indicated that the repurchasing corporation must be solvent both at the time of an agreement to repurchase and at the time of each payment. Herwitz, "Installment Repurchase of Stock: Surplus Limitations," 79 Harv. L. Rev. 303, 322 (1965). See *Hullender v. Acts II*, 153 Ga. App. 119 (1980) (refusing to enforce a corporate note given in a buy-back because of insolvency at time note was given. Uncertainty thus surrounded the enforceability of executory repurchase agreements until each installment payment was made. The provisions of subsection (e) clarify this area.

Subsection (e)(1) provides that compliance with the insolvency and net asset tests shall be measured at the earlier of (1) the payment date or (2) the date the shareholder



ceases to be a shareholder, except as provided in subsection (g). Distribution of indebtedness is defined as a payment for purpose of share repurchases.

Subsection (e)(2) provides that the time for measuring the effect of a distribution of indebtedness is the date the indebtedness is distributed.

Subsection (e)(3) provides that the time for measuring the effect of a distribution for compliance with the equity insolvency and balance sheet tests for all distributions not involving the reacquisition of shares or the distribution of indebtedness is the date of authorization, if the payment occurs within 120 days following the authorization; if the payment occurs more than 120 days after the authorization, however, the date of payment must be used. If the corporation elects to make a distribution in the form of its own indebtedness under subsection (e)(2), the validity of that distribution must be measured as of the time of distribution, unless the indebtedness qualifies under subsection (g).

Subsection (f) provides that indebtedness created to acquire the corporation's shares or issued as a distribution is on a parity with the indebtedness of the corporation to its general, unsecured creditors, except to the extent subordinated by agreement. Subsection (f) of the Model Act was amended by adding the second exception, "or except to the extent secured," which is intended to be clarifying.

Subsection (g) provides that indebtedness need not be taken into account as a liability in determining whether the tests of subsection (c) have been met if the terms of the indebtedness provide that payments of principal or interest can be made only if and to the extent that payment of a distribution could then be made under Section 14-2-640. This has the effect of making the holder of the indebtedness junior to all other creditors but senior to the holders of all classes of shares, not only during the time the corporation is operating but also upon dissolution and liquidation.

Although subsection (g) is applicable to all indebtedness meeting its tests, regardless of the circumstances of its issuance, it is anticipated that it will be applicable most frequently to permit the reacquisition of shares of the corporation at a time when the deferred purchase price exceeds the net worth of the corporation. In such situations, it is anticipated that net worth will grow over time from operations so that when payments in respect of the indebtedness are to be made the two insolvency tests will be satisfied. In the meantime, the fact that the indebtedness is outstanding will not prevent distributions that could be made under subsection (c) if the indebtedness were not counted in making the determination.

#### Cross-References

Director standards of conduct, see § 14-2-830 et seq. "Distribution" defined, see § 14-2-140. Failure to present certificates for redemption or cancellation, see § 14-2-641. Liability for unlawful distributions, see § 14-2-831. Record date, see § 14-2-707. Redemption, see §§ 14-2-601 & 14-2-631. Share dividends, see § 14-2-623.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code 1933, § 22-512 and former Code Section 14-2-91, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Arrangements for payment of debts must first be made.** — One cannot withdraw

capital from a corporation without first arranging for payment of its valid debts. *Nicholson v. Core* (In re Carolee's Combine, Inc.), 3 Bankr. 324 (Bankr. N.D. Ga. 1980) (decided under former Code 1933, § 22-512).

**Leverage buy out transaction.** — Georgia's stock distribution and repurchase statutes applied to a leverage acquisition of a corpo-

ration. *Munford v. Valuation Research Corp.*, 97 F.3d 456 (11th Cir. 1996).

**Effect of guarantee of corporation's obligation upon buyout of shareholder.** — Since the defendant guarantors had insisted on structuring the buyout of a former shareholder's interest as a purchase of stock by the corporation and guarantee of the corporation's obligation, the guarantors could not contend that the entire transaction was void on the ground that the transaction rendered the corporation insolvent. *Morris & Manning Ins. Agency, Inc. v. Morris*, 211 Ga. App. 433, 439 S.E.2d 660 (1994).

**Payment for stock.** — Payment for capital stock made to former employee/shareholders of a professional corporation was not a distribution in violation of O.C.G.A. § 14-2-640 since, under the terms of a termi-

nation agreement, the corporation was required to pay the purchase price of the stock, and the former employees were no longer shareholders. *Dougherty, McKinnon & Luby v. Greenwald*, 225 Ga. App. 762, 484 S.E.2d 722 (1997).

When the creditor first made a demand on the debtor to pay the creditor \$900,000 in exchange for the creditor's stock, the debtor would not have been able to pay its debts as they came due in the usual course of its business, whether or not it paid the creditor. Therefore, the debtor was not permitted by O.C.G.A. § 14-2-640 to convert the creditor's equity to debt and hence was not obligated to pay \$900,000 to the creditor; thus, the creditor's claim had to be disallowed. *Vista Eyecare, Inc. v. Neumann*, 283 Bankr. 613 (Bankr. N.D. Ga. Aug. 13, 2002).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1168-1170, 1185-1196, 1204, 1701, 1707.

**C.J.S.** — 18 C.J.S., Corporations, §§ 293-301. 19 C.J.S., Corporations, §§ 485, 489, 497, 541.

**ALR.** — Insolvency of corporation as barring stockholder's right to rescind subscription on ground of fraud, 41 ALR 674; 46 ALR 484.

Reduction of capital stock and distribution of capital assets upon reduction, 44 ALR 11; 35 ALR2d 1149.

Trademark or tradename as asset in case of bankruptcy, insolvency, or assignment for benefit of creditors, 44 ALR 706.

Right or duty of corporation to pay dividends, and liability for wrongful payment, 55 ALR 8; 76 ALR 885; 109 ALR 1381.

Right as between seller and purchaser of stock to dividends declared thereon, 60 ALR 703.

Right of pledgee of corporate stock in respect of dividends declared thereon, 67 ALR 485; 103 ALR 849.

Rights of holders of preferred stock in respect of dividends, 67 ALR 765; 98 ALR 1526; 133 ALR 653.

Duty and remedy as regards deferring payment of dividends from assets of insolvent bank or other insolvent corporation while there are undetermined claims or preferences, 88 ALR 1301.

Constitutionality of tax upon corporate dividends, or the transfer thereof, in respect of stock owned by nonresident, 104 ALR 1491.

Failure of purchaser of stock from existing corporation, or of subscriber thereto, to pay for same as affecting his right to dividends, 122 ALR 1048.

Right as between life beneficiaries and remaindermen, or successive life beneficiaries, in corporate dividends or distributions during the life interest, 130 ALR 492; 44 ALR2d 1277.

Validity and construction of state statutes as applied to the taxation of income derived from dividends on stock of foreign corporations, 143 ALR 147.

When dividends on corporate stock become taxable as income, 143 ALR 596; 158 ALR 1432; 167 ALR 303.

Validity of cancellation of accrued dividends on preferred corporate stock, 8 ALR2d 893.

Parties defendant to stockholder's suit to compel declaration of dividend, 15 ALR2d 1124.

Preferred stockholders' rights, upon liquidation or dissolution to dividends, 25 ALR2d 788.

Dividend rights in surplus of new consolidated corporation resulting from reduction of capital stock of former constituent corporations, 28 ALR2d 1177.



Corporation's right to interplead claimants to dividends, 46 ALR2d 980.

Construction of "net profits," "earnings," or the like, in provision for profit-sharing bonus for corporate officers or employees, 49 ALR2d 1129.

Negligence, nonfeasance, or ratification of wrongdoing as excusing demand on directors as prerequisite to bringing of stockholder's derivative action on behalf of corporation, 99 ALR3d 1034.

**14-2-641. Effect of failure to present securities for redemption, surrender, cancellation, or payment.**

(a) As used in this Code section, the term:

(1) "Call" means a notice or demand, pursuant to a right contained in the articles of incorporation, resolution of the board of directors, or other document governing rights and preferences of shares or other securities, to redeem, cancel, or otherwise extinguish a part or all of a class or series of securities of an issuing corporation.

(2) "Registered holder" means the holder or owner of shares or other securities as shown upon the records maintained by or on behalf of the issuer for that purpose.

(3) "Redemption" includes the surrender, cancellation, or payment in satisfaction of or with respect to shares or other securities by an issuer.

(b) When a corporation has duly and properly called for redemption of any securities and the registered holder of the securities has been mailed notice of call at his last address as it appears on the records of the corporation but fails to present the certificate for the securities or otherwise take action as required by the call within 60 days of the effective date of the call or such longer time as may be specified in the notice of the call, then the corporation may transfer the money or other property distributable upon the redemption to a trustee, for the benefit of the registered owner or his successors in title, and thereupon the securities shall be deemed as of the effective date of the call to have been redeemed, canceled, or paid and no longer outstanding.

(c) In order for the transfer to the trustee permitted by subsection (b) of this Code section to be effective for this purpose, the corporation must have adopted a plan therefor prior to the call, and must have mailed notice to the registered holder of the securities of the details of the plan, including the name and address of the trustee, at the time of the mailing of the notice of the call. The registered holder for whom the transfer in trust is made, or his successors in title, shall have only the right to obtain the money or other property from the trustee:

(1) In the case of certificated securities, upon surrender to the trustee of the certificates involved; and

(2) In the case of uncertificated securities, upon satisfying the trustee that he was the registered holder.



(d) Any money or other property held by the trustee which is not claimed by the registered holder within six years from the date of the transfer to the trustee shall be distributed to the persons and in the manner provided in the plan previously adopted or, if the provisions for distribution are held to be invalid or the plan does not contain provisions for distribution, shall be distributed to and become the property of the Board of Regents of the University System of Georgia, to be used for educational purposes. The trustee appointed under this Code section must be a bank or trust company located in the State of Georgia.

(e) The procedures specified in subsections (b) through (d) of this Code section shall not be exclusive of other procedures, not otherwise inconsistent with law, specified in the articles of incorporation, including an amendment of the articles of incorporation adopted by the board of directors establishing and designating a series of preferred shares and fixing and determining the relative rights and preferences of a series of preferred shares, or in the instruments governing any other securities, with respect to the redemption of the securities, and, upon compliance by a corporation with any of those procedures, the shares or other securities shall be deemed as of the date provided in those procedures to have been redeemed, canceled, and no longer to be outstanding, regardless of whether the holders thereof shall have taken the steps provided in this Code section. (Code 1981, § 14-2-641, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Former § 14-2-98. There is no counterpart in the Model Act. This section provides a non-exclusive method for canceling redeemable securities which are not surrendered within a minimum of 60 days after the issuing corporation has called for their redemption. If a plan for transfer of funds or other property distributable upon cancellation or redemption is adopted by the corporation prior to the notice of the call, and is properly described in the notice, the effect is to cancel the securities effective as of the call date. The term "securities" is not defined, but is intended to be read broadly to include any instruments that might be defined as securities under the Georgia Securities Act of 1973, including such promissory notes and commercial paper as are treated as securities in § 10-5-2(a)(16). For certificated securities, the triggering event is the failure to present any certificates required by the call, whether for shares or bonds or debentures. In the case of uncertificated securities, the issuer can require such documentation as is appropriate under the Uniform Commercial Code or other applicable law. Holders are given six years within which to claim their property. After the lapse of six years, property remaining in the hands of a trustee may be distributed according to the plan, or if no plan of distribution has been adopted, the property shall be distributed to the Board of Regents of the University System of Georgia.

This section does not provide for notice to the holders of registered security interests under recent revisions to Article 8 of the Uniform Commercial Code.

#### Cross-References

"Distribution" defined, see § 14-2-140. Effective date of notice, see § 14-2-141. Record date, see § 14-2-707. Redemption, see §§ 14-2-601 & 14-2-631. "Shares" defined, see § 14-2-140. Voting of shares called for redemption, see § 14-2-721.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 541, 544, 545, 569, 572.

**C.J.S.** — 18 C.J.S., Corporations, §§ 180, 181, 183.

## ARTICLE 7

## SHAREHOLDERS

**Law reviews.** — For article, "Comparison of Features of Old and New Business Corporation Laws Relating to Domestic Corporations," see 5 Ga. St. B.J. 13 (1968). For article, "Corporate Social-Reform, the Business Judgment Rule and Other Considerations," see 20 Ga. L. Rev. 565 (1986). For article, "Georgia's New Business Corpora-

tion Code," see 24 Ga. St. B.J. 158 (1988). For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989).

For note, "Exclusionary Tender Offers: A Reasonably Formulated Takeover Defense or a Discriminatory Attempt to Retain Control?," see 20 Ga. L. Rev. 627 (1986).

## RESEARCH REFERENCES

**ALR.** — Right of stockholder not a director, officer, or employee of the corporation to compensation for services in selling stock or corporate property in absence of express contract, 3 ALR 778.

Certificate of stock as conclusive and exclusive evidence of stockholder's rights, 31 ALR 1326.

Right of stockholder to redeem corporate property from execution or mortgage sale, 39 ALR 1056.

Duty of promoter to account for proceeds of sale of stock issued to him, 43 ALR 1363.

Liability of transferrer of corporate stock for calls or assessments as affected by insolvency, fraud, or illegality in transfer, 45 ALR 99; 86 ALR 57.

Informality of meeting of stockholders as affecting action taken thereat, 51 ALR 941.

Right of pledgee of corporate stock in respect of dividends declared thereon, 67 ALR 485; 103 ALR 849.

Inherent power of equity, at instance of a stockholder, to appoint receiver for, or to wind up, a solvent, going corporation, on ground of fraud, mismanagement, or dissensions, 91 ALR 665.

Right of pledgee of corporate stock to have it transferred to him on books of company, 116 ALR 571.

Rights, powers, and duties in respect of sale or transfer of corporate stock in which one holds a legal life estate, 126 ALR 1298.

Judgment in action by or against corporation as res judicata in action by or against stockholder or officer of corporation, 129 ALR 1041.

Eligibility as corporate director of one who was not stockholder in fact, or not stockholder of record, at time of election, but who afterwards became such, 130 ALR 156.

Right of stockholder as individual to complain as against officers, directors, or large stockholders, of their transactions in corporation's outstanding stock involving its control or other purpose, 132 ALR 260.

Construction and application of provisions of articles, bylaws, statutes, or agreements restricting alienation or transfer of corporate stock, 2 ALR2d 745.

Validity of security for contemporaneous loan to corporation by officer, director, or stockholder, 31 ALR2d 663.

Intervention by stockholder for purpose of interposing defense for corporation, 33 ALR2d 473.

Construction, application, and effect of constitutional provisions or statutes relating to cumulative voting of stock for corporate directors, 43 ALR2d 1322.

Propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder, 1 ALR4th 1124.



## PART 1

## MEETINGS

**14-2-701. Annual meeting.**

(a) A corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws.

(b) Annual shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual meetings shall be held at the corporation's principal office.

(c) The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action. (Code 1981, § 14-2-701, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973). For article, "The Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under Georgia Law," see 37 Mercer L. Rev. 79 (1985).

**COMMENT**

Source: Model Act, § 7.01. This replaces former § 14-2-112(a) & (b).

The requirement of subsection (a) that an annual meeting be held is phrased in mandatory terms to ensure that every shareholder entitled to participate in the meeting has the unqualified rights (1) to demand that the annual meeting be held and (2) to compel the holding of the meeting under Section 14-2-703 if the corporation does not promptly hold the meeting.

Subsection (b) provides that the time and place of the annual meeting may be "stated in or fixed in accordance with the bylaws." If the bylaws do not themselves fix a time and place for the annual meeting, authority to fix them may be delegated to the board of directors or to a specified corporate officer.

Many corporations, such as non-public subsidiaries and closely held corporations, do not regularly hold annual meetings, and if no shareholder objects, that practice creates no problem under Section 14-2-701, since subsection (c) provides that failure to hold an annual meeting does not affect the validity of any corporate action.

**Cross-References**

Action without meeting, see § 14-2-704. Bylaws, see § 14-2-206 and Article 10, Part 2. Close corporations, see Article 9. Court-ordered meeting, see § 14-2-703. Director holdover terms, see § 14-2-805. Notice of meeting, see § 14-2-705. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Proxies, see § 14-2-722. Quorum and voting requirements, see § 14-2-725 et seq. Shareholders' list at meeting, see § 14-2-720. Special meeting, see § 14-2-702. Voting entitlement generally, see § 14-2-721. "Voting group" defined, see § 14-2-140.



## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-112, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, is included in the annotations for this Code section.

**Cited in** J.M. Clayton Co. v. Martin, 177 Ga. App. 228, 339 S.E.2d 280 (1985).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 949, 953-957.

**C.J.S.** — 18 C.J.S., Corporations, §§ 362, 363.

**ALR.** — Power of directors to change time for regular meetings of stockholders, 2 ALR 558; 8 ALR 678.

Informality of meeting of stockholders as affecting action taken thereat, 51 ALR 941.

Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 ALR2d 1259.

## 14-2-702. Special meeting.

(a) A corporation shall hold a special meeting of shareholders:

(1) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws;

(2) Except as to corporations described in paragraph (3) of this subsection, if the holders of at least 25 percent, or such greater or lesser percentage as may be provided in the articles of incorporation or bylaws, of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting, sign, date, and deliver to the corporation one or more written demands for the meeting describing the purpose or purposes for which it is to be held; or

(3) In the case of a corporation having 100 or fewer shareholders of record, if the holders of at least 25 percent, or such lesser percentage as may be provided in the articles of incorporation or bylaws, of all the votes entitled to be cast on any issue to be considered at the proposed special meeting sign, date, and deliver to the corporation one or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(b) If not otherwise fixed under Code Section 14-2-703 or Code Section 14-2-707, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

(c) Special shareholders' meetings may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(d) Only business within the purpose or purposes described in the meeting notice required by subsection (c) of Code Section 14-2-705 may be conducted at a special shareholders' meeting.

(e) Unless otherwise provided in the articles of incorporation, a written demand by a shareholder for a special meeting may be revoked by a writing to that effect by the shareholder received by the corporation prior to the call of the special meeting.

(f) A bylaw provision governing the percentage of shares required to call special meetings is not a quorum or voting requirement. (Code 1981, § 14-2-702, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 21; Ga. L. 1997, p. 1165, § 4.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

#### COMMENT

Source: Model Act, § 7.02. This replaces former § 14-2-112(c).

A special meeting may be called under subsection (a) by the board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws. Georgia formerly provided in § 14-2-112(c) that special meetings might be called by the president or the chairman of the board, while subsection (a)(1) leaves this grant to the articles or bylaws.

The rule of former § 14-2-112(c), creating a statutory right to call meetings of shareholders in the holders of 25% of a company's shares, is the default rule for corporations with more than 100 shareholders, under subsection (a)(2), unless those corporations elect a larger or smaller number, or preclude shareholder calls of special meetings.

The former rule, creating an absolute statutory right for shareholders to call meetings, is preserved for corporations with 100 or fewer shareholders, in subsection (a)(3). In this respect the Code follows the Delaware approach, in Del. Code Ann., tit. 8, § 211(d).

The number of record shareholders is to be determined in accordance with Section 14-2-142.

Subsection (b) fixes a record date for determining the shareholders entitled to sign a demand for a special shareholders' meeting. Unless a record date is otherwise fixed for this purpose, the record date is the date the first shareholder signs the demand. No such provision existed in former Georgia law.

#### Note to 1989 Amendment

The 1989 amendment changed subsection (a)(2) by clarifying the reference to "corporations described" in paragraph (3).

#### Note to 1997 Amendment

The 1997 amendments to subsection (a) eliminated the requirement that a shareholder demand be delivered only to the corporate secretary, thus permitting delivery to the corporation generally, and added a new final sentence (clause (4)) permitting revocations of calls of special meetings. Code section 14-2-141(d) governs delivery of notice to a corporation, and permits delivery to a registered agent at the registered office, or to "the corporation or its secretary at its principal office." Subsection (e) was added in 1997. It is intended to clarify that bylaw amendments governing the call of special meetings by shareholders are not subject to the provisions of Code section



14-2-1021(b), which provide that such bylaws may only be adopted, amended or repealed by the shareholders.

### Cross-References

Action without meeting, see § 14-2-704. Annual meeting, see § 14-2-701. Articles of incorporation, see § 14-2-202. Bylaws, see § 14-2-206 and Article 10, Part 2. Court-ordered meeting, see § 14-2-703. Notice of meeting, see § 14-2-705. Number of shareholders of record, see § 14-2-142. Objection to extraneous business, see § 14-2-706. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Quorum and voting requirements, see § 14-2-725 et seq. "Secretary" defined, see § 14-2-140. Shareholders' list at meeting, see § 14-2-720. Voting entitlement generally, see § 14-2-721. "Voting group" defined, see § 14-2-140. Waiver of notice, see § 14-2-706.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 949, 956, 958-961, 966, 973, 975.

**C.J.S.** — 18 C.J.S., Corporations, §§ 363-367.

**ALR.** — Informality of meeting of stockholders as affecting action taken thereat, 51 ALR 941.

Remedies to restrain or compel holding of

stockholders' meeting, 48 ALR2d 615.

Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 ALR2d 1259.

Participation in meeting as waiver of compliance with notice requirement for shareholders' meeting, 64 ALR3d 358.

### 14-2-703. Court-ordered meeting.

(a) The superior court of the county where a corporation's registered office is located may summarily order a meeting to be held:

(1) On application of any shareholder of the corporation if an annual meeting was not held within the earlier of six months after the end of a fiscal year of the corporation or 15 months after its last annual meeting; or

(2) On application of a shareholder who signed a demand for a special meeting valid under Code Section 14-2-702, if:

(A) Notice of the special meeting was not given within 30 days after the date the demand was delivered to the corporation's secretary; or

(B) The special meeting was not held in accordance with the notice.

(b) After notice to the corporation, the superior court may order that the meeting be deemed an annual meeting or a special meeting. (Code 1981, § 14-2-703, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 22; Ga. L. 1993, p. 1231, § 6.)

### COMMENT

Source: Model Act, § 7.03. This replaces former § 14-2-112(b).

Section 14-2-703 provides the remedy for shareholders if the corporation refuses or fails to hold a shareholders' meeting as required by Section 14-2-701 or 14-2-702. A



shareholder entitled to participate in a meeting may apply for a summary court order to command the holding of a meeting if (1) an annual meeting is not held within the later of 6 months after the end of the corporation's fiscal year or 15 months after its last annual meeting, or (2) a special meeting is not properly noticed within 30 days after a valid demand is delivered to the secretary of the corporation or, if properly noticed, is not held in accordance with the notice. Since a meeting must be held within 60 days of the notice date under Section 14-2-705, the maximum delay between the demand for a special meeting and the right to petition a court for a summary order is 90 days. Where the corporation fails to hold an annual meeting at the time specified in its bylaws, or, in the absence of such a specification, within 60 days after a demand, former § 14-2-112(b) provided for shareholder application to the superior court to mandate an annual meeting. No provision was made in the former law for special meetings.

The court has discretion under Section 14-2-703 since the language of the statute is that the court "may summarily order" that a meeting be held. In any event, a shareholder applying for a summary order to hold a meeting has the burden of showing that he is entitled to the order.

Subsection (b) of the Model Act, describing the powers of the court, was amended to return to the language of § 14-2-112(b), which is simpler and clearer. The court may provide that a meeting it has ordered is to be the annual meeting. If so provided, the meeting should be viewed as compliance with Section 14-2-701, precluding all other shareholder requests for an annual meeting for that year. The court may, consistent with the articles of incorporation, bylaws, and the Code, specify the quorum and votes required for the meeting and actions taken at the meeting. This may include such matters as determining which shares must be counted for approval of business combinations with an interested shareholder under Article 11, Part 2, or which shares are qualified to approve a director's conflicting interest transaction under Article 8, Part 6.

#### **Note to 1989 Amendment**

Subsection (a)(1) was amended by substituting "earlier" for "later". This returns to Model Act language, and liberalizes a shareholder's right to demand a meeting. Subsection (a)(1) was also amended by changing the phrase "the corporation's fiscal year" to "a fiscal year of the corporation." This was to clarify that where a corporation had missed several annual meetings a shareholder need not wait for a period of six months after the most recent fiscal year before obtaining a court-ordered meeting. If the corporation has not held a meeting within the earlier of 15 months from its last annual meeting or six months after the end of any fiscal year, relief is available under this section.

The 1989 amendment changed subsection (b) to delete the ambiguous reference to a "substitute" meeting and to eliminate surplus language dealing with administrative details, without intending to limit the broad authority of courts to order remedial actions.

#### **Note to 1993 Amendment**

The 1993 amendment is intended to clarify that any shareholder of a corporation may petition the court to order the annual meeting be held, and not simply a shareholder who is entitled to vote at such a meeting.

#### **Cross-References**

Annual meeting, see § 14-2-701. Effective date of notice, see § 14-2-141. Notice of meeting, see § 14-2-705. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Quorum and voting requirements, see § 14-2-725 et seq. Registered office: designated in annual registration, see § 14-2-1622; required,

see § 14-2-202 & 14-2-501. Shareholders' list for voting at meeting, see § 14-2-720. Voting entitlement generally, see § 14-2-721.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 1166, 1167.

**C.J.S.** — 18 C.J.S., Corporations, §§ 395, 396.

**ALR.** — Remedies to restrain or compel holding of stockholders' meeting, 48 ALR 615.

#### 14-2-704. Action without meeting.

(a) Action required or permitted by this chapter to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by all the shareholders entitled to vote on the action or, if so provided in the articles of incorporation, by persons who would be entitled to vote at a meeting shares having voting power to cast not less than the minimum number (or numbers, in the case of voting by groups) of votes that would be necessary to authorize or take the action at a meeting at which all shareholders entitled to vote were present and voted. The action must be evidenced by one or more written consents bearing the date of signature and describing the action taken, signed by shareholders entitled to take action without a meeting and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) No written consent signed under this Code section shall be valid unless:

(1) The consenting shareholder has been furnished the same material that, under this chapter, would have been required to be sent to shareholders in a notice of a meeting at which the proposed action would have been submitted to the shareholders for action, including notice of any applicable dissenters' rights as provided in Code Section 14-2-1320; or

(2) The written consent contains an express waiver of the right to receive the material otherwise required to be furnished.

(c) If the articles of incorporation give the shareholders the right to cumulate their votes, action with respect to any election of directors may be taken without a meeting only by written consent signed by all the shareholders entitled to vote on the election of directors.

(d) If not otherwise fixed under Code Section 14-2-703 or Code Section 14-2-707, the record date for determining shareholders entitled to take action without a meeting is the date the first shareholder signs the consent. No written consent shall be effective to take the corporate action referred to therein unless, within 60 days of the earliest date appearing on a consent delivered to the corporation in the manner required by this Code section, evidence of written consents signed by shareholders sufficient to act by



written consent are received by the corporation. A written consent may be revoked by a writing to that effect received by the corporation prior to the receipt by the corporation of unrevoked written consents sufficient in number to take corporate action.

(e) A consent signed under this Code section has the effect of a meeting vote and may be described as such in any document. A consent delivered to the corporation shall become effective on the date of delivery of the last consent required to take action under subsection (d) of this Code section or such later date as it may provide.

(f) If action is taken under this Code section by less than all of the shareholders entitled to vote on the action, all voting shareholders on the record date who did not participate in taking the action shall be given written notice of the action, together with the material described in paragraph (1) of subsection (b) of this Code section, not more than ten days after the taking of action without a meeting.

(g) If this chapter requires that notice of action by shareholders be given to nonvoting shareholders and the action is taken by voting shareholders without a meeting, the corporation must give its nonvoting shareholders written notice of the action not more than ten days after the taking of action without a meeting. The notice must contain or be accompanied by the same material that, under this chapter, would have been required to be sent to nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted to the shareholders for action. (Code 1981, § 14-2-704, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 23; Ga. L. 1993, p. 1231, § 7; Ga. L. 1997, p. 1165, § 5.)

#### COMMENT

Source: Model Act, § 7.04. This replaces former § 14-2-112(d).

Subsection (a) provides that all the shareholders entitled to vote on an issue may validly act by unanimous written consent without a meeting. Unanimous written consent is obtainable, as a practical matter, only on matters on which there are only a relatively few shareholders entitled to vote. For this reason, language was added to the Model Act version of subsection (a) to restore the "opt-in" provisions of former law, § 14-2-112(d), as amended in 1985, permitting shareholder action on less than unanimous consent if so provided in the articles of incorporation.

The final sentence of subsection (a) provides that to be effective, consents must be in writing, signed by all the shareholders consenting to the action (whether unanimous under subsection (a) or by the lesser number permitted in articles of incorporation, and delivered to the secretary of the corporation. The phrase "one or more written consents" is included in subsection (a) to make it clear that all shareholders do not need to sign the same piece of paper.

Implicit in this language is that action by written consent is effective only when the last necessary shareholder has signed the appropriate written consent and all consents have been delivered to the corporation. Before that time, any shareholder may withdraw his consent simply by advising the secretary of that fact. Cf. *Calumet Industries, Inc. v. McClure*, 464 F. Supp. 19 (N.D. 111. 1978). The withdrawal of a sufficient number of



consents may, of course, destroy the written consent required by this section. If a shareholder seeks to withdraw his consent after shareholders have signed written consents and filed them with the secretary of the corporation, the corporation may either treat the attempted withdrawal as too late or give it effect, thereby requiring the matter to be presented at a shareholders' meeting if the withdrawal reduces the number of consenting shareholders below the required level.

Subsection (b) has no counterpart in the Model Act. Protective provisions have been added with respect to mergers, share exchanges, and asset sales, drawn largely from former Georgia law, § 14-2-112(d), as amended in 1985, to assure that shareholders receive adequate disclosures or knowingly waive their rights to disclosures. With respect to mergers approved by written consent, the protective provisions represent a combination of former law and the provisions relating to notice of dissenters' rights contained in Article 13 of the Code. For mergers and share exchanges, the disclosure requirements of Section 14-2-1103(d) will apply.

Following the 1985 amendment to former § 14-2-112(d), subsection (c) retains the unanimous consent provision for election of directors where cumulative voting is in effect, notwithstanding anything in the articles of incorporation to the contrary.

Section 14-2-704 is applicable to all shareholder actions, including the approval of fundamental corporate changes described in articles 10, 11, 11A, 12, and 14. If these actions were taken at an annual or special meeting, the Model Act provided that shareholders who were not entitled to vote on the matter would nevertheless be entitled to receive notice of the meeting, including a description of the transaction proposed to be considered at the meeting. Because of Georgia's omission of the Model Act's notice provisions for nonvoting shareholders in § 7.04(d) for actual meetings, the provisions of the Model Act for such notice in the case of shareholder action by written consent were also omitted.

Subsection (d) sets the record date, if not otherwise fixed, as the date the first shareholder signs the consent. This follows former § 14-2-112(d).

Subsection (e) permits the corporate secretary to certify to third parties that shareholder action was duly taken at a meeting of shareholders. This accommodates many printed forms, such as banking resolutions, that call for such a certificate.

Subsection (f) retains the requirement of former § 14-2-112(d), as amended in 1985, of notice of action taken by consent to nonconsenting shareholders.

#### **Note to 1989 Amendment**

The 1989 amendment changed subsection (c) to clarify the relationship between section 14-2-705 and section 14-2-728. While section 14-2-728 provides that shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless the meeting notice states that cumulative voting will be in effect or a shareholder who has the right to vote cumulatively gives notice not less than 48 hours before the time of the meeting that he intends to cumulate his votes, no such notice is required where shareholders act by unanimous consent.

The 1989 amendment also eliminates a superfluous cross reference in subsection (d) to subsections (a) and (b) of this section.

#### **Note to 1993 Amendment**

The 1993 amendment is intended to clarify the notice required to be afforded shareholders in the case of actions creating dissenters' rights which are effected by shareholder consent. If a corporation solicits a consent, § 14-2-1320 still requires that the corporation notify the shareholder that the action may trigger dissenters' rights.

**Note to 1997 Amendments**

The 1997 amendments to subsections (a) and (d) introduce the requirement that shareholders' written consents must be dated (subsection (a)), and that the requisite consents must be dated within 60 days of each other (subsection (d)). The purpose is to minimize the possibility that shareholder action by written consent will be authorized by persons who may no longer be shareholders at the time the action is taken. The final sentence of subsection (d) authorizes revocation of such consents. The second sentence of subsection (e) was added to provide a default rule for the effective date of consents, which cannot be earlier than the time the corporation receives notice of them through delivery.

**Cross-References**

Acceptance of consents, see § 14-2-724. Amendment of articles of incorporation, see Article 10, Part 1. Dissolution, see Article 14. Merger and share exchange, see Articles 11 and 11A. "Notice" defined, see § 14-2-141. Sale of assets, see Article 12. "Secretary" defined, see § 14-2-140. Voting entitlement generally, see § 14-2-721.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 950.

**C.J.S.** — 18 C.J.S., Corporations, § 362.

**ALR.** — Participation in meeting as waiver of compliance with notice requirement for stockholders' meeting, 64 ALR3d 358.

**14-2-705. Notice of meeting.**

(a) A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders' meeting no fewer than ten nor more than 60 days before the meeting date. Unless this chapter or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting.

(b) Unless this chapter or the articles of incorporation require otherwise, notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

(c) Notice of a special meeting must include a description of the purpose or purposes for which the meeting is called.

(d) If not otherwise fixed under Code Section 14-2-703 or Code Section 14-2-707, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the close of business on the day before the first notice is delivered to shareholders.

(e) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under Code Section 14-2-707, however, notice of the adjourned meeting must be given under this Code section to persons who are shareholders as of the new record date. (Code 1981, § 14-2-705, enacted by Ga. L. 1988, p. 1070, § 1.)



**COMMENT**

Source: Model Act, § 7.05. This replaces former §§ 14-2-113 & 14-2-114(c).

Under subsection (a) shareholders entitled to notice must be given notice of annual and special meetings pursuant to Section 14-2-705 unless the notice is waived pursuant to Section 14-2-706. Notice must be given at least 10 but not more than 60 days before the meeting date. The window within which notices of meetings must be given is extended from 10-50 days under former § 14-2-133(a) to 10-60 days under the Code. The timing of notice is uniform for all shareholders' meetings. Formerly Georgia provided for different notice periods for certain corporate actions. Twenty day's notice was required for approval of mergers under former § 14-2-212(b). Under the Code, notice requirements for mergers or share exchanges (§ 14-2-1103(d)), sales of assets other than in the regular course of business (§ 14-2-1202(d)), and amendments of the articles of incorporation (§ 14-2-1003(d)) are cross referenced to § 14-2-705, thus providing unified treatment.

Under subsection (a) only shareholders who are entitled to vote at a meeting are entitled to notice. Thus, notice usually needs to be sent only to holders of shares entitled to vote for an election of directors or generally on other matters (in the case of an annual meeting), and on matters within the specified purposes set forth in the notice (in the case of a special meeting), and only to holders of shares of those classes or series of shares on the record date.

Notice may be mailed by other than first class mail under the provisions of § 14-2-141 by certain companies, if mailed sufficiently in advance.

Subsection (b) provides that no purposes need be stated for annual meetings unless the articles of incorporation specify otherwise, or the Code requires, as in the case of mergers, share exchanges and certain asset sales. See Code Sections 14-2-1003, 14-2-1103, 14-2-1202, and 14-2-1402.

Subsection (c) requires that notice of all special meetings must include a description of the purpose or purposes for which the meeting is called and the matters that can be acted upon at the meeting are limited to those described in the notice.

Subsection (d) provides a default rule for determining a record date, where the notice or board resolution fail to do so, which is similar to that formerly provided in § 14-2-114(c). If notice is mailed to shareholders over a period of more than one day, the day before the notice is delivered to the first shareholder is the record date.

The selection of the close of business on the day before the notice is mailed as the catch-all record date is intended to permit the corporation to mail notices to shareholders on a given day without regard to any requests for transfer that may have been received during that day.

Subsection (e) provides rules for adjourned meetings and determines whether new notice must be given to shareholders. If a new record date is or must be fixed, the 10-to-60-day notice requirement and all other requirements of Section 14-2-705 must be complied with as notice is given to the persons who are shareholders as of the new record date. A new quorum for the adjourned meeting must also be established. See Section 14-2-725.

**Cross-References**

Annual meeting, see § 14-2-701. "Deliver" includes mail, see § 14-2-140. Effective date of notice, see § 14-2-141. "Notice" defined, see § 14-2-141. Notice otherwise required: amendment, see § 14-2-1003; dissolution, see § 14-2-1402; merger and share exchange, see § 14-2-1103; sale of assets, see § 14-2-1202. Special meeting, see § 14-2-702. Waiver of notice, see § 14-2-706.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 963-976, 1028.

**C.J.S.** — 18 C.J.S., Corporations, §§ 365-367, 375-377.

**ALR.** — Informality of meeting of stock-

holders as affecting action taken thereat, 51 ALR 941.

Participation in meeting as waiver of compliance with notice requirement for shareholders' meeting, 64 ALR3d 358.

**14-2-706. Waiver of notice.**

(a) A shareholder may waive any notice required by this chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A shareholder's attendance at a meeting:

(1) Waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; and

(2) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

(c) Unless required by the bylaws, neither the business transacted nor the purpose of the meeting need be specified in the waiver, except that any waiver by a shareholder of the notice of a meeting of shareholders with respect to an amendment of the articles of incorporation pursuant to Code Section 14-2-1003, a plan of merger or share exchange pursuant to Code Section 14-2-1103, a sale of assets pursuant to Code Section 14-2-1202, or any other action which would entitle the shareholder to dissent pursuant to Code Section 14-2-1302 and obtain payment for his shares shall not be effective unless:

(1) Prior to the execution of the waiver, the shareholder shall have been furnished the same material that under this chapter would have been required to be sent to the shareholder in a notice of the meeting, including notice of any applicable dissenters' rights as provided in Code Sections 14-2-1320 and 14-2-1322; or

(2) The waiver expressly waives the right to receive the material required to be furnished. (Code 1981, § 14-2-706, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Model Act, § 7.06. This replaces former § 14-2-113(d).

Subsection (a) permits any shareholder to waive any notice required by Section 14-2-705 by a written waiver, signed by the shareholder and delivered to the corporation. A waiver is effective even though it is signed at or after the time set for the meeting.

Subsection (b)(1) provides that attendance at a meeting constitutes waiver of any failure to receive the notice or defects in the statement of the date, time, and place of any meeting. If a shareholder believes that the defect in or failure of notice was in some way prejudicial, he may preserve his objection by stating at the beginning of the meeting that he objects to holding the meeting or transacting any business. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or by obtaining written waivers of notice from all shareholders who did not receive the notice required by Section 14-2-705.

A shareholder who attends a meeting solely for the purpose of objecting to the notice may not be counted as present for purposes of determining whether a quorum is present. See the Comment to Section 14-2-725.

In the case of special meetings, or annual meetings at which fundamental corporate changes are considered, a second purpose of the notice is to tell shareholders what is to be considered at the meeting. An objection that a particular matter is not within the stated purposes of the meeting obviously cannot be raised until the matter is presented. Thus subsection (b)(2) provides that a shareholder waives this kind of objection if he fails to object promptly after the matter is first presented.

Subsection (c) restores the approach of the notice provisions of § 14-2-113(d)(1) of former law, incorporating the disclosure requirements generally applicable to mergers, share exchanges and asset sales under the Code as a condition to obtaining an effective waiver of notice for these meetings under this section.

#### Cross-References

Acceptance of waiver, see § 14-2-724. Action without meeting, see § 14-2-704. Meeting notice, see § 14-2-705. "Notice" defined, see § 14-2-141. Proxies, see § 14-2-722. Waiver of quorum objection, see § 14-2-725.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 980-985.

**C.J.S.** — 18 C.J.S., Corporations, §§ 365-367.

**ALR.** — Participation in meeting as waiver of compliance with notice requirement for shareholders' meeting, 64 ALR3d 358.

#### 14-2-707. Record date.

(a) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(b) A record date fixed under this Code section may not be more than 70 days before the meeting or action requiring a determination of shareholders.



(c) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting.

(d) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date. (Code 1981, § 14-2-707, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 7.07. This replaces former § 14-2-114.

Section 14-2-707 authorizes the board of directors to fix record dates for any action unless the bylaws themselves fix or provide for the fixing of a record date.

A separate record date may be established for each voting group entitled to vote separately on a matter at a meeting, or a single record date may be established for all voting groups entitled to participate in the meeting. If neither the bylaws nor the board of directors fix a record date for specific action, the section of this chapter that deals with that action itself fixes the record date.

The time in advance of a meeting for setting a record date is expanded by subsection (b) from the 50 days formerly provided by § 14-2-114(b) to 70 days, to accommodate very large publicly held corporations. The record date may not be fixed retroactively.

Under subsection (c), once the record date has been set, the same record date may be utilized for an adjournment of the meeting that reconvenes within 120 days after the date fixed for the original meeting, or the board of directors may fix a new record date. If the adjourned meeting takes place more than 120 days after the date fixed for the original meeting, subsection (c) requires that a new record date be fixed.

### Cross-References

Annual meeting, see § 14-2-701. Bylaws, see § 14-2-206 & Article 10 Part 2. Court-ordered meeting, see § 14-2-703. Other record date provisions: action without meeting, see § 14-2-704; distributions to shareholders, see § 14-2-640; notice of meeting, see § 14-2-705; special meeting, see § 14-2-702. "Voting group" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Owner had no dissenters' rights if not owner on record date.** — Minority shareholder's LLC did not have dissenters' rights to a merger since the shares were transferred to it after the record date established pursuant to O.C.G.A. § 14-2-707; LLC was not

entitled to participate in the event at issue, the merger, and could not obtain payment for its shares under the dissenters' rights statutes. *Magner v. One Secs. Corp.*, 258 Ga. App. 520, 574 S.E.2d 555 (2002).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 966, 1028, 1167.

**C.J.S.** — 18 C.J.S., Corporations, §§ 365-367, 375-377, 395, 396.



## PART 2

## VOTING

**14-2-720. Shareholders' list for meeting.**

(a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting. The list must be arranged by voting group (and within each voting group by class or series of shares) and show the address of and number of shares held by each shareholder.

(b) The shareholders' list must be available for inspection by any shareholder, his agent, or his attorney at the time and place of the meeting.

(c) If the corporation refuses to allow a shareholder, his agent, or his attorney to inspect the shareholders' list at the meeting, the superior court of the county where a corporation's registered office is located, on application of the shareholder, may summarily order the inspection at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection is complete.

(d) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting. (Code 1981, § 14-2-720, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Act, § 7.20. This replaces former § 14-2-115.

Subsection (a) requires the preparation of a list of shareholders entitled to notice of a meeting.

Subsection (b) departs from the Model Act, which required the shareholder list to be available two days after the notice of the meeting, and returns to the approach of § 14-2-115, which required the list to be available at the time and place of the meeting. Shareholders seeking copies of lists may still request them under Section 14-2-1602. Access to shareholders, their agents, and attorneys, is made explicit in subsection (b), where former § 14-2-115 was silent on the rights of agents and attorneys.

Subsection (b) permits shareholders to "inspect" the list without limitation, but implicitly permits the shareholder to "copy" the list only if the shareholder complies with the requirement of Section 14-2-1602(c), that the demand be "made in good faith and for a proper purpose." This departs from the Model Act approach, which contemplated copying of the list made available over a longer period.

Section 14-2-720 does not require the list of shareholders to be in any particular form. It may be maintained, for example, in electronic form. If the list is maintained in other than written form, however, suitable equipment must be provided so that a comprehensible list may be inspected by a shareholder as permitted by this section.

If the corporation fails to prepare the list or refuses to permit a shareholder to inspect it, a shareholder may apply to the appropriate court under subsection (c) for a summary order permitting inspection of the list; the court may further order the meeting to be

postponed for a reasonable time. These powers were not expressly granted in former § 14-2-115.

This judicial remedy is the only sanction for violation of Section 14-2-720, since Section 14-2-720(d) provides that the failure to prepare, maintain, or produce the list does not affect the validity of any action taken at the meeting. Former § 14-2-115(b) provided that if the requirements of making a shareholder list available were not met, the meeting should be adjourned at the demand of any shareholder until the requirements are complied with. No comparable provision exists in the Code; indeed, subsection (d) states explicitly that violations do not affect the validity of action taken at the meeting.

#### Cross-References

Annual meeting, see § 14-2-701. Charge for providing copy, see § 14-2-1603. Effective date of notice, see § 14-2-141. Inspection of corporate records generally, see Article 16, Part 1. "Notice" defined, see § 14-2-141. Notice of meeting, see § 14-2-705. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Proper purpose for copying, see § 14-2-1602. Record date, see § 14-2-707. Record of shareholders, see § 14-2-1601. Registered office: designated in annual registration, see § 14-2-1622; required, see §§ 14-2-202 & 14-2-501. "Shareholder" defined, see § 14-2-140. Special meeting, see § 14-2-702. Voting entitlement generally, see § 14-2-721. "Voting group" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 357, 360, 395, 1029.

**C.J.S.** — 18 C.J.S., Corporations, §§ 334, 335, 375-377.

**ALR.** — Corporation: right to reconsider

vote in stockholders' or directors' meeting, 13 ALR 131.

Purposes for which stockholder or officer may exercise right to examine corporate books and records, 15 ALR2d 11.

#### 14-2-721. Voting entitlement of shares.

(a) Except as provided in subsections (b) and (c) of this Code section or unless the articles of incorporation provide otherwise, each outstanding share (other than shares of preferred stock issued or authorized before July 1, 1989), regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting. Only shares are entitled to vote. If articles of incorporation have been restated or amended on or after July 1, 1989, such amendment shall not be deemed to have granted voting rights to holders of preferred shares previously without voting rights unless notice was provided to shareholders that such restatement or amendment would cause the holders of preferred shares to have voting rights, and a shareholder vote approved the restatement or amendment.

(b) Absent special circumstances, the shares of a corporation are not entitled to vote if owned by the corporation as treasury shares or if they are held, directly or indirectly, by a second corporation, domestic or foreign, of which the first corporation owns, directly or indirectly, shares sufficient to elect a majority of the directors of the second corporation.



(c) Subsection (b) of this Code section does not limit the power of a corporation to vote any shares, including its own shares, held by it in a fiduciary capacity.

(d) Redeemable shares are not entitled to vote after notice of redemption is mailed to the holders and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution under an irrevocable obligation to pay the holders the redemption price on surrender of the shares. (Code 1981, § 14-2-721, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 24; Ga. L. 1995, p. 482, § 3; Ga. L. 1997, p. 1165, § 6.)

#### COMMENT

Source: Model Act, § 7.21. There are no substantial changes from former law, § 14-2-117.

Subsection (a) provides that each outstanding share, regardless of class, is entitled to one vote per share unless otherwise provided in the articles of incorporation. The word “outstanding” was moved from the first to the second sentence, in the interest of clarity and emphasis. The articles of incorporation may provide for multiple or fractional votes per share, and may provide that some classes of shares are nonvoting on some or all matters, or that some classes have multiple or fractional votes per share while other classes have a single vote per share or different multiple or fractional votes per share, or that some classes constitute one or more separate voting groups and are entitled to vote separately on the matter.

The power to vary or condition voting power is also often used to give increased protection to financial interests in the corporation. It is customary, for example, to make classes of shares with preferential rights nonvoting, but the power to vote may be granted to those classes if distributions are omitted for a specified period. Other conditions may also be created that vary voting rights of holders within a class, such as creation of large blocks, or the duration of the shareholder’s ownership.

Under the last sentence of subsection (a), the power to vote cannot be granted generally to nonshareholders. But creditors may in effect be given the power to vote, e.g., by creating a special class of redeemable voting shares for them, by creating a voting trust at the time the credit is extended with power in the creditors to name the voting trustees, by registering the shares in the name of the creditors as pledgees with power to vote, or by granting the creditors a revocable or irrevocable proxy to vote some or all of the outstanding shares.

Subsection (b) prohibits the voting of shares held by a domestic or foreign corporation that is itself a majority-owned subsidiary of the corporation issuing the shares. The Code departs from the Model Act’s definition of “majority-owned” as the definition of a subsidiary, and clarifies an ambiguity in former law, § 14-2-117(c), which simply referred to a “subsidiary,” leaving open the question of whether minority control disqualified shares. The Code deletes the Model Act’s definition, which was based upon ownership of a majority of the shares entitled to vote for directors, and replaces it with ownership of sufficient shares to elect a majority of the directors. Reference to “sufficient shares to elect” recognizes the increasing use of dual classes of common stock with disparate voting rights, as well as the power of preferred shares to vote under some circumstances. The use of the word “sufficient” is intended to eliminate subjective questions of whether a minority has “working control.” In this context, “sufficient” means enough votes to elect a majority of the directors even if all other shares are voted against these candidates.



The inclusion of subsection (b) is not intended to affect the possible application of common law principles that may invalidate circular holding situations not within its literal prohibition. As to the possible existence of these common law principles, see, e.g., *Cleveland Trust Co. v. Eaton*, 11 Ohio Misc. 151, 229 N.E.2d 850 (1967), rev'd on the basis of statutory amendment, 20 Ohio St.2d 129, 256 N.E.2d 198 (1970). The phrase "absent special circumstances" is included to enable a court to permit the voting of shares where it deems that the purpose of the section is not violated.

Subsection (c) makes the prohibition against voting of circularly-owned shares of subsection (b) inapplicable to shares held in a fiduciary capacity. Formerly, § 14-2-117(c) permitted such voting only by a subsidiary that was a state or national bank or trust company authorized to exercise fiduciary powers. Code Section 7-1-242 limits the right of corporations to exercise fiduciary powers.

Subsection (d) avoids subjecting a transaction to approval by a class of redeemable shares that will be redeemed as a result of the transaction if adequate provision has been made to ensure that the holders of the redeemable shares will in fact receive the amount payable to them on redemption. This should be distinguished from voting rights that exist when articles of incorporation are amended to redeem shares that were not redeemable by their terms, where voting rights are granted by Section 14-2-1004(a)(10).

#### Note to 1989 Amendment

The 1989 amendment deleted the word "outstanding" from the last sentence of subsection (a) for purposes of clarification. Earlier variations from the Model Act, explained in the second sentence of the second paragraph of the original Comment, were deemed to be confusing. The intent was to emphasize that shares, and only shares, are entitled to vote.

#### Note to 1997 Amendments

Subsection (b) was amended in 1997 to prohibit a corporation from voting its own shares.

#### Cross-References

Acceptance of votes, see § 14-2-724. Articles of incorporation, see § 14-2-202. Cumulative voting, see § 14-2-728. Director establishment of voting rights, see § 14-2-602. "Notice" defined, see § 14-2-141. Proxy voting, see § 14-2-722. Redeemable shares, see § 14-2-601. Redemption of shares, see § 14-2-641. Series of shares, see § 14-2-602. "Share" defined, see § 14-2-140. Shareholders' meetings, see § 14-2-701 et seq. Voting by nominees, see § 14-2-723. Voting by voting groups, see §§ 14-2-140, 14-2-725, 14-2-726. Voting rights generally, see § 14-2-701.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-117, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Full payment presumed following board resolution.** — Although a corporation may issue shares and share certificates to a person who is not entitled to them by reason of a full payment, full payment becomes con-

clusively presumed when, in the absence of bad faith, the board of directors issues a resolution as to the fair value of the consideration to the corporation. In *re Delk Rd. Assocs.*, 37 Bankr. 354 (Bankr. N.D. Ga. 1984) (decided under former § 14-2-117).

Cited in *Givens v. Spencer*, 232 Ga. 806, 209 S.E.2d 157 (1974); *Bloodworth v. Sandersville Prod. Credit Ass'n*, 245 Ga. 40, 262 S.E.2d 804 (1980).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 1019, 1020, 1023, 1035-1042, 1048-1052.

**C.J.S.** — 18 C.J.S., Corporations, §§ 375-378.

**ALR.** — Corporations: right to reconsider vote in stockholders' or directors' meeting, 13 ALR 131.

Waiver of right to object to voting of invalid or unauthorized stock, 72 ALR 948.

Voting power of corporation stock as confined to issued and outstanding stock to exclusion of authorized unissued stock or stock which has been reacquired by the corporation, 90 ALR 315.

Powers of voting trustees, 159 ALR 1067.

Construction, application, and effect of constitutional provisions or statutes relating

to cumulative voting of stock for corporate directors, 43 ALR2d 1322.

Transfer of, and voting rights in, stock, of co-operative apartment association, 99 ALR2d 236.

Corporations: casting of ballots after closing of polls, 41 ALR3d 234.

Corporations: power of inspectors of election relating to irregular or conflicting proxies, 44 ALR3d 1443.

Corporations: validity of charter provision for nonvoting common stock, 52 ALR3d 1131.

Right, as between pledgor and pledgee, to vote pledged stock, 68 ALR3d 680.

Validity of variations from one share-one vote rule under modern corporate law, 3 ALR4th 1204.

**14-2-722. Proxies.**

(a) A shareholder may vote his or her shares in person or by proxy.

(b) A shareholder or his or her agent or attorney in fact may appoint a proxy to vote or otherwise act for the shareholder by signing an appointment form or by an electronic transmission. An electronic transmission must contain or be accompanied by information from which it can be determined that the shareholder, the shareholder's agent, or the shareholder's attorney in fact authorized the electronic transmission.

(c) An appointment of a proxy is effective when a signed appointment form or electronic transmission of the appointment is received by the inspector of election or the officer or agent of the corporation authorized to tabulate votes. An appointment is valid for 11 months unless a longer period is expressly provided in the appointment.

(d) An appointment of a proxy is revocable unless the appointment form or electronic transmission states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:

(1) A pledgee;

(2) A person who purchased or agreed to purchase the shares;

(3) A creditor of the corporation who extended it credit under terms requiring the appointment;

(4) An employee of the corporation whose employment contract requires the appointment; or



(5) A party to a voting agreement created under Code Section 14-2-731.

(e) The death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises his or her authority under the appointment.

(f) An appointment made irrevocable under subsection (d) of this Code section is revoked when the interest with which it is coupled is extinguished.

(g) A transferee for value of shares subject to an irrevocable appointment may revoke the appointment if he or she did not know of its existence when he or she acquired the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

(h) Subject to Code Section 14-2-724 and to any express limitation on the proxy's authority stated in the appointment form or electronic transmission, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment.

(i) Any copy, facsimile transmission, or other reliable reproduction of the writing or electronic transmission created pursuant to subsection (b) of this Code section may be substituted or used in lieu of the original writing or electronic transmission for any and all purposes for which the original writing or electronic transmission could be used, provided that such copy, facsimile transmission, or other reproduction shall be a complete reproduction of the entire original writing or electronic transmission.

(j) A corporation may adopt bylaws authorizing additional means or procedures for shareholders to exercise rights granted by this Code section. (Code 1981, § 14-2-722, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 8; Ga. L. 1997, p. 1165, § 7; Ga. L. 1999, p. 405, § 6.)

**Law reviews.** — For article, "The Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under Georgia Law," see 37 Mercer L. Rev. 79 (1985).

For note discussing revocation of proxy upon maker's incapacity, see 17 Ga. St. B.J. 88 (1980).

## COMMENT

Source: Model Act, § 7.22. This replaces former § 14-2-119.

Subsection (a) provides that shareholders may vote in person or by proxy. Subsection (a) gives voting rights to "shareholders," and not to pledgees, and in that sense is consistent with the rule of former § 14-2-117(i), which was more specific. Pledgees obtain voting rights only through the grant of a proxy, as provided in this section.

Subsection (b) states the general rules on powers of attorney.



Subsection (c) provides that an appointment form that contains no expiration date is valid for 11 months. This is consistent with former § 14-2-119(b). This ensures that in the normal course a new appointment will be solicited at least once every 12 months. But an appointment form may validly specify a longer period if the parties agree.

The appointment of a proxy is essentially the appointment of an agent and is revocable in accordance with the principles of agency law unless it is "coupled with an interest." See subsection (d). Thus, an appointment may be revoked either expressly or by implication, as when a shareholder later executes a second appointment form inconsistent with an earlier one, or attends the meeting in person and seeks to vote on his own behalf. Former § 14-2-119(c) provided that attendance of a shareholder at a meeting and an election to vote in person revokes a previously granted proxy. This was omitted from the Code as surplusage.

Subsection (d) deals with the irrevocable appointment of a proxy. The general test adopted is the common law test that all appointments are revocable unless they expressly provide for irrevocability and are "coupled with an interest." Subsection (d) provides considerable certainty since it describes several accepted forms of relationship as examples of "proxies coupled with an interest." These examples are not exhaustive and other arrangements may also be held to be "coupled with an interest."

Subsection (e) preserves the rule of former § 14-2-119(c) that the death or incapacity of a shareholder does not affect the corporation's right to accept a proxy unless the corporation receives prior notice. In view of the widespread dispersal of shareholders in many corporations, it is not feasible for the corporation to learn of these events independently of notice. On the other hand, subsection (e) does not affect the validity of the proxy appointment or its manner of exercise as between the proxy and the personal representatives of the decedent or incompetent. That relationship is governed by the law of agency independent of the Code.

Subsection (f) provides that an irrevocable proxy is revoked when the interest with which it was coupled is extinguished — for example, by repayment of the loan or release of the pledge.

Subsection (g) provides that a transferee for value of shares that are subject to an irrevocable appointment takes free of the appointment if (1) he did not know of the existence of the appointment and (2) the existence of the irrevocable appointment was not noted conspicuously on the certificate or information statement. Former § 14-2-119(i) provided for automatic revocation of a proxy when shares are transferred to a bona fide purchaser for value without notice.

The omission of the language of former § 14-2-119(f), which prohibits the sale of the vote, is deliberate. Older cases holding sales of votes to be against public policy are inapposite in the context of economic relationships, and that the doctrine frustrated legitimate transactions. Thus, creditors or shareholders of a particular class may find that certain contingencies in credit agreements, bond indentures or the articles of incorporation were not fully covered, and that payments to shareholders with respect to some changes are appropriate. See, Clark, *Vote Buying and Corporate Law*, 29 Case W. Res. L. Rev. 776 (1979) and Manne, *Some Theoretical Aspects of Share Voting*, 64 Colum. L. Rev. 1427 (1964).

#### **Note to 1993 Amendment**

The 1993 amendment authorizes shareholders to appoint proxies using virtually any written medium, including facsimile. The amendment also authorizes a corporation to adopt optional bylaws providing for additional means by which a shareholder may appoint proxies or vote, including the authorization of oral proxies.

**Note to 1997 Amendment**

Subsections (b), (c), (d) and (h) were amended to conform to Model Act amendments concerning facsimile transmission of proxies. The only other substantive change was authorization of execution of proxies by either a shareholder or his agent or attorney-in-fact. The 1997 amendments generally conform to the Model Act by revising subsections (c), (d) and (h) to add references to facsimile transmissions, although the Model Act contains a broader reference to "electronic transmission."

**Note to 1999 Amendment**

Subsections (b), (c), (d) and (h) were amended to conform to recent Model Act amendments concerning the electronic transmission of proxies. The new subsection (i) is the last sentence of the former subsection (b), with the addition of the reference to electronic transmission.

This section provides that a shareholder may appoint a proxy to vote by signing an appointment form, either personally or by his agent or attorney-in-fact. The 1999 amendment authorizes shareholders to appoint a proxy by electronic transmission. An electronic transmission which appoints a proxy is deemed the equivalent of a signed appointment form if it contains or is accompanied by information from which it can be reasonably verified that the transmission was authorized by the shareholder or by the shareholder's agent or attorney-in-fact. "Electronic transmission" as used in this section means any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient. See the 1999 amendment to § 14-2-140. Subsection (b) is intended to sanction the practice whereby shareholders who have been provided proxy materials with a personal identification number may electronically transmit (e.g., by touch-tone telephone or e-mail) their vote and identifying number to a person who, acting as the shareholder's agent, causes that information to be transmitted, directly or indirectly, to the inspector of election.

The appointment is effective when an appointment form or an electronic transmission (or documentary evidence thereof, including verification information) is received by the inspector of election or the officer or agent of the corporation authorized to receive and tabulate votes. The proxy has the same power to vote as that possessed by the shareholder, unless the appointment form or electronic transmission contains an express limitation on the power to vote or direction as to how to vote the shares on a particular matter, in which event the corporation must tabulate the votes in a manner consistent with that limitation or direction. See subsection (h).

**Cross-References**

Acceptance of proxy votes, see § 14-2-724. Certificateless shares, see § 14-2-626. "Conspicuously" defined, see § 14-2-140. "Electronic transmission" defined, see § 14-2-140. "Include" defined, see § 14-2-140. Information on share certificate, see § 14-2-625. "Notice" defined, see § 14-2-141. "Secretary" defined, see § 14-2-140. "Transmitted electronically" defined, see § 14-2-140.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-119, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, is included in the annotations for this Code section.

**Cited in** *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91 (5th Cir. 1976).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 1069-1095.

**C.J.S.** — 18 C.J.S., Corporations, §§ 385-393.

**ALR.** — Corporation: right to reconsider vote in stockholders' or directors' meeting, 13 ALR 131.

Power to require nonassenting creditors or bondholders to accept securities of, or shares in, new or reorganized corporation, 28 ALR 1196; 88 ALR 1238.

Revocability of proxy to vote stock, 159 ALR 307.

Expenses incurred by competing factions within corporation in soliciting proxies as charge against corporation, 51 ALR2d 873.

Corporations: power of inspectors of election relating to irregular or conflicting proxies, 44 ALR3d 1443.

Misrepresentation in proxy solicitation — state cases, 20 ALR4th 1287.

**14-2-723. Shares held by nominees.**

(a) A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The extent of this recognition may be determined in the procedure.

(b) The procedure may set forth:

(1) The types of nominees to which it applies;

(2) The rights or privileges that the corporation recognizes in a beneficial owner;

(3) The manner in which the procedure is selected by the nominee;

(4) The information that must be provided when the procedure is selected;

(5) The period for which selection of the procedure is effective; and

(6) Other aspects of the rights and duties created. (Code 1981, § 14-2-723, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Model Act, § 7.23. This replaces former § 14-2-2(12), which defines "shareholder."

Traditionally, a corporation recognizes only the registered owner as the owner of shares. That was the former approach in Georgia. But it has become a common practice for persons purchasing shares to have them registered in the "street name" of a broker-dealer or other financial institution, principally to facilitate transfer by eliminating the need for the beneficial owner's signature and delivery.

The purpose of Section 14-2-723 is to facilitate direct communication between the corporation and the beneficial owner by authorizing the corporation to create a procedure for bypassing both the registered owner and intermediate brokerage firms. The adoption of this procedure is discretionary with each corporation and affirmative action by the corporation is necessary to accomplish it. The procedure is also discretionary with the shareholder, who must elect to follow the applicable procedure



prescribed by the corporation. The shareholder retains all of his rights except those granted to the beneficial owner.

The corporation may limit or qualify the procedure as it deems appropriate.

The definition of "shareholder" in Section 14-2-140 includes beneficial owners to the extent they obtain the rights of shareholders pursuant to the procedure authorized by this section.

#### Cross-References

"Shareholder" defined, see § 14-2-140.

#### RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 1026, 1051, 1052. C.J.S. — 18 C.J.S., Corporations, §§ 375-377.

#### 14-2-724. Corporation's acceptance of votes.

(a) If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation if acting in good faith is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder.

(b) If the name signed on a vote, consent, waiver, or proxy appointment does not correspond to the name of its shareholder, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder if:

(1) The shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;

(2) The name signed purports to be that of an administrator, executor, guardian, or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment;

(3) The name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment;

(4) The name signed purports to be that of a pledgee, beneficial owner, or attorney in fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, consent, waiver, or proxy appointment; or

(5) Two or more persons are the shareholder as cotenants or fiduciaries and the name signed purports to be the name of at least one of the

co-owners and the person signing appears to be acting on behalf of all the co-owners.

(c) The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the shareholder or about the faithfulness or completeness of the reproduction when the original has not been examined.

(d) The corporation and its officer or agent who accept or reject a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this Code section or subsection (b) of Code Section 14-2-722 are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

(e) Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this Code section or subsection (b) of Code Section 14-2-722 is valid unless a court of competent jurisdiction determines otherwise. (Code 1981, § 14-2-724, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1997, p. 1165, § 8.)

**Code Commission notes.** — Pursuant to was substituted for "coowners" in two places Code Section 28-9-5, in 1997, "co-owners" in paragraph (b)(5).

#### COMMENT

Source: Model Act, § 7.24. This replaces former §§ 14-2-115, 14-2-117, & 14-2-119.

Corporations are often asked to accept a written instrument as evidence of action by a shareholder. Ordinarily the corporation will have no knowledge of the circumstances surrounding the execution of the instrument. This section establishes general rules permitting the corporation to accept instruments if they appear to be executed in the manner described in the section. This privilege is, of course, qualified by a "good faith" requirement, so that actual knowledge of the circumstances of execution of an instrument cannot be ignored. The rules set forth in this section are not exclusive and may be supplemented by additional rules established by the corporation in its bylaws pursuant to Section 14-2-206(b).

Subsection (a) provides a safe harbor for corporations that accept votes or proxies if they appear to be executed by the shareholder, bearing a name that "corresponds" to the record name of a shareholder, if done in good faith.

Subsection (b) provides a safe harbor for corporations that accept votes bearing signatures in representative capacities. Subsection (b) permits the acceptance of an instrument executed by a person other than the shareholder if there is a designation or evidence of the capacity of the person executing the instrument that indicates the act of the person is the act of the shareholder. It does not affect the rights of grantors and grantees of proxies inter se. Subsections (b)(1)-(3) correspond to former § 14-2-117(e)-(g); and subsection (b)(5) corresponds to § 14-2-117(h). There was no counterpart in former law corresponding to subsection (b)(4), which simply states that if a pledgee has a power of attorney to vote the pledgor's shares, the corporation may accept the votes. This is merely a restatement of agency principles; another statement of those principles appeared in former § 14-2-117(i), which provided that the pledgor may continue to vote pledged shares until they are transferred to the name of the pledgee.



Subsection (c) provides a safe harbor for corporations rejecting votes in good faith. It permits rejection of an instrument if the officer or agent tabulating votes has a "reasonable basis for doubt" about the validity of the signature or about the authority of the person acting on behalf of the shareholder.

Subsection (d) provides protection for officers and directors who accept or reject instruments based on the standards set out in the preceding subsections. This is broader than former law; § 14-2-117(j) only protected corporations that accepted record owners as the owners of shares for all purposes.

Subsection (e) makes clear that the validity or invalidity of corporate action is ultimately a matter for judicial resolution through review of the results of an election in a suit to enjoin or compel corporate action. It is contemplated that any such suit will be brought promptly, typically before the corporate action is consummated or the corporation's position otherwise changes in reliance on the vote, and that any suit that is not brought promptly under the circumstances would normally be barred because of laches.

#### **Note to 1989 Amendment**

Subsection (c) was amended to delete a reference to "a bylaw authorized by the articles of incorporation" and replace it with a reference to "a bylaw adopted by the shareholders," which is consistent with the reference to Code Section 14-2-1021.

#### **Note to 1997 Amendments**

Subsection (c) was amended by adding the last clause, permitting corporations to reject proxy votes when concerned about the accuracy of reproductions. Subsections (d) and (e) were amended by the addition of a reference to proxies appointed in accordance with the standards of Code section 14-2-722(b), which authorizes facsimile transmission of proxies.

#### **Cross-References**

Consents, see § 14-2-704. "Entity" defined, see § 14-2-140. Officers, see § 14-2-840. Proxies, see § 14-2-722. "Secretary" defined, see § 14-2-140. "Shareholder" defined, see § 14-2-140. Voting by nominees, see § 14-2-723. Waiver of notice, see § 14-2-706.

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 1029, 1030.

**C.J.S.** — 18 C.J.S., Corporations, §§ 375-377.

**ALR.** — Corporations: right to reconsider vote in stockholders' or directors' meeting, 13 ALR 131.

Waiver of right to object to voting of invalid or unauthorized stock, 72 ALR 948.

Powers of voting trustees, 159 ALR 1067.

Corporations: casting of ballots after closing of polls, 41 ALR3d 234.

Corporations: power of inspectors of election relating to irregular or conflicting proxies, 44 ALR3d 1443.

Right, as between pledgor and pledgee, to vote pledged stock, 68 ALR3d 680.

### **14-2-725. Quorum and voting requirements for voting groups.**

(a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation or this chapter provides otherwise, a majority of the votes entitled to be cast on the matter by the



voting group constitutes a quorum of that voting group for action on that matter.

(b) Once a share is represented for any purpose at a meeting other than solely to object to holding the meeting or transacting business at the meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(c) If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation, a bylaw adopted by the shareholders under Code Section 14-2-1021, or this chapter requires a greater number of affirmative votes.

(d) The election of directors is governed by Code Section 14-2-728. (Code 1981, § 14-2-725, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 25.)

**Law reviews.** — For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, and as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For article, "The

Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under Georgia Law," see 37 Mercer L. Rev. 79 (1985). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

#### COMMENT

Source: Model Act, § 7.25. This replaces former § 14-2-116.

The Code has been altered to reflect voting by voting groups, which are defined in Section 14-2-140 as all shares of one or more classes or series that under the articles of incorporation are entitled to vote collectively. On most matters coming before shareholders' meetings, only a single voting group, consisting of a class of voting shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to Section 14-2-725. See Section 14-2-726(a).

Under the Code, classes or series of shares are generally not entitled to vote separately by voting group except to the extent specifically authorized by the articles of incorporation. But Section 14-2-1004 of the Code grants classes or series of shares the right to vote separately when fundamental changes are proposed in the articles of incorporation that may adversely affect that class. Section 14-2-1004 provides, further, that when two or more series are affected in essentially the same way, the series are lumped together and must vote as a single voting group rather than as multiple voting groups on the matter. Similarly, votes of a class may be required to waive preemptive rights for the class under Code Section 14-2-630.

Following this approach, subsection (a) provides that a voting group may take action only if a quorum of those shares exists, and provides a default rule of a majority of the shares, in the absence of a contrary provision in the articles of incorporation or this Code.

The articles of incorporation may modify the quorum and voting requirements of Section 14-2-725 for a single voting group or for all voting groups entitled to vote on any

matter. The articles of incorporation may increase the quorum and voting requirements to any extent desired up to and including unanimity upon compliance with Section 14-2-727; they may also require that shares of different classes or series are entitled to vote separately or together on specific issues or provide that actions are approved only if they receive the favorable vote of a majority of the shares of a voting group present at a meeting at which a quorum is present. Higher voting requirements may also be imposed through bylaws adopted pursuant to Section 14-2-1021, or for business combinations through bylaws adopted pursuant to Sections 14-2-1113 and 14-2-1133.

Subsection (a) imposes no limit of one-third on quorums the articles of incorporation or a shareholder adopted bylaw might provide to alter the basic majority rule. Section 14-2-727(a) of the Code governs the limits on quorum provisions, setting a lower limit of one-third of all votes, preserving the rule of former § 14-2-116(a).

The phrase “or this chapter” in Section 14-2-725(a) and (c) makes clear that wherever the provisions of the Model Act provide more stringent voting or quorum requirements, they control over Section 14-2-725. More stringent requirements are provided for the approval of certain fundamental corporate changes — for example, certain amendments to the articles of incorporation, mergers, and the sale of all or substantially all the corporate property not in the ordinary course of business. See Sections 14-2-1003, 14-2-1103, and 14-2-1202. See also Section 14-2-863, which imposes a special voting and quorum requirement for approval of conflict of interest transactions by members of the board of directors, Article 11, Part 2, and Article 11A, both of which provide special voting requirements for business combinations with interested shareholders.

Subsection (b) provides that once a quorum is present, it continues, notwithstanding withdrawal of a shareholder from a meeting, unless the meeting is adjourned under circumstances where a new record date is or must be set. This latter provision is an addition to existing Georgia law.

The language “other than solely to object to holding the meeting or transacting business at the meeting” was added to the Model Act version of subsection (b). It follows the language of Section 14-2-706(b), permitting a shareholder to make a special appearance for purposes of objecting to the lack of notice or defective notice without being counted for purposes of a quorum.

Subsection (c) provides that an action (other than the election of directors, which is governed by Section 14-2-728) is approved by a voting group at a meeting at which a quorum is present if the votes cast in favor of the action exceed the votes cast opposing the action. This section changes the traditional rule of former § 14-2-116(b) that an action was approved at a meeting at which a quorum was present if it received the affirmative vote “of the majority of the shares represented at that meeting.” The traditional rule in effect treated abstentions as negative votes; the Code treats them truly as abstentions.

Subsection (c) of the Model Act originally permitted supermajority shareholder voting only through the articles of incorporation or the statute. Subsection (c) was amended to refer to supermajority voting requirements imposed in bylaws adopted by shareholders pursuant to Section 14-2-1021 of the Code. This follows the general approach of former § 14-2-116(b), which permitted supermajority voting to be imposed in the bylaws; subject, of course to the concurrent power of shareholders and directors to amend bylaws in former § 14-2-176(b). Under old § 14-2-176(c) bylaw amendments could be “locked in” with a supermajority amendment requirement by providing for this in the articles.

Subsection (d) of the Model Act was deleted as surplusage. It duplicates Section 14-2-727(b).



Georgia's fair price statute, formerly § 14-2-235, which now appears as Part 2 of Article 11, permits the board to "opt in" through a bylaw amendment that can only be repealed by a shareholder vote that includes the affirmative vote of a majority of all eligible shares, excluding those held by a related person — a requirement that makes abstentions "no" votes. A similar bylaw election can be made with respect to business combinations under Article 11A that contains restrictions on repeal.

### Cross-References

Adjourned meeting record date, see § 14-2-707. Amendment of articles of incorporation, see § 14-2-1003. Amendment of bylaws, see Article 10, Part 2. Business combination with interested shareholder, see §§ 14-2-1110 et seq. and 14-2-1131 et seq. Bylaw requirements for voting, see § 14-2-1021. Dissolution, see § 14-2-1402. Election of directors, see § 14-2-728. Merger and share exchange, see § 14-2-1103. Multiple voting groups, see § 14-2-726. Proxy voting, see § 14-2-722. Quorum and voting requirements for directors' conflicting interest transactions, see § 14-2-863. Record date, see § 14-2-707. Sale of assets, see § 14-2-1202. Supermajority requirements, see §§ 14-2-727 & 14-2-1021. "Voting group" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-716, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, is included in the annotations for this Code section.

**Cited in** Long v. Atlanta & W. Point R.R., 253 Ga. 257, 320 S.E.2d 530 (1984).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 993-998, 1004-1006.

**C.J.S.** — 18 C.J.S., Corporations, §§ 370, 383.

**ALR.** — Corporation: right to reconsider

vote in stockholders' or directors' meeting, 13 ALR 131.

Stockholders required for quorum or vote as determined by number of stockholders or number of shares, 63 ALR 1106.

### 14-2-726. Action by single and multiple voting groups.

(a) If the articles of incorporation or this chapter provides for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in Code Section 14-2-725.

(b) If the articles of incorporation or this chapter provides for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in Code Section 14-2-725. Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter. (Code 1981, § 14-2-726, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 7.26. There was no counterpart in former Georgia law.

Subsection (a) provides that when a matter is to be voted upon by a single voting group, action is taken when the voting group votes upon the action as provided in Section 14-2-725. In most instances the single voting group will consist of all the shares



of the class or classes entitled to vote by the articles of incorporation; voting by two or more voting groups as contemplated by subsection (b) is the exceptional case.

Subsection (b) basically requires that if more than one voting group is entitled to vote on a matter, favorable action on a matter is taken only when it is voted upon favorably by each voting group, counted separately. Implicit in this section are the concepts that (1) different quorum and voting requirements may be applicable to different matters considered at a single meeting and (2) different quorum and voting requirements may be applicable to different voting groups on the same matter. See the Comment to Section 14-2-725.

#### Cross-References

Amendment of articles of incorporation, see § 14-2-1004. Change of voting group requirements, see § 14-2-727. Merger and share exchange, see § 14-2-1103. Number of votes per share, see § 14-2-721. Quorum and voting requirements, see § 14-2-725. Supermajority requirements, see § 14-2-727. Voting by voting groups on amendments of articles of incorporation, see § 14-2-1004. "Voting group" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 1004-1006.

**C.J.S.** — 18 C.J.S., Corporations, § 383.

#### 14-2-727. Greater or lesser quorum or voting requirements.

(a) The articles of incorporation or a bylaw adopted under Code Section 14-2-1021 may provide for a greater or lesser quorum (but not less than one-third of the votes entitled to be cast) or a greater voting requirement for shareholders (or voting groups of shareholders) than is provided for by this chapter.

(b) An amendment to the articles of incorporation or bylaws that changes or deletes a greater quorum or voting requirement must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements prescribed in the provision being amended. (Code 1981, § 14-2-727, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

#### COMMENT

Source: Model Act, § 7.27, and former §§ 14-2-116(a) and 14-2-118(b).

Subsection (a) permits the articles of incorporation to increase the quorum or voting requirements for approval of an action by shareholders up to any desired amount including unanimity.

As it appeared in the Model Act, subsection (a), permitting upward variances in quorums from simple majority, eliminated the explicit provision of former § 14-2-116(a), which permitted reduction of a quorum to not less than one-third of the shares entitled to vote. The policy of existing Georgia law was preserved by adding the

words "or lesser", and restoring the one-third limit. The Model Act provision, which permitted such voting variations only in the articles, was amended to continue Georgia's rule of also permitting such variations in the bylaws, in former § 14-2-116(a). Article 11, Part 2 of this Chapter preserves the ability of the board to amend the bylaws to require supermajority votes for business combinations with interested shareholders. See also Section 14-2-1133.

Subsection (b) of the Model Act requires any amendment of the articles of incorporation that adds, modifies, or repeals any supermajority provision to be approved by the greater of the proposed quorum and vote requirement or by the quorum and vote required by the articles before their amendment. This approach was rejected in the Code, which permits adoption of supermajority voting requirements by the voting rules then in effect. The Model Act approach reflected a mistrust of shareholder voting not shared by Georgia. On the other hand, in large publicly held corporations normal shareholder apathy at annual meetings could make adoption of supermajority requirements difficult if not impossible, even though obtaining the supermajority would be feasible for a vote on an event that generated considerable shareholder interest, such as a merger or share exchange. Subsection (b) of the Model Act was amended to follow the language of former law, § 14-2-118(b). This protects supermajority provisions from being repealed by lower votes, but does not require adoption of a supermajority voting requirement to receive more than the usual vote for approval.

#### Cross-References

Amendment of articles of incorporation, see Article 10, Part 1. Bylaw provisions changing quorum and voting requirements, see §§ 14-2-1021 & 14-2-1022. Quorum and voting requirements in general, see § 14-2-725. Quorum and voting requirements for directors' conflicting interest transactions, see § 14-2-863. Voting by voting group, see § 14-2-726. "Voting group" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 994, 995, 1004-1006.

**C.J.S.** — 18 C.J.S., Corporations, §§ 370, 383.

**ALR.** — Stockholders required for quorum or vote as determined by number of

stockholders or number of shares, 63 ALR 1106.

Validity, construction, and effect of provision in charter or bylaw requiring supermajority vote, 80 ALR4th 667.

#### 14-2-728. Voting for directors; cumulative voting.

(a) Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(b) Shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide.

(c) A statement included in the articles of incorporation that all or a designated voting group of shareholders are entitled to cumulate their votes for directors (or words of similar import) means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast



the product for a single candidate or distribute the product among two or more candidates.

(d) Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless:

(1) The meeting notice or proxy statement accompanying the notice states that cumulative voting will be in effect; or

(2) A shareholder who has the right to cumulate his votes gives notice to the corporation not less than 48 hours before the time set for the meeting of his intent to cumulate his votes during the meeting, and if one shareholder gives this notice all other shareholders in the same voting group participating in the election are entitled to cumulate their votes without giving further notice. (Code 1981, § 14-2-728, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

#### COMMENT

Source: Model Act, § 7.28. This replaces former §§ 14-2-117 & 14-2-119.

Subsection (a) provides that directors are elected by a plurality of the votes cast, where former law was silent on the subject.

Subsection (b) makes the default rule no cumulative voting, unless provided in the articles of incorporation, which is consistent with former Georgia law in § 14-2-117(d). Subsection (b) provides basically for an "opt in" election. Under subsection (c) this election may be made simply by inserting a statement that "all directors are elected by cumulative voting" or "holders of class A shares are entitled to cumulate their votes," or words of similar import. The effect of such a statement is to make applicable automatically the detailed provisions of subsections (c) and (d) describing the cumulative right to vote at elections of directors by the voting group or groups specified.

Subsection (c) provides that if the articles provide for cumulative voting, whether by all shareholders or by a designated voting group, they may cumulate their votes. Former law did not provide for cumulative voting by a voting group. Subsection (c) of the Model Act was amended by the addition of the word "or" and inclusion of both possibilities. The quotation marks in the Model Act provision were eliminated to eliminate any inference that specific words had to be used in order to comply with the statute.

Subsection (d) attempts to prevent surprise where cumulative voting is permitted by requiring (1) notice of that cumulative voting is in effect in the notice of meeting or proxy statement or (2) 48 hours' advance notice to the corporation of a shareholder's intent to vote cumulatively. Subsection (d)(1) of the Model Act was amended by deleting the words "is authorized" and replacing them with "will be in effect." Complying with federal proxy rules requiring the disclosure of the authorization of cumulative voting in a corporate charter should not trigger the right of shareholders to vote cumulatively without notice from the shareholders, unless the corporation deliberately decides to announce that cumulative voting will be "in effect" for the upcoming election. The word "conspicuously" was deleted from the Model Act because it might create needless conflicts with federal proxy rules.



**Cross-References**

Articles of incorporation: amendment, see Article 10, Part 1; content, see § 14-2-202. "Deliver" includes mail, see § 14-2-140. Notice of meeting, see § 14-2-705. "Notice" to the corporation, see § 14-2-141. Proxies, see § 14-2-722. Quorum of shareholders, see § 14-2-725. Voting for directors by voting group, see § 14-2-804. "Voting group" defined, see § 14-2-140.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1375, 1379, 1388-1394.

**C.J.S.** — 19 C.J.S., Corporations, §§ 434, 435, 438-442.

**ALR.** — Corporations: right to reconsider vote in stockholders' or directors' meeting, 13 ALR 131.

Voting power of corporation stock as confined to issued and outstanding stock to exclusion of authorized unissued stock or stock which has been reacquired by the corporation, 90 ALR 315.

Powers of voting trustees, 159 ALR 1067.

Construction, application, and effect of constitutional provisions or statutes relating to cumulative voting of stock for corporate directors, 43 ALR2d 1322.

Corporations: validity of charter provision for nonvoting common stock, 52 ALR3d 1131.

Validity of variations from one share-one vote rule under modern corporate law, 3 ALR4th 1204.

**14-2-729. Adjournment of meeting by majority of voting shares.**

The holders of a majority of the voting shares represented at a meeting, whether or not a quorum is present, may adjourn such meeting from time to time. (Code 1981, § 14-2-729, enacted by Ga. L. 1989, p. 946, § 26.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

**COMMENT**

Source: Former § 14-2-166(d).

This Code section was added in 1989 to preserve prior Georgia law that explicitly provides for adjournment for lack of a quorum. Repeated adjournments are permitted by this section.

**Cross-References**

Quorum of shareholders, see § 14-2-725.

**14-2-729.1. Inspectors.**

(a) A corporation having any shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association shall, and any other corporation may, appoint one or more inspectors to act at a meeting of shareholders and make a written report of the inspectors' determinations. Each inspector shall take and sign an oath faithfully to execute the duties of inspector with strict impartiality and according to the best of the inspector's ability.

(b) The inspectors shall:

- (1) Ascertain the number of shares outstanding and the voting power of each;
- (2) Determine the shares represented at a meeting;
- (3) Determine the validity of proxies and ballots;
- (4) Count all votes; and
- (5) Determine the result.

(c) An inspector may be an officer or employee of the corporation.  
(Code 1981, § 14-2-729.1, enacted by Ga. L. 1997, p. 1165, § 9.)

#### COMMENT

##### Note to 1997 Amendments

This section was added in 1997. Subsection (a) requires publicly held corporations meeting the definition of having shares listed on a national securities exchange to appoint inspectors to act at shareholders meetings, and to make a written report of the determinations made pursuant to subsection (b). The requirement of a written report is to facilitate judicial review of determinations made by inspectors.

Subsection (b) specifies the duties of inspectors of election. Normally, in making these determinations, the only facts before the inspectors should be appointment forms and electronic transmissions (or written evidence thereof), envelopes submitted with appointment forms, ballots and the regular books and records of the corporation, including lists of holders obtained from depositories. However, inspectors may consider other reliable information for the limited purpose of reconciling appointment forms, electronic transmissions, and ballots submitted by or on behalf of banks, brokers, their nominees, and similar persons which represent more votes than the holder of a proxy is authorized by the record owner to cast or more votes than the shareholder holds of record.

##### Cross-References

"National Securities Exchange" defined, see § 14-2-140. Officer, see § 14-2-840.

### PART 3

#### VOTING TRUSTS AND AGREEMENTS

##### 14-2-730. Voting trusts.

(a) One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust (which may include anything consistent with its purpose) and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses of all owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and deliver a copy of the list and agreement to the corporation's principal office.



(b) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name. A voting trust is valid for not more than ten years after its effective date unless extended under subsection (c) of this Code section.

(c) All or some of the parties to a voting trust may extend it for additional terms of not more than ten years each by signing an extension agreement and obtaining the voting trustee's written consent to the extension. An extension is valid for ten years from the date the first shareholder signs the extension agreement. The voting trustee must deliver copies of the extension agreement and list of beneficial owners to the corporation's principal office. An extension agreement binds only those parties signing it. (Code 1981, § 14-2-730, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 27.)

### COMMENT

Source: Model Act, § 7.30. There are no substantial changes from former law, § 14-2-121.

Subsection (a) provides a simple and direct procedure for the creation of an enforceable voting trust. This simple disclosure requirement eliminates the possibility that the voting trust may be used to create "secret, uncontrolled combinations of stockholders to acquire control of the corporation to the possible detriment of non-participating shareholders." *Lehrman v. Cohen*, 222 A.2d 800, 807 (Del. 1966).

The purpose of Section 14-2-730 is not to impose narrow or technical requirements on voting trusts. For example, a voting trust that by its terms extends beyond the 10-year maximum should be treated as being valid for the maximum permissible term of 10 years.

Following the long established pattern of earlier versions of the Model Act and the statutes of many states, a voting trust under subsection (b) is valid for a maximum of 10 years after its effective date.

Subsection (c) permits a voting trust to be extended for successive terms of 10 years commencing with the date the first shareholder signs the extension agreement. Shareholders who do not agree to an extension are entitled to the return of their shares upon the expiration of the original term.

#### Note to 1989 Amendment

Subsection (a) was amended to change "copies" to "a copy."

#### Cross-References

"Deliver" includes mail, see § 14-2-140. Delivery to corporation, see § 14-2-141. Inspection of shareholder lists, see § 14-2-720, Article 16, Part 1. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. "Shareholder" defined, see § 14-2-140. Shares held by nominees, see § 14-2-723. Voting agreements, see § 14-2-731.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 1124-1158.

**C.J.S.** — 18 C.J.S., Corporations, §§ 380-382.

**ALR.** — Corporation: right to reconsider vote in stockholders' or directors' meeting, 13 ALR 131.

Transactions incident to voting trusts as subject to tax imposed upon issuance or transfer of stock, 118 ALR 1292.

Powers of voting trustees, 159 ALR 1067.

Validity of provision of voting trust against transfer of beneficiary's interest, 11 ALR2d 1000.

Removal of trustee of voting trust, 34 ALR2d 1136.

Validity of voting trust or other similar agreement for control of voting power of corporate stock, 98 ALR2d 376.

Validity of voting trust created by will, 77 ALR4th 1194.

### 14-2-731. Shareholder agreements.

(a) Two or more shareholders may provide for the manner in which their shares will be voted by signing an agreement for that purpose. A voting agreement created under this Code section or under subsection (b), (f), or (g) of Code Section 14-2-920 is not subject to the provisions of Code Section 14-2-730.

(b) A voting agreement created under this Code section is specifically enforceable.

(c) The duration of any agreement created under this Code section shall not exceed 20 years. Failure to state a period of duration or stating a period of duration in excess of 20 years shall not invalidate the agreement, but in either case the period of duration shall be 20 years. Any such agreement may be renewed for a period not in excess of 20 years from the date of renewal by agreement of all the shareholders bound thereby at the date of renewal. (Code 1981, § 14-2-731, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 28; Ga. L. 2000, p. 1567, § 4.)

**Law reviews.** — For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, and as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For article, "The Dynamics Among Shareholders, Directors,

and Officers in Corporate Organizations Under Georgia Law," see 37 Mercer L. Rev. 79 (1985).

For note on 2000 amendment of O.C.G.A. § 14-2-731, see 17 Ga. St. U.L. Rev. 46 (2000).

### COMMENT

Source: Model Act, § 7.31. This replaces former § 14-2-120.

Subsection (a) explicitly recognizes agreements among two or more shareholders as to the voting of shares and makes clear that these agreements are not subject to the rules relating to a voting trust. These agreements are often referred to as "pooling agreements." The only formal requirements are that they be in writing and signed by all the participating shareholders; in other respects their validity is to be judged as any other contract. They are not subject to the 10-year limitation applicable to voting trusts. Subsection (a) of the Model Act was amended to change the first sentence from:

"Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose."



This was an attempt to clarify that a voting agreement may, by its terms, bind transferees of shares, subject, of course, to proper notice to bona fide purchasers for value under subsection (e) and Article 8 of the U.C.C.

Subsection (b) provides that voting agreements may be specifically enforceable. A voting agreement may provide its own enforcement mechanism, as by the appointment of a proxy to vote all shares subject to the agreement; the appointment may be made irrevocable under Section 14-2-722. If no enforcement mechanism is provided, a court may order specific enforcement of the agreement and order the votes cast as the agreement contemplates. This section recognizes that damages are not likely to be an appropriate remedy for breach of a voting agreement, and also avoids the result reached in *Ringling Bros. Barnum & Bailey Combined Shows v. Ringling*, 53 A.2d 441 (Del. 1947), where the court held that the appropriate remedy to enforce a pooling agreement was to refuse to permit any voting of the breaching party's shares.

Subsections (c)-(f) preserve the approach of former § 14-2-120, and are designed to allow shareholders, by agreement, to obtain the flexibility of the Close Corporation article (Article 9) without electing statutory close corporation status.

Subsection (c) provides that no agreement in a non-publicly held corporation is invalid as an attempt to restrict the discretion of the board of directors. The definition of a publicly held corporation is broader than in former law, including not only those corporations whose shares are "generally traded," but also those that are "regularly quoted" in the pink sheets by securities dealers, regardless of the volume or regularity of trading activity. The language of former law has also been broadened to include provisions found in Code Section 14-2-920, dealing with statutory close corporations, by adding the phrase, "on the ground that it eliminates a board of directors, authorizes director proxies or weighted voting rights for directors, is an attempt to restrict the discretion or powers of the board of directors." This permits shareholder agreements to vary the usual corporate form in any way permitted for a statutory close corporation, and to deal with matters normally within the powers of directors, as long as no harm is brought or threatened to non-signing shareholders or third parties, such as creditors.

Subsection (d) provides that the duration of voting agreements is limited to 20 years, and where the agreement fails to specify a duration, the default rule is 20 years.

Subsection (e) provides that transferees are only bound if on notice of the voting agreement, which can be provided with a legend on the certificate.

Subsection (f) states that where a voting agreement covers powers normally exercised by the board, the directors are relieved of liability, and corresponding liability is imposed on the shareholders assenting to the acts taken.

Subsections (g) and (h) are taken from Code Section 14-2-920(f) and (g), which governs electing statutory close corporations, and are intended to apply the same rules to shareholder agreements concerning limiting or eliminating the board of directors for all corporations.

#### **Note to 1989 Amendment**

Subsection (c) was amended to replace "between" with "among." Subsection (e) was amended by adding, at the end of the subsection, the phrase, "or upon the written statement required for shares without certificates by Code Section 14-2-626(b)." This corrects the earlier omission of any reference to the procedure for giving notice with respect to certificateless shares, and is consistent with the notice required for share transfer restrictions under Code Section 14-2-627(b).

Subsection (e) was amended to provide a notice procedure for uncertificated shares. This notice parallels that contained in Code section 14-2-627(b) for share transfer restrictions.

The 1989 amendment changed subsection (f) to add "board of" prior to the first reference to "directors."

#### Note to 2000 Amendment

Source: Model Act, § 7.31. This Code section is based on the Model Act, § 7.31, which was revised subsequent to the enactment of former Code Section 14-2-731. Consistent with the revised Model Act, former subsections 14-2-731(c)-(h), concerning shareholder agreements creating alternative forms of corporate governance, are now dealt with in Code Section 14-2-732.

Subsection (c) differs from Model Act § 7.31 in that it retains the duration limitations for voting agreements that were found in former Code Section 14-2-731(d). Under subsection (c), the maximum duration for any voting agreement is 20 years. A voting agreement may provide for a lesser term, but if the agreement states a term greater than 20 years, or no term at all, the agreement is still valid, and the duration will automatically be 20 years. Model Act § 7.31 does not limit the term for a voting agreement.

#### Cross-References

Agreements among shareholders of close corporations, see § 14-2-920. Duties of board of directors, see § 14-2-801. Irrevocable proxies, see § 14-2-722. Shareholder agreements, see § 14-2-732. Voting trust, see § 14-2-730.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-120, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Divesting control of fiscal and credit policy of close corporation.** — Nothing in Georgia law renders it unlawful for the shareholders of a close corporation, who are also the

directors and officers of the corporation, to divest themselves of ultimate control over the fiscal and credit policy of the corporation. To the contrary, this type of arrangement is expressly sanctioned by subsection (c) of this section. *Walton Motor Sales, Inc. v. Ross*, 736 F.2d 1449 (11th Cir. 1984) (decided under former § 14-2-120).

**Cited in** *Givens v. Spencer*, 232 Ga. 806, 209 S.E.2d 157 (1974).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 1112-1123.

**C.J.S.** — 18 C.J.S., Corporations, § 379.

**ALR.** — Corporation: right to reconsider vote in stockholders' or directors' meeting, 13 ALR 131.

Validity and effect of agreement controlling the vote of corporate stock, 45 ALR2d 799.

#### 14-2-732. Shareholder agreements.

(a) An agreement among the shareholders of a corporation that complies with this Code section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Code in that it:

(1) Eliminates the board of directors or restricts the discretion or powers of the board of directors;



(2) Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations of Code Section 14-2-640;

(3) Establishes the directors or officers of the corporation, or their terms of office or manner of selection or removal;

(4) Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(5) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation or among any of them;

(6) Transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(7) Requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or

(8) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors, and the corporation, or among any of them, and is not contrary to public policy.

(b) An agreement authorized by this Code section shall be:

(1) Set forth:

(A) In the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or

(B) In a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;

(2) Subject to amendment only by:

(A) An amendment to the articles of incorporation or bylaws approved by all persons who are shareholders at the time of the amendment; or

(B) An agreement in writing by all persons who are shareholders at the time of the amendment, unless the agreement provides that it may be amended by less than all the shareholders; and

(3) Valid for no more than 20 years. Failure to state a period of duration or stating a period of duration in excess of 20 years shall not invalidate the agreement, but in either case the period of duration shall be 20 years. Any such agreement may be renewed for a period not in excess of 20 years from the date of renewal by agreement of all the shareholders at the date of renewal.

(c) The existence of an agreement authorized by this Code section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by subsection (b) of Code Section 14-2-626. If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of purchase of the shares. An action to enforce the right of rescission authorized by this subsection must be commenced within the earlier of 90 days after discovery of the existence of the agreement or two years after the time of purchase of the shares.

(d) An agreement authorized by this Code section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by securities dealers or brokers. If the agreement ceases to be effective for any reason, the board of directors may, if the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.

(e) An agreement authorized by this Code section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

(f) Except as provided in subsection (e) of this Code section, the existence or performance of an agreement authorized by this Code section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its perfor-



mance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(g) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this Code section if no shares have been issued when the agreement is made. (Code 1981, § 14-2-732, enacted by Ga. L. 2000, p. 1567, § 5; Ga. L. 2001, p. 4, § 14.)

**The 2001 amendment**, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, substituted “shareholder” for “shareholders” near the end of subsection (d).

**Law reviews.** — For note on 2000 amendment of O.C.G.A. § 14-2-732, see 17 Ga. St. U.L. Rev. 46 (2000).

### COMMENT

Source: Model Act, § 7.32. This Code section replaces former Code Section 14-2-731(c)-(h). This Code section is based on the Model Act § 7.32, which was adopted subsequent to the enactment of former Code Section 14-2-731.

This Code section is intended to add, within the context of the traditional corporate structure, legal certainty to shareholder agreements that embody various aspects of the business arrangement established by the shareholders to meet their business and personal needs. This Code section validates for nonpublicly held corporations various types of agreements among shareholders even when the agreements are inconsistent with the statutory norms otherwise contained in this Code.

This Code section varies from former Code Section 14-2-731(c)-(h) in that it allows nonpublicly held corporations a greater degree of flexibility by approving a wider breadth of shareholder agreements. Former Code Section 14-2-731(c)-(h) allowed for shareholder agreements that would eliminate the board of directors, authorize director proxies or weighted voting, restrict board power or discretion over business management as if it were a partnership, and arrange the relationships of shareholders in a manner that would be appropriate only between partners. Subsection (a) allows those types of agreements sanctioned by former Code Section 14-2-731 and also allows other types of agreements that generally restrict the discretion or powers of the board of directors; govern the authorization of distributions; establish who shall be a director or officer of the corporation, as well as the terms of office and manner of selection or removal for those positions; govern the use or transfer of property or services between the corporation and any shareholder, director, officer, or employee; transfer authority to exercise corporate powers, including deadlock resolution; and require the dissolution of the corporation upon shareholder request or the happening of a contingency.

Subsection (b)(3) differ from the Model Act in that it retains the duration limitations for shareholder agreements that were found in former Code Section 14-2-731(d). Under subsection (b)(3) the maximum duration for any shareholder agreement is 20 years. A shareholder agreement with a lesser term or no term at all will not be invalidated, but its duration will automatically be set for 20 years. Model Act § 7.32(b)(3) specifies no maximum duration for shareholder agreements and, in the event that no term is stated, the duration is set at 10 years.

The types of shareholder agreements sanctioned by this Code section require unanimous shareholder agreement (subsection (b)) and cease to be effective when the corporation becomes publicly held (subsection (d)). These provisions essentially adopt the interpretation of former Code Section 14-2-731(c) in Invacare Corp. v. Healthdyne

*Technologies, Inc.*, 968 F.Supp. 1578 (N.D. Ga. 1997), which held that the shareholders of a publicly held corporation cannot restrict the board of directors' powers or discretion (including the board's discretion as it relates to shareholders' rights plans) by amending the corporation's bylaws.

#### Cross-References

Form and content of certificates, see § 14-2-265. Shares without certificates, see § 14-2-626. Voting agreements, see § 14-2-731. Articles of incorporation, see § 14-2-202. Bylaws, see § 14-2-206. Amendment of articles of incorporation, see § 14-2-1001 et seq. Amendments of bylaws, see § 14-2-1020 et seq. Requirements for and duties of board of directors, see § 14-2-801.

### PART 4

#### DERIVATIVE PROCEEDINGS

**Cross references.** — Class actions, § 9-11-23.

**Law reviews.** — For article discussing liability of corporate directors, officers, and

shareholders under the Georgia Business Corporation Code, and as affected by provisions of the Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971).

#### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 2224, Code 1933, § 22-711, and § 14-2-123, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this part.

**Wrong by officers and directors is wrong done to corporation.** — Primarily the right to recover against defendants for a wrong was in the corporation itself, and not in its stockholders. The right to action against officers and directors to redress, or to recover damages for wrongs inflicted by them upon the corporation, is in the corporation and not in the stockholders. *Greenwood v. Greenblatt*, 173 Ga. 551, 161 S.E. 135 (1931) (decided under former Civil Code 1910, § 2224).

**Condition precedent to minority stockholder's suit in equity.** — The conditions precedent with which a minority stockholder must comply before proceeding on behalf of oneself and other stockholders against the corporation, its officers, and those participating therein, when the minority stockholders are injured thereby are that the petitioner had made an earnest effort to obtain redress at the hands of the directors and stockholders, or why this could not be done, or that it was not reasonable to require it.

*Greenwood v. Greenblatt*, 173 Ga. 551, 161 S.E. 135 (1931) (decided under former Civil Code 1910, § 2224).

It is a condition precedent to the maintenance of a suit in equity by a minority stockholder against the corporation and its officers that it be shown that the stockholder has made an earnest effort to obtain redress at the hands of the directors and stockholders, or why it could not be done, or that it was not reasonable to require it. *Peeples v. Peeples*, 193 Ga. 358, 18 S.E.2d 629 (1942); *Chalverus v. Wilson Mfg. Co.*, 212 Ga. 612, 94 S.E.2d 736 (1956) (decided under former Code 1933, § 22-711).

Petitioners standing upon the single statement that, under the circumstances, seeking redress at the hands of the directors or stockholders would have been impracticable and useless was not sufficient. *Peeples v. Southern Chem. Corp.*, 194 Ga. 388, 21 S.E.2d 698 (1942) (decided under former Code 1933, § 22-711).

**Minority stockholder's duty to seek protection within corporation first.** — It is the duty of a minority stockholder to seek protection within the corporation, and whatever complaint the stockholder may have the stockholder will not be allowed to assert it in a court of equity unless the petition shows that the stockholder has made an earnest



effort within the corporation, or shows why this could not be done, or that it would not be reasonable to require the stockholder to make such effort. *Peeples v. Southern Chem. Corp.*, 194 Ga. 388, 21 S.E.2d 698 (1942) (decided under former Code 1933, § 22-711).

**Estoppel.** — Nothing will call a court of equity into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing; and where stockholders in a corporation participate in the performance of an act, or acquiesce in and ratify the same, they are estopped to complain thereof in equity. *Chalverus v. Wilson Mfg. Co.*, 212 Ga. 612, 94 S.E.2d 736 (1956) (decided under former Code 1933, § 22-711).

**Cited in** *Strickland v. Crutcher*, 229 Ga.

310, 191 S.E.2d 55 (1972); *Pickett v. Paine*, 230 Ga. 786, 199 S.E.2d 223 (1973); *Davis v. Ben O'Callaghan Co.*, 238 Ga. 218, 232 S.E.2d 53 (1977); *Burnette v. Southern Consol. Inns, Inc.*, 240 Ga. 98, 239 S.E.2d 513 (1977); *Kirk v. First Nat'l Bank*, 439 F. Supp. 1141 (M.D. Ga. 1977); *Comolli v. Comolli*, 241 Ga. 471, 246 S.E.2d 278 (1978); *Rose Hall, Ltd. v. Holiday Inns, Inc.*, 146 Ga. App. 709, 247 S.E.2d 173 (1978); *Hall v. Churchwell's, Inc.*, 243 Ga. 852, 257 S.E.2d 272 (1979); *Hasty v. Randall*, 152 Ga. App. 365, 262 S.E.2d 626 (1979); *Sherrer v. Hale*, 248 Ga. 793, 285 S.E.2d 714 (1982); *Computer Maintenance Corp. v. Tilley*, 172 Ga. App. 220, 322 S.E.2d 533 (1984); *Kenney v. Don-Ra, Inc.*, 178 Ga. App. 492, 343 S.E.2d 779 (1986); *Nicholson v. Harris*, 179 Ga. App. 35, 345 S.E.2d 63 (1986).

#### RESEARCH REFERENCES

**ALR.** — Shares of corporate stock as within statute enabling assignee to maintain action in his own name, 23 ALR 1322.

Refusal to deal with corporation as giving stockholder right of action, 59 ALR 1099.

Motive as affecting stockholders' right to maintain suit against corporation or officer, other than to inspect books, 67 ALR 1470.

Right as against corporation of stockholder who surrenders part of his stock in reliance upon agreement by other stockholders to do the same which they fail to carry out, 74 ALR 1377.

Laches of stockholders in attacking sale of corporate assets, 70 ALR 53.

Right to recover back amount paid on an illegal or unauthorized assessment on corporate stock, 131 ALR 138.

Proceeding by stockholder in behalf of corporation for relief from judgment taken against it through fraud of officers or directors, 135 ALR 838.

Stockholder's right to maintain (personal) action against third person as affected by corporation's right of action for the same wrong, 167 ALR 279.

Dissolved corporation as an indispensable party to a stockholders' derivative action, 172 ALR 691.

Estoppel of stockholder to recover back or to secure restoration of compensation of corporate officers claimed to be exorbitant or unauthorized, 16 ALR2d 467.

Application to pending action or existing cause of action of statute regulating stockholders' actions, 32 ALR2d 851.

Diversity of citizenship, for purposes of federal jurisdiction, in stockholders' derivative action, 68 ALR2d 824.

Intervention by other stockholders in stockholders' derivative action, 69 ALR2d 562.

Maintenance of second or successive stockholder's derivative action, 70 ALR2d 1305.

Communications by corporation as privileged in stockholders' action, 34 ALR3d 1106.

Dominant shareholder's accountability to minority for profit, bonus, or the like, received on sale of stock to outsiders, 38 ALR3d 738.

Test in stockholder's actions as to reasonableness of compensation of corporate officers who as directors determine own compensation, 53 ALR3d 358.

Allowance of punitive damages in stockholder's derivative action, 67 ALR3d 350.

What business opportunities are in "line of business" of corporation for purposes of determining whether a corporate opportunity was presented, 77 ALR3d 961.

Right to jury trial in stockholder's derivative action, 32 ALR4th 141.

**14-2-740. Part definitions.**

As used in this part, the term:

(1) "Derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in Code Section 14-2-747, in the right of a foreign corporation.

(2) "Shareholder" includes a beneficial owner whose shares are held in a voting trust or held by a nominee on the owner's behalf. (Code 1981, § 14-2-740, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "The Development of the Shareholder's Direct Action — Damage Remedy," see 28 Ga. St. B.J. 195 (1992).

**COMMENT**

Source: Model Act, Part 4 (under consideration, 1987). The proposals of the ABA Committee on Corporate Laws were ultimately published, after further revision, as Changes in the Model Business Corporation Act — Amendments Pertaining to Derivative Proceedings, 44 Bus. Law. 543 (1989).

The definition of "derivative proceeding" makes it clear that the part applies to foreign corporations only to the extent provided in Section 14-2-747. Section 14-2-747 provides that the law of the jurisdiction of incorporation governs except for Sections 14-2-743 (stay of proceedings), 14-2-745 (discontinuance or settlement) and 14-2-746 (payment of expenses). See the Comment to Section 14-2-747.

The definition of "shareholder," which applies only to Part 4, includes all beneficial owners and therefore goes beyond the definition in Section 14-2-140, which includes only recordholders and beneficial owners who are certified by a nominee pursuant to the procedure specified in Section 14-2-723. In the context of Part 4, beneficial owner means a person having a direct economic interest in the shares. The definition is not intended to adopt the broad definition of beneficial ownership in SEC Rule 13d-2 under the Securities Exchange Act of 1934 which includes persons with the right to vote or dispose of the shares even though they have no economic interest in them. Similar definitions are found in Section 14-2-1301 (dissenters' rights) and Section 14-2-1602(g) (inspection of records by a shareholder).

Subsection (2) defines "shareholder" so that the plaintiff may be either a registered or beneficial owner of shares held by a nominee in his behalf. Former Georgia law required derivative actions to be brought by a "shareholder of record," in § 14-2-123(b). This limiting requirement was dropped in light of the widespread use of street name or nominee ownership of shares. Subsection (2) expands the right to bring derivative actions to include voting trust certificate holders, who could not formerly bring such actions in Georgia. Former § 14-2-123(b)(3) only permitted former voting trust certificate holders to sue, if they were certificate holders at the time of the alleged wrong; but they must be holders of record in order to bring suit.

**Cross-References**

Beneficial owner treated as record owner, see § 14-2-723. "Domestic corporation" defined, see § 14-2-140. "Foreign corporation" defined, see § 14-2-140. "Proceeding" defined, see § 14-2-140. "Shareholder" defined, see § 14-2-140. Voting trusts, see § 14-2-730.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 735. 19 Am. Jur. 2d, Corporations, §§ 2250, 2340-2352.

**C.J.S.** — 18 C.J.S., Corporations, §§ 305, 397, 398.

**ALR.** — Causation in private civil actions

by minority shareholders under proxy provisions of § 14 (a) of the Securities Exchange Act of 1934 (15 USCS § 78n (a)) and Securities Exchange Act (SEC) Rules thereunder — Post Virginia bankshares, 137 ALR Fed 293.

**14-2-741. Standing.**

A shareholder may not commence or maintain a derivative proceeding unless the shareholder:

(1) Was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time; and

(2) Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation. (Code 1981, § 14-2-741, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 29.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

## COMMENT

Source: Model Act, § 7.41 (under consideration, 1987). This replaces provisions formerly found in § 14-2-123(b). It eliminates the rule of former § 14-2-153(b), that permitted such actions to be brought by a receiver, trustee in bankruptcy, officer, director, or judgment creditor. There was no counterpart in former law to subsection (b).

Former Georgia law, § 14-2-123(b), the Model Act, and the statutes of many states have long imposed a "contemporaneous ownership" rule, i.e., the plaintiff must have been an owner of shares at the time of the transaction in question. The decision to retain the contemporaneous ownership rule in Section 14-2-741(1) was based primarily on the view that it was just, in that it prevents the purchase of litigation. It is also simple, clear, and easy to apply. Section 14-2-741 requires the plaintiff to be a shareholder and therefore does not permit creditors or holders of options, warrants, or conversion rights to commence a derivative proceeding.

Section 14-2-741(2) follows the requirement of Federal Rule of Civil Procedure 23.1 with the exception that the plaintiff must fairly and adequately represent the interests of the corporation rather than shareholders similarly situated as provided in the Rule. The reference to the corporation in Section 14-2-741(2) more properly reflects the nature of the derivative suit. If a plaintiff no longer has standing, courts have in a number of instances provided an opportunity for one or more other shareholders to intervene.

The introductory language of Section 14-2-741 refers both to the commencement and maintenance of the proceeding to make it clear that the proceeding should be dismissed if, after commencement, the plaintiff ceases to be a fair and adequate

representative. This would occur, for example, if the plaintiff should sell all of the shares owned during the litigation with the result that the plaintiff would no longer have any economic interest in the suit. The requirement of ownership at commencement of the action preserves existing Georgia law, set out in § 14-2-123(b). *Haldi v. Continental Inv. Corp.*, 50 F.R.D. 275 (N.D.Ga. 1970). Former law did not address the issue of continuing ownership. It did, however, require class plaintiffs to be fair and adequate representatives of the class, under § 9-11-23(a).

The reference in former § 14-2-123(b)(1) to "the transaction of which he complains" has been changed to "act or omission" since the grounds for a derivative proceeding may not be the result of a transaction as such.

#### Note to 1989 Amendment

The 1989 amendment changed the introductory clause to substitute "shareholder" for "person" in order to clarify the limited group of claimants with standing to bring derivative actions, and to refer to the definition in section 14-2-740.

#### Cross-References

Class actions generally, see § 9-11-23. Procedures for derivative actions, see § 9-11-23(b). "Shareholder" defined, see § 14-2-740.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 22-615 and 22-711 and former Code Section 14-2-123, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Only shareholder when alleged wrongs occurred may sue.** — In a derivative action brought by shareholders, the complaint as originally filed contained an allegation that plaintiff was a shareholder of the corporation at the time of the complained of transactions, but that allegation was deleted when the amended complaint was filed so that it alleged merely that plaintiff was a shareholder at the time the amended complaint was filed. This does not meet the requirements of Georgia law. Absent a substantial allegation that plaintiff was a shareholder at the time the alleged transgressions occurred, plaintiff cannot maintain such an action. *Haldi v. Continental Inv. Corp.*, 50 F.R.D. 275 (N.D. Ga. 1970) (decided under former Code 1933, § 22-615).

**Direct claims distinguished.** — Outside the context of a close corporation, a shareholder must be injured in a way which is different from the other shareholders or independently of the corporation to have standing to assert a direct action. *Grace Bros. v. Farley Indus., Inc.*, 264 Ga. 817, 450 S.E.2d 814 (1994).

**Owner of equitable title to stock was not prevented by former Code 1933, § 22-711 (see O.C.G.A. § 14-2-741) from maintaining suit which sought to protect stock in which that person had such an ownership or interest from impairment or loss.** *Hurt v. Cotton States Fertilizer Co.*, 145 F.2d 293 (5th Cir. 1944), cert. denied, 324 U.S. 844, 65 S. Ct. 679, 89 L. Ed. 1406 (1945) (decided under former Code 1933, § 22-711).

**Rights of pledgee of stock.** — A pledgee of corporate stock has an interest which the pledgee may protect and preserve, and the rights of a pledgee are essentially the same as those of the owner of stock. *Hurt v. Cotton States Fertilizer Co.*, 145 F.2d 293 (5th Cir. 1944), cert. denied, 324 U.S. 844, 65 S. Ct. 679, 89 L. Ed. 1406 (1945) (decided under former Code 1933, § 22-711).

**A former shareholder in a merged corporation has no standing to maintain a shareholder's derivative action.** *Grace Bros. v. Farley Indus., Inc.*, 264 Ga. 817, 450 S.E.2d 814 (1994).

**Recovery limited for shareholder in misappropriation action.** — Except for costs and attorney fees, complaining shareholder will not be allowed to recover directly in an action for misappropriation and waste of corporate assets by a director or officer of a corporation. *Pickett v. Paine*, 230 Ga. 786, 199 S.E.2d 223 (1973) (decided under former Code 1933, § 22-615).



**Shareholder may only bring a derivative suit** when seeking to recover misappropriated corporate funds. *Thomas v. Dickson*, 250 Ga. 772, 301 S.E.2d 49 (1983) (decided under former § 14-2-123).

**Derivative action proper if plaintiff is sole injured shareholder.** — Where plaintiff was sole injured shareholder and where reasons underlying general rule limiting shareholders to derivative suits did not exist in the case, plaintiff-shareholder was properly allowed to bring direct action. *Thomas v. Dickson*, 250 Ga. 772, 301 S.E.2d 49 (1983) (decided under former § 14-2-123).

Former subsection (d) of this section is a statute to which O.C.G.A. § 9-11-41(a) is subject; thus, plaintiff's attempt to dismiss shareholder's derivative suit will be ineffec-

tive where no approval of trial court was sought prior to attempted dismissal. *Reese v. Frazier*, 158 Ga. App. 237, 279 S.E.2d 529 (1981) (decided under former Code 1933, § 22-615).

**Standing not affected by filing derivative and direct claims.** — The standing of a corporate shareholder as an adequate representative of the interests of the corporation to bring derivative claims against an accounting firm that handled the corporation's business affairs was not affected merely because it filed both a direct and derivative claim against the defendants. *Williams v. Service Corp. Int'l*, 218 Ga. App. 10, 459 S.E.2d 621 (1995).

**Cited in** *Dunn v. Ceccarelli*, 239 Ga. App. 687, 521 S.E.2d 237 (1999).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2340, 2353.

**C.J.S.** — 18 C.J.S., Corporations, §§ 402-404.

**ALR.** — Laches as affecting right of corporation or its stockholders to relief against directors for violations of trust, 10 ALR 370.

Right of stockholder to maintain derivative action based upon mismanagement or misfeasance by officers or directors prior to his acquisition of stock, 148 ALR 1090.

Rights of stockholder of one corporation

to maintain derivative action in right of another corporation stock of which is owned by the former corporation ("double derivative suit"), 154 ALR 1295.

Right of former stockholder to maintain stockholder's suit, 168 ALR 906.

Ownership of stock at time cause of action arose as condition of stockholder's right to maintain nonderivative action, 172 ALR 512.

What law governs as to shareholder's right to maintain derivative action, 93 ALR2d 1354.

### 14-2-742. Demand.

A shareholder may not commence a derivative proceeding until:

(1) A written demand has been made upon the corporation to take suitable action; and

(2) Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90 day period. (Code 1981, § 14-2-742, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 7.42 (under consideration, 1987). This replaces former § 14-2-123(c), which merely required the complaint to allege with particularity plaintiff's efforts to secure the initiation of the action by the board of directors, or the reasons for not making that effort.

Section 14-2-742 requires a written demand on the corporation in all cases. The demand must be made at least 90 days before commencement of suit unless irreparable injury to the corporation would result, in which case the period may be shortened.

#### 1. Form of Demand.

Section 14-2-742 specifies only that the demand shall be in writing. The demand should, however, set forth the facts concerning share ownership and be sufficiently specific to apprise the corporation of the action so that the demand can be investigated. In keeping with the spirit of this section, the specificity of the demand should not become a new source of dilatory motions.

#### 2. Upon Whom Demand Should Be Made.

Section 14-2-742 states that demand shall be made upon the corporation. Reference is not made specifically to the board of directors as in previous versions of the Model Act, since there may be instances in which the taking of, or refusal to take, action would fall within the authority of an officer of the corporation, such as a decision to sue a third party for an injury to the corporation. Nevertheless, it is expected that in most cases the board of directors will be the appropriate body to review the demand.

The demand should be addressed to the board of directors, chief executive officer or corporate secretary of the corporation at its principal office to ensure that it reaches the appropriate person for review.

#### 3. The 90 Day Period.

Section 14-2-742(2) provides that the derivative proceeding may not be commenced until 90 days after demand has been made. The corporation may request counsel for the shareholder to delay filing suit until the investigation is completed or, if suit is commenced, the corporation can apply to the court for a stay under Section 14-2-743.

Two exceptions are provided to the 90 day waiting period. The first exception is the situation where the shareholder has been notified of the rejection of the demand prior to the end of the 90 days. The second exception is where irreparable injury to the corporation would otherwise result if the commencement of the proceeding is delayed for the 90 day period.

It should be noted that the shareholder bringing suit does not necessarily have to be the person making the demand. Only one demand need be made in order for the corporation to consider whether to take corrective action.

#### 4. Response by the Corporation.

There is no obligation on the part of the corporation to respond to the demand. However, if the corporation, after receiving the demand, decides to institute litigation or, after a derivative proceeding has commenced, decides to assume control of the litigation, the shareholder's right to commence or control the proceeding ends unless it can be shown that the corporation will not adequately pursue the matter.

#### Cross-References

Board of Directors, exercise of power, see § 14-2-801. "Derivative proceeding" defined, see § 14-2-740. Directors' conflicting interest transactions, see Article 8, Part 6. "Proceeding" defined, see § 14-2-140. "Shareholder" defined, see § 14-2-740.

### JUDICIAL DECISIONS

**Section is procedural only.** — O.C.G.A. § 14-2-742 has nothing to do with the merits of the shareholder's claim but only with a procedural prerequisite for asserting such a



claim. *McGregor v. Stachel*, 200 Ga. App. 324, 408 S.E.2d 118 (1991).

**Response to demand.** — Comment 4 of O.C.G.A. § 14-2-742 does not prohibit the commencement of a shareholder's derivative action once the corporation files suit, without regard to the type of action filed and without reference to whom is being sued. *McKoon v. Jones*, 214 Ga. App. 40, 447 S.E.2d 50 (1994).

A shareholder's right to pursue a derivative action against officers and directors of a corporation was not terminated when, in

response to the shareholder's demand that action be taken against the officers and directors, the corporation filed suit against its surety to recover on a fidelity bond. *McKoon v. Jones*, 214 Ga. App. 40, 447 S.E.2d 50 (1994).

**Waiver of waiting period.** — Trial court acted within its discretion in waiving the 90-day waiting period because the corporate president's sale of property was imminent. *Ebon Found., Inc. v. Oatman*, 269 Ga. 340, 498 S.E.2d 728 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2273.

**C.J.S.** — 18 C.J.S., Corporations, §§ 406-410, 412.

**ALR.** — Request that stockholders as a body sue directors as a condition of right of individual stockholders to bring the action in the interest of the corporation, 72 ALR 628.

Circumstances excusing demand upon

other shareholders which is otherwise prerequisite to bringing of stockholder's derivative suit on behalf of corporation, 48 ALR3d 595.

Negligence, nonfeasance, or ratification of wrongdoing as excusing demand on directors as prerequisite to bringing of stockholder's derivative suit on behalf of corporation, 99 ALR3d 1034.

### 14-2-743. Stay of proceedings.

If the corporation commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative proceeding for such period as the court deems appropriate. (Code 1981, § 14-2-743, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 30.)

### COMMENT

Source: Model Act, § 7.43 (under consideration, 1987). There was no counterpart in former Georgia law.

Section 14-2-743 provides that if the corporation undertakes an investigation, the court may in its discretion stay the proceeding for such period as the court deems appropriate. A stay might be granted if the complaint is filed 90 days after demand but the investigation of the demand has not been completed or if the corporation commences the investigation after the complaint has been filed, prior to the expiration of 90 days from demand alleging that irreparable injury will be incurred by delaying the filing of the action. In either case, it is expected that the court will monitor the course of investigation to ensure that it is proceeding expeditiously and in good faith.

#### Note to 1989 Amendment

The words "inquiry into" were substituted for "investigation of" to conform to the Model Act's proposed language.

#### Cross-References

"Derivative proceeding" defined, see § 14-2-740.

**14-2-744. Dismissal.**

(a) The court may dismiss a derivative proceeding if, on motion by the corporation, the court finds that one of the groups specified in subsection (b) of this Code section has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation shall have the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation.

(b) The determination in subsection (a) of this Code section shall be made by:

(1) A majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum;

(2) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum; or

(3) A panel of one or more independent persons appointed by the court upon motion by the corporation.

(c) None of the following shall by itself cause a director to be considered not independent for purposes of subsection (b) of this Code section:

(1) The nomination or election of the director by directors who are not independent;

(2) The naming of the director as a defendant in the derivative proceeding; or

(3) The fact that the director approved the action being challenged in the derivative proceeding so long as the director did not receive a personal benefit as a result of the action. (Code 1981, § 14-2-744, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For annual survey of law of business associations, see 43 Mercer L. Rev. 85 (1991).

For comment, "Deciding Who Should Decide to Dismiss Derivative Suits," see 39 Emory L.J. 937 (1990).

**COMMENT**

Source: Model Act, § 7.44 (under consideration, 1987). There was no counterpart in former Georgia law.

Neither the prior version of the Model Act nor former Georgia law expressly provided what happens when a board of directors properly rejects a demand to bring an action. Judicial decisions indicate that a derivative action should be dismissed under these circumstances. See *Aronson v. Lewis*, 473 A.2d 805 (Del. Supr. 1984).



Subsection (a) specifically provides that the proceeding may be dismissed if there is a proper determination that the maintenance of the proceeding is not in the best interests of the corporation. Where the Model Act provided that the court "shall dismiss" the suit, the Code substitutes "may dismiss." This reflects the ultimate power of the court to make determinations about the independence and good faith of the persons making the decision to dismiss. It apparently gives the court discretion in refusing to dismiss an action, regardless of whether the corporation has shown that the determination to dismiss was made in full compliance with subsection (a). This represents a change from the language recommended by the Revision Committee.

Subsection (a) requires, before dismissal, that the court find that the determination has been made by the appropriate persons in good faith after conducting a reasonable investigation upon which their conclusions are based. The burden is on the corporation to prove the good faith and reasonableness of the investigation as well as the independence of the persons making the determination if the determination is made by independent directors.

This provision represents a compromise between the two principal lines of cases in this area. In the first line of cases represented by *Auerbach v. Bennett*, 47 N.Y.2d 619, 419 N.Y.S.2d 920, 393 N.E.2d 994 (1979), the court held that judicial review should be limited to an analysis of the independence and good faith of the committee and the thoroughness of its investigation and that the burden of proof was on the plaintiff to show facts sufficient to require a trial on any material issue of fact. The second line, represented by *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. Supr. 1981), differed from the *Auerbach* test in three respects: (1) it is made clear that the burden is on the corporation to prove the independence, good faith, and reasonable investigation of the committee; (2) the court may examine not only the procedures followed but also the reasonableness of the bases for the committee's conclusions; and (3) the court may take a second step and determine, applying its own business judgment, whether the motion should be granted.

The Code does not clarify what grounds, beyond a determination made in good faith, after reasonable investigation, by a disinterested body, will be considered by a court. Consideration of whether the conclusion to dismiss was reasonably based would represent a middle ground between deference to the investigators and total displacement of their function. A subsequent Delaware decision has confirmed that the second step, exercising the court's own business judgment, is discretionary with the trial court. *Kaplan v. Wyatt*, 499 A.2d 1184 (Del. Supr. 1985).

Subsection (b) prescribes the manner in which the determination in subsection (a) is to be made. The subsection provides that the determination may be made by a majority vote of a quorum of independent directors if there is a quorum of independent directors, or by a committee of independent directors. These provisions parallel the mechanics for determining entitlement to indemnification in Section 14-2-855 of the Code except that clause (2) provides that the committee of independent directors shall be appointed by a vote of the independent directors only, rather than the entire board. In this respect this clause differs from Section 14-2-824 of the Code which requires the approval of at least a majority of a quorum of the entire board to take action. This approach has been taken to ameliorate to some degree the criticism in some cases that special litigation committees suffer from a structural bias because of their appointment by vote of non-independent directors. See *Hasan v. CleveTrust Realty Investors*, 729 F.2d 372, 376-77 (6th Cir. 1984).

The decisions that have examined the qualifications of members of special litigation committees have required that they be both "disinterested" in the sense of not having a personal interest in the transaction being challenged as opposed to a benefit which devolves upon the corporation or all shareholders generally, and "independent" in the

sense of not being influenced in favor of the defendants by reason of personal or other relationships. See *Aronson v. Lewis*, 473 A.2d 805, 812-16 (Del Supr. 1984). Only the word "independent" has been used in subsection (b) because this word necessarily also includes the requirement that a person have no interest in the transaction. The concept of an independent director is not intended to be limited to non-officer or "outside" directors but may in appropriate circumstances include directors who are also officers.

Subsection (b)(3) also provides for a determination by a panel of one or more independent persons appointed by the court, a procedure which has been adopted in Virginia. Stock Corporation Act Section 13.1-672D. The subsection provides for the appointment only upon motion by the corporation. This would not, however, prevent the court on its own initiative from appointing a special master pursuant to applicable rules of civil practice.

Although subsection (b)(2) requires a committee of at least two directors, subsection (b)(3) permits the appointment of only one person in recognition of the potentially increased costs to the corporation for the fees and expenses of an outside person.

Many of the special litigation committees involved in the reported cases consisted of independent directors who were elected after the alleged wrongful acts by the directors who were named as defendants in the action. Subsection (c)(1) makes it clear that the participation of non-independent directors or shareholders in the nomination or election of a new director shall not prevent the new director from being considered independent. Clauses (2) and (3) also confirm the decisions by a number of courts that the mere fact that a director has been named as a defendant or approved the action being challenged does not cause the director to be considered not independent.

#### Cross-References

"Derivative proceeding" defined, see § 14-2-740.

### JUDICIAL DECISIONS

**Delegation of authority.** — Under Georgia law, both before and after the adoption of the new Business Corporation Code effective July 1, 1989, special litigation committees were authorized, and committees had properly delegated authority to act to a board of

directors. Hence, the court did not err in dismissing a derivative proceeding based on a determination made by that committee. *Millsap v. American Family Corp.*, 208 Ga. App. 230, 430 S.E.2d 385 (1993).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2446.

**ALR.** — Propriety of termination of properly initiated derivative action by "independent committee" appointed by board of

directors whose actions (or inaction) are under attack, 22 ALR4th 1206.

#### 14-2-745. Discontinuance or settlement.

A derivative proceeding may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected. (Code 1981, § 14-2-745, enacted by Ga. L. 1988, p. 1070, § 1.)



## COMMENT

Source: Model Act, § 7.45 (under consideration, 1987). This replaces provisions formerly found in § 14-2-123(d).

Section 14-2-745 follows the Federal Rules of Civil Procedure, and the provisions of former Georgia law, and requires that all proposed settlements and discontinuances must receive judicial approval. This requirement seems a natural consequence of the proposition that a derivative suit is brought for the benefit of all shareholders and avoids many of the evils of the strike suit by preventing the individual shareholder-plaintiff from settling privately with the defendants.

Section 14-2-745 also requires notice to all affected shareholders if the court determines that the proposed settlement may substantially affect their interests. This provision permits the court to decide that no notice need be given if, in the court's judgment, the proceeding is frivolous or has become moot. This preserves the policy of former § 14-2-123(d). This section also makes a distinction between classes of shareholders, which is not in Federal Rule of Civil Procedure 23.1, is adapted from the New York and Michigan statutes. This procedure could be used, for example, to eliminate the costs of notices to preferred shareholders where the settlement does not have a substantial effect on their rights as a class, such as their rights to dividends or a liquidation preference.

Like former law, Section 14-2-745 does not address the issue of which party should bear the costs of giving this notice. That is a matter left to the discretion of the court reviewing the proposed settlement.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2445-2456.

**ALR.** — Settlement or compromise of asserted right of corporation pending a de-

rivative action to enforce it, 150 ALR 872.

Accountability of stockholder for money received upon settlement or discontinuance of derivative action, 169 ALR 946.

**14-2-746. Payment of expenses.**

On termination of the derivative proceeding the court may:

(1) Order the corporation to pay the plaintiff's reasonable expenses (including attorneys' fees) incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation; or

(2) Order the plaintiff to pay any defendant's reasonable expenses (including attorneys' fees) incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose. (Code 1981, § 14-2-746, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Model Act, § 7.46 (under consideration, 1987). This replaces provisions formerly found in § 14-2-123(e) & (f).

Section 14-2-746(1) is intended to be a codification of existing case law. See, e.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). It provides that the court may order the corporation to pay the plaintiff's reasonable expenses (including attorney's fees) if it

finds that the proceeding has resulted in a substantial benefit to the corporation. This preserves the approach of former law, § 14-2-123(e). The subsection requires that there be a "substantial" benefit to the corporation to prevent the plaintiff from proposing inconsequential changes in order to justify the payment of counsel fees. While the subsection does not specify the method for calculating attorneys' fees, it does require that the expenses be reasonable, which would include taking into account the amount or character of the benefit to the corporation. A corporation would not receive a substantial benefit from a monetary judgment in a derivative proceeding if it would be obligated to make payments to directors equal to the judgment pursuant to shareholder approved indemnification under Section 14-2-856.

Subsection (2) continues the approach of former § 14-2-123(f) and provides that on termination of a proceeding the court may require the complainant to pay the defendants' reasonable expenses, including attorneys' fees, if it finds that the proceeding "was commenced or maintained without reasonable cause or for an improper purpose." The phrase "for an improper purpose," has been added to parallel Federal Rule of Civil Procedure 11 as recently amended in order to prevent proceedings which may be brought to harass the corporation or its officers.

### Cross-References

Award of costs and attorneys' fees in appraisal proceedings, see § 14-2-1331.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-615 and former Code Section 14-2-123, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Rule of recovery for corporation** is well settled in stockholders' derivative suits and recovery "normally" goes to the corporation. *Schnorbach v. Fuqua*, 70 F.R.D. 424 (S.D. Ga. 1975) (decided under former Code 1933, § 22-615).

**Award of attorney's fees.** — While determination that action was brought without reasonable cause was necessary to support award of attorney's fees under former Code 1933, § 14-2-615 (see O.C.G.A. § 14-2-76), there was no need for a determination of the contrary to deny such an award. *Grizzard v. Petkas*, 155 Ga. App. 741, 272 S.E.2d 583 (1980) (decided under former Code 1933, § 22-615).

An award of attorneys' fees pursuant to former subsection (f) required a specific finding, and adequate underlying factual findings, that the derivative action was brought "without reasonable cause." *Rothenberg v. Security Mgt. Co.*, 736 F.2d 1470 (11th Cir. 1984) (decided under former § 14-2-123).

Former § 14-2-123 (see O.C.G.A. § 14-2-746) does not prevent a shareholder's recovery of costs and attorney fees directly from the corporate officers responsible for the misconduct giving rise to the derivative action. *Grizzard v. Petkas*, 173 Ga. App. 629, 327 S.E.2d 514 (1985) (decided under former § 14-2-123).

**Derivative plaintiff is not required to post security for costs.** *Oldfield v. Alston*, 77 F.R.D. 735 (N.D. Ga. 1978) (decided under former Code 1933, § 22-615).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2485-2495.

**ALR.** — Validity of statutory provision for attorneys' fees, 90 ALR 530.

Right of protective committee, its attor-

ney, or employee, representing stockholders, bondholders, or other creditors, to compensation for expenses and services, 115 ALR 559.

Attorneys' fees and other expenses inci-



dent to controversy respecting internal affairs of corporation as charge against the corporation, 152 ALR 909; 39 ALR2d 580.

Constitutionality, construction, and application of statutes requiring security for costs or expenses in case of stockholder's action in right of corporation, 159 ALR 978.

Amount of attorneys' compensation in

absence of contract or statute fixing amount, 57 ALR3d 475.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice-versa, 73 ALR3d 515.

Amount of attorneys' fees in matters involving commercial and general business activities, 23 ALR5th 241.

### 14-2-747. Applicability to foreign corporations.

In any derivative proceeding in the right of a foreign corporation, the matters covered by this part shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for Code Sections 14-2-743 and 14-2-745 and paragraph (2) of Code Section 14-2-746. (Code 1981, § 14-2-747, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 7.47 (under consideration, 1987). There was no counterpart in former Georgia law.

Section 14-2-747 clarifies the application of the provisions of Part 4 to foreign corporations. Under generally prevailing practice, a court will look to the choice-of-law rules of the forum state to determine which law shall apply. If the issue is "procedural," the law of the forum state will apply; if the issue is "substantive", relating to the internal affairs of the corporation, the law of the state of incorporation will apply. See, e.g., *Glazer v. Glazer*, 374 F.2d 390, 407 (5th Cir. 1967). Compare Restatement, Second, Conflict of Laws §§ 302, 303, 304, 306 and 309 (the local law of the state of incorporation will be applied except in the unusual case where, with respect to some particular issue, some other state has a more significant relationship under the principles stated in § 6 of the Restatement to the parties and the corporation or the transaction).

However, the distinction between what is procedural and what is substantive is not always clear. In view of these uncertainties, Section 14-2-747 sets forth a choice of law rule for foreign corporations. It provides, subject to three exceptions, that the matters covered by the part shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation.

The three exceptions are areas that are traditionally part of the forum's oversight of the litigation process: Section 14-2-743 dealing with the ability of the court to stay proceedings; Section 14-2-745 setting forth the procedure for settling a proceeding; and Section 14-2-746 providing for the assessment of reasonable expenses (including attorney's fees) in certain situations.

#### Cross-References

Foreign corporation transacting business without authority: defense of proceedings, see § 14-2-1502. Maintenance of proceedings, see § 14-2-1502. "Foreign corporation" defined, see § 14-2-140. Service of process on foreign corporation, see § 14-2-1510. Service on foreign corporation with revoked certificate of authority, see § 14-2-1531. Service on withdrawn foreign corporation, see § 14-2-1520.

## ARTICLE 8

## DIRECTORS AND OFFICERS

**Law reviews.** — For article, "Comparison of Features of Old and New Business Corporation Laws Relating to Domestic Corporations," see 5 Ga. St. B.J. 13 (1968). For article, "Corporate Social-Reform, the Business Judgment Rule and Other Considerations," see 20 Ga. L. Rev. 565 (1986). For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988). For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989).

For comment, "Dead Hand Poison Pills: Will Georgia Corporations Continue to Issue a Lethal Dose?," see 16 Ga. St. U.L. Rev. 665 (2000).

For note discussing the need for revision of director and officer liability under Blue Sky Laws, see 5 Ga. L. Rev. 128 (1971). For note, "Exclusionary Tender Offers: A Reasonably Formulated Takeover Defense or a Discriminatory Attempt to Retain Control?," see 20 Ga. L. Rev. 627 (1986).

## RESEARCH REFERENCES

**ALR.** — Right of corporation to act as relator in information in the nature of quo warranto, 1 ALR 197.

Duty of promoter to account for proceeds of sale of stock issued to him, 43 ALR 1363.

Liability of promoter to corporation on account of profits as affected by fact that all outstanding stock was held by promoter or by persons who knew the facts, 85 ALR 1262.

Validity, construction, and effect of clause in obligation of corporation that it is issued

without recourse against officers or directors, 87 ALR 1052; 97 ALR 1157.

Authority to employ attorney for corporation, 130 ALR 894.

Validity of security for contemporaneous loan to corporation by officer, director, or stockholder, 31 ALR2d 663.

In personam jurisdiction over nonresident director of forum corporation under long-arm statutes, 100 ALR3d 1108.

## PART 1

## BOARD OF DIRECTORS

**14-2-801. Requirement for and duties of board of directors.**

(a) Each corporation must have a board of directors, except as provided in Article 9 of this chapter or in a written agreement meeting the requirements of Code Section 14-2-732.

(b) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation, in rights, options, or warrants permitted by paragraph (2) of subsection (d) of Code Section 14-2-624, or in an agreement among the shareholders meeting the requirements of Code Section 14-2-732.

(c) No limitation upon the authority of the directors, whether contained in the articles of incorporation or an agreement among the shareholders meeting the requirements of Code Section 14-2-732, shall be effective



against persons, other than shareholders and directors, who are without actual knowledge of the limitation. (Code 1981, § 14-2-801, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2000, p. 1567, § 6; Ga. L. 2001, p. 4, § 14.)

**The 2001 amendment**, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, inserted a comma following "Code Section 14-2-732" in subsection (c).

**Cross references.** — Qualifications for officers, directors, and stockholders of pharmacy corporations, § 26-4-101.

**Law reviews.** — For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973).

For note on 2000 amendment of O.C.G.A. § 14-2-801, see 17 Ga. St. U.L. Rev. 46 (2000).

For comment on the survivability of the dead hand provision in corporate America, see 48 Emory L.J. 991 (1999). For comment, "Poison Pills: Are Dead Hand Pills Dead in Georgia?," see 50 Mercer L. Rev. 809 (1999).

### COMMENT

Source: Model Act, § 8.01. This replaces provisions formerly found in § 14-2-140.

Subsection (a) varies from the Model Act. It requires that every corporation have a board of directors unless otherwise provided in accordance with Article 9 (governing statutory close corporations) or as provided in a writing, which may be the articles of incorporation or bylaws or a shareholders' agreement, approved in each case by all of the shareholders. The purpose is to provide corporations that do not elect statutory close corporation status with as much flexibility in managing their business as those that do elect. The reference to Section 14-2-731 limits such arrangements to corporations that do not have shares regularly traded in public securities markets.

Subsection (b) states that if a corporation has a board of directors "all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of," the board of directors. The quoted language is chosen to reflect the role and functions of boards of directors in all varieties of corporations. In a small corporation and in some larger corporations where the board of directors is composed entirely of persons actively involved in the management of the corporate business, it may be reasonable to describe management as being "by" the board of directors. But a different model may be appropriate for the boards of directors of publicly held corporations, which usually include individuals not actively involved in management. In these corporations the appropriate model may be that the business and affairs be managed "under the direction of" the board of directors, since the role of the board of directors consists principally of the formulation of major management policy with little or no direct involvement in day-to-day management.

The Model Act recognized that corporate powers could be limited in the articles of incorporation; the Code has expanded this to include bylaws, if approved by the shareholders, and shareholder agreements as ways in which board authority may be limited. This is intended to preserve the approach of former § 14-2-140. While the Model Act approach is designed to require that such limitations be placed in articles of incorporation, which are public documents, the Code permits them in private documents as well, subject, of course, to the apparent authority of the board to bind the corporation when dealing with third parties. Subsection (b) should be read in conjunction with Section 14-2-731(c), which provides that if either articles of incorporation, bylaws or a separate agreement restrict the power of the board to manage the business, it must be approved by all of the shareholders in order to be insulated from attack as an attempt to manage the corporation as if it were a partnership. If such arrangements are adopted in the initial articles of incorporation or bylaws, or in a

subscription agreement among all prospective shareholders, all shareholders who subsequently purchased originally issued shares with the notice required by Section 14-2-731(e) would be deemed to have assented to such arrangements.

Subsection (b) should also be read in the context of subsection (c), which follows former § 14-2-140(b), which codified the apparent authority of the board in dealing with third parties not on notice of restrictions on the board's authority.

The language of the Model Act in subsection (c), limiting displacement of the board's authority to close corporations with less than 50 shareholders, was stricken in its entirety. The only limit is that the corporation not have its shares traded in public securities markets, as previously mentioned. Similarly, for corporations with fewer than 50 shareholders, election of statutory Close Corporation status does not provide the exclusive means for limiting or transferring board authority. See *Zion v. Kurtz*, 50 N.Y.2d 92, 405 N.E.2d 681 (Ct. App. 1980).

Any arrangement under Section 14-2-801 may also be established by a statutory close corporation election under Section 14-2-920.

#### Note to 2000 Amendment

Source: Model Act, § 8.01. Subsections (a) and (b) of this Code section are based on the Model Act § 8.01, which was revised subsequent to the enactment of former Code Section 14-2-801.

Subsection 14-2-801(b) replaces the reference to shareholder approved bylaws with a reference to an agreement meeting the requirements of new Code Section 14-2-732. See Comment to Code Section 14-2-732. Also, a reference to new Code subsection 14-2-624(d)(2) has been added because that subsection authorizes provisions in a rights agreement or "poison pill" which restrict the power of future directors to redeem, modify or terminate such rights, subject to certain time limitations.

Subsection (c) is based on the existing Code Section 14-2-801(c), but the reference to bylaws is replaced by the reference to an agreement authorized under Code Section 14-2-732, to be consistent with revised Code Section 14-2-801(b).

#### Cross-References

Amendment of articles of incorporation, see Article 10, Part 1. Articles of incorporation, see § 14-2-202. Close corporations, see Article 9. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Directors' conflicting interest transactions, see § 14-2-860 et seq. Indemnification, see § 14-2-850 et seq. Number of shareholders, see § 14-2-142. Officers, see §§ 14-2-840 & 14-2-841. Shareholder agreements, see § 14-2-732. Shareholder agreements restricting board powers, see §§ 14-2-731 and 14-2-920.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-140, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Divesting control of fiscal and credit policy of close corporation.** — Nothing in Georgia law renders it unlawful for the shareholders of a close corporation, who are also the directors and officers of the corporation, to divest themselves of ultimate control over

the fiscal and credit policy of the corporation. To the contrary, this type of arrangement is expressly sanctioned by § 14-2-120(b) (now see subsection (c) of § 14-2-731). *Walton Motor Sales, Inc. v. Ross*, 736 F.2d 1449 (11th Cir. 1984) (decided under former § 14-2-140).

**Board of directors had authority to adopt a shareholders rights plan with a continuing director feature to protect against hostile takeovers without amendment of the articles of incorporation or bylaws.** *Invacare Corp. v.*



Healthdyne Technologies, Inc., 968 F. Supp. 1578 (N.D. Ga. 1997).

Cited in Tallant v. Executive Equities, Inc., 232 Ga. 807, 209 S.E.2d 159 (1974).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1345, 1483-1486.

**C.J.S.** — 19 C.J.S., Corporations, §§ 460, 461.

**ALR.** — Power of board of directors to rescind or modify its action in calling stock for redemption or retirement, 148 ALR 839.

Test in stockholder's actions as to reasonableness of compensation of corporate officers who as directors determine own compensation, 53 ALR3d 358.

Validity of stockholders' agreement allegedly infringing on directors' management powers — modern cases, 15 ALR4th 1078.

### 14-2-802. Qualifications of directors.

Directors shall be natural persons who are 18 years of age or older but need not be residents of this state nor shareholders of the corporation unless the articles of incorporation so require. The articles of incorporation or bylaws may prescribe additional qualifications for directors. (Code 1981, § 14-2-802, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Former § 14-2-140(c).

The Model Act provisions eliminated all mandatory qualifications for directors. The Code preserves the former Georgia approach of § 14-2-140(c), which only provided for natural persons of legal age. This resolves questions of legal capacity.

#### Cross-References

Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Bylaws, see § 14-2-206 and Article 10, Part 2. Close corporations, see Article 9.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1354, 1355.

**ALR.** — Character or ability as a qualification of membership of board of trustees or directors of a private corporation, 30 ALR 248.

Eligibility as corporate director of one who was not stockholder in fact, or not stockholder of record, at time of election,

but who afterwards became such, 130 ALR 156.

Validity, construction, and effect of statute or corporate regulation requiring deposit of stock of corporation as condition of qualification of director, 148 ALR 1164.

Validity of transfer or contract incident to transfer of corporate stock to qualify transferee as director or officer, 167 ALR 387.

### 14-2-803. Number and election of directors.

(a) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) The articles of incorporation or bylaws may authorize the shareholders or the board of directors to fix or change the number of directors or

may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the shareholders or, if the articles or bylaws so provide, by the board of directors.

(c) In the case of a corporation having cumulative voting:

(1) Any amendment of the bylaws decreasing the number or minimum number of directors must be adopted by the shareholders; and

(2) No amendment of either the articles of incorporation or the bylaws decreasing the number or minimum number of directors shall be effective when the number of shares voting against the proposal for decrease would be sufficient to elect a director if voted cumulatively at an annual election.

(d) After initial election or appointment pursuant to Code Section 14-2-205, directors are elected at each annual shareholders' meeting unless their terms are staggered under Code Section 14-2-806. (Code 1981, § 14-2-803, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 31.)

**Law reviews.** — For article, "The Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under Georgia Law," see 37 Mercer L. Rev. 79 (1985).

#### COMMENT

Source: Model Act, § 8.03. This replaces provisions formerly found in § 14-2-141.

Section 14-2-803 prescribes rules for the determination of the size of the board of directors of corporations that have not dispensed with a board of directors under Section 14-2-801(b), and for changes in the size of the board of directors once it is established.

Subsection (a) provides explicit permission for corporations to have any number of directors. Former § 14-2-141 required a board of directors to consist of at least three directors, unless there were fewer than three shareholders. A board of directors consisting of one or more individuals may be appropriate for corporations with more than two shareholders where in fact the full power of management is vested in only one or two persons.

The Model Act's limits on the power of the board to change its own size, in § 8.03(b) were eliminated, to provide maximum flexibility. Subsection (b) represents a modification of Model Act § 8.03(c) which limited authorization of a variable range to the articles of incorporation. Consistent with the Code's general approach, this is expanded to include the bylaws. The shareholders can provide for limits on the power of the board to change its own size, either by so providing in the articles of incorporation or a bylaw that may only be repealed or amended by the shareholders, under Section 14-2-1020.

Subsection (c) is also an addition to the Model Act, and restores the protection of cumulative voting rights formerly provided by § 14-2-141(b).

Subsection (d) makes it clear that all directors are elected annually unless the terms of members of the board are staggered. See Section 14-2-805 and its Comment.



### Note to 1989 Amendment

The 1989 amendment changed subsection (b) to provide a default rule where articles or bylaws provide for a variable range size for the board but fail to provide whether the board or the shareholders shall specify the size of the board from time to time, within the range. The default rule, that allows shareholders to set the size of the board, reflects the mandatory rule of former law, O.C.G.A. § 14-2-141(a) (Supp. 1988). Thus corporations that are satisfied with the former rule need not amend their bylaws to preserve it.

The 1989 amendments also deleted former subsection (c). Subsection (c) was a local addition to the Model Act, which duplicated § 14-2-805(c).

### Cross-References

Annual shareholders' meeting, see § 14-2-701. Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Bylaws, see § 14-2-206, Article 10, Part 2. Classification of board of directors, see § 14-2-806. Cumulative voting, see § 14-2-728. Deadlocked board of directors as ground for dissolution, see § 14-2-1430. Deadlocked board of directors as ground for judicial relief in close corporation, see § 14-2-940. Staggered terms, see § 14-2-806. Terms generally, see § 14-2-805.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-702 and former Code Section 14-2-141, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Legal title determines "stockholder" status.** — The number of stockholders of a corporation is based on in whom legal title to that stock is vested. *Trauner v. Trust Co. Bank* (In re Valles Mechanical Indus., Inc.), 21 Bankr. 542 (Bankr. N.D. Ga. 1982) (decided under former Code 1933, § 22-702).

**Trustees, not beneficiaries, held legal title to stock.** — Action by two directors, one of whom held 20 percent of the corporation's stock and the other of whom held 80 percent

of the stock as trustee for two beneficiaries, was valid since the trustee and not the beneficiaries had legal title to the stock, and therefore the number of directors was not less than the number of stockholders. *Trauner v. Trust Co. Bank* (In re Valles Mechanical Indus., Inc.), 21 Bankr. 542 (Bankr. N.D. Ga. 1982) (decided under former Code 1933, § 22-702).

**Voting fellow board of directors member out of office.** — As owners of more than two-thirds of the outstanding stock, the other three shareholders under the shareholders' agreement and by law had the right to vote a member of the board of directors out of office. *Matthews v. Tele-Systems*, 240 Ga. App. 871, 525 S.E.2d 413 (1999).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1349-1352, 1363, 1365.

**C.J.S.** — 19 C.J.S., Corporations, §§ 433, 437, 447, 448.

**ALR.** — Eligibility as corporate director of one who was not stockholder in fact, or not stockholder of record, at time of election, but who afterwards became such, 130 ALR 156.

Provision authorizing directors to fill va-

cancies as applicable to newly created directorships, 6 ALR2d 174.

Construction, application, and effect of constitutional provisions or statutes relating to cumulative voting of stock for corporate directors, 43 ALR2d 1322.

Construction and effect of corporate bylaws or articles relating to change in number of directors, 3 ALR3d 623.

Validity of agreement in conjunction with

sale of corporate shares that majority of directors will be replaced by purchaser's designees, 13 ALR3d 361.

### **14-2-804. Election of directors by certain classes of shareholders.**

If the articles of incorporation authorize dividing the shares into classes or series, the articles may also authorize the election of all or a specified number of directors by the holders of one or more authorized classes of shares or series. Each class (or classes) or series of shares entitled to elect one or more directors is a separate voting group for purposes of the election of directors. (Code 1981, § 14-2-804, enacted by Ga. L. 1988, p. 1070, § 1.)

#### **COMMENT**

Source: Model Act, § 8.04. § 14-2-804 is substantially the same as former § 14-2-141(d).

Section 14-2-804 makes explicit that the articles of incorporation may provide that a specified number (or all) of the directors may be elected by the holders of one or more classes of shares. A class (or series within a class) of shares entitled to elect separately one or more directors constitutes a separate voting group for purposes of the election of directors; within each voting group directors are elected by a plurality of votes and quorum and voting requirements must be separately met by each voting group. See Sections 14-2-725, 14-2-726, and 14-2-727.

The Model Act provision was amended by the addition of "or series," which is intended to clarify that the articles of incorporation may give series within a class the right to elect directors separately.

#### **Cross-References**

Articles of incorporation, see § 14-2-202, Article 10, Part 1. Classes of shares, see § 14-2-601. Close corporations, see Article 9. Cumulative voting, see § 14-2-728. Election of directors generally, see § 14-2-728. Removal of directors, see § 14-2-808. Voting by voting groups: Quorum and voting requirements for election of directors, see § 14-2-728. Quorum and voting requirements generally, see § 14-2-725 et seq. "Voting group" defined, see § 14-2-140.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 1381.

**C.J.S.** — 19 C.J.S., Corporations, §§ 439-442.

### **14-2-805. Terms of directors generally.**

(a) The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

(b) The terms of all other directors expire at the next annual shareholders' meeting following their election unless their terms are staggered under Code Section 14-2-806.

(c) A decrease in the number of directors does not shorten an incumbent director's term.



(d) A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office. Any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors, but only for a term of office continuing until the next election of directors by the shareholders and until the election and qualification of the successor.

(e) Despite the expiration of a director's term, he continues to serve until his successor is elected and qualifies or until there is a decrease in the number of directors. (Code 1981, § 14-2-805, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "The Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under Georgia Law," see 37 Mercer L. Rev. 79

(1985). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

### COMMENT

Source: Model Act, § 8.05 and former § 14-2-144(4). This also replaces some provisions formerly found in § 14-2-141.

Subsection (a) provides that the terms of initial directors expire at the first shareholders' meeting, while subsection (b) provides for the annual election of directors at the annual shareholders' meeting with the single exception that terms may be staggered as permitted in Section 14-2-806.

Subsection (c) provides that a decrease in the number of directors does not shorten the term of an incumbent director or divest any director of his office. Rather, the incumbent director's term expires at the annual meeting at which his successor would otherwise be elected.

Subsection (d) rejects the Model Act rule, that the terms of all directors elected to fill vacancies expire at the next meeting of shareholders at which directors are elected, in favor of former § 14-2-144(4), which provided that a director shall be elected for the unexpired term of the director's predecessor. While the Model Act takes the position that filling vacancies is an interim act, between shareholders' meetings, the Code takes the position that recruitment of qualified directors to a staggered board may well take a commitment by the corporation to install them for a longer term. In contrast, where vacancies result from an increase in board size, shareholders retain the power under the Code, following former Georgia law, to fill vacancies so created.

Subsection (e) provides for "holdover" directors so that directorships do not automatically become vacant at the expiration of their terms but the same persons continue in office until successors qualify for office. Thus the power of the board of directors to act continues uninterrupted even though an annual shareholders' meeting is not held or the shareholders are deadlocked and unable to elect directors at the meeting.

### Cross-References

Annual shareholders' meeting, see § 14-2-701. Court-ordered shareholders' meeting, see § 14-2-703. Removal, see § 14-2-808. Resignation, see § 14-2-807. Size of board, see § 14-2-803. Staggered terms, see § 14-2-806. Vacancies, see § 14-2-810.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1395, 1396, 1400, 1401.

**C.J.S.** — 19 C.J.S., Corporations, §§ 450, 451.

**ALR.** — Provision authorizing directors to fill vacancies as applicable to newly created directorships, 6 ALR2d 174.

Validity of agreement in conjunction with sale of corporate shares that majority of directors will be replaced by purchaser's designees, 13 ALR3d 361.

**14-2-806. Staggered terms for directors.**

(a) The articles of incorporation or a bylaw adopted by the shareholders may provide for staggering the terms of the directors by dividing the total number of directors into two or three groups, with each group containing one-half or one-third of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, and the terms of the third group, if any, expire at the third annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two years or three years, as the case may be, to succeed those whose terms expire.

(b) If directors have staggered terms and the number of directors is thereafter changed:

(1) Any increase or decrease in the number of directors shall be so apportioned among the classes as to make all classes as nearly equal in number as possible; and

(2) When the number of directors is increased and any newly created directorships are filled by the board, the terms of the additional directors shall expire at the next election of directors by the shareholders. (Code 1981, § 14-2-806, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

## COMMENT

Source: Model Act, § 8.06, Del. Code Ann. tit. 8, § 141(d), and former O.C.G.A. § 14-2-143.

Section 14-2-806 recognizes the practice of "classifying" the board or "staggering" the terms of directors so that only one-half or one-third of them are elected at each annual shareholders' meeting and directors are elected for two- or three-year terms rather than one-year terms.

The Model Act provision, which limited staggered boards to those with nine or more members, as did former Georgia law, was rejected in favor of the Delaware approach, which permits staggered boards without regard to size. Subsection (a) is drawn from



Del. Code Ann. tit. 8, § 141(d), and provides maximum flexibility in the use of staggered boards.

Subsection (b) is identical to former § 14-2-143(c). No substantive change is intended.

#### Cross-References

Annual shareholders' meeting, see § 14-2-701. Cumulative voting, see § 14-2-728. Election of directors generally, see § 14-2-728. Number of directors, see § 14-2-803. Removal, see § 14-2-808. Resignation, see § 14-2-807. Terms of directors generally, see § 14-2-805. Vacancies, see § 14-2-810.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 1397.

**C.J.S.** — 19 C.J.S., Corporations, §§ 434, 435, 450.

**ALR.** — Construction and effect of corporate bylaws or articles relating to change in number of directors, 3 ALR3d 623.

### 14-2-807. Resignation of directors.

(a) A director may resign at any time by delivering written notice to the board of directors, its chairman, or to the corporation.

(b) A resignation is effective when the notice is delivered unless the notice specifies a later effective date. (Code 1981, § 14-2-807, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 8.07. This replaces provisions formerly found in § 14-2-144(5).

The resignation of a director is effective when the written notice is delivered unless the notice specifies a later effective date, in which case the director continues to serve until that later date. Since the person giving the notice is still a member of the board, he may participate in all decisions until the specified date, including the choice of his successor under Section 14-2-810. The participation of the retiring director in the decision on his successor may be of importance in closely held corporations where control of the board may be affected by the resignation.

Subsection (a) follows the approach of former § 14-2-144(5), except that § 14-2-144(5) did not explicitly set forth the power of directors to resign. By referring to a written document, § 14-2-807 makes a writing the exclusive means of resigning.

The provisions of subsection (b) concerning the effectiveness of a notice of resignation reverse the holdings of some older cases to the effect that resignations are not effective until accepted. Vacancies created by a resignation effective at a later date may be filled before that date under Section 14-2-810.

#### Cross-References

"Deliver" includes mail, see § 14-2-140. Delivery to corporation, see § 14-2-140. "Notice" defined, see § 14-2-141. "Secretary" defined, see § 14-2-140. Vacancies, see § 14-2-810.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1419-1423.

**C.J.S.** — 19 C.J.S., Corporations, § 452.

**ALR.** — When resignation of officer of private corporation becomes effective, 20 ALR 267.

**14-2-808. Removal of directors by shareholders.**

(a) The shareholders may remove one or more directors with or without cause unless the articles of incorporation or a bylaw adopted by the shareholders provides that directors may be removed only for cause.

(b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him.

(c) If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only by a majority of the votes entitled to be cast.

(d) If the directors have staggered terms as provided in Code Section 14-2-806, directors may be removed only for cause, unless the articles of incorporation or a bylaw adopted by the shareholders provides otherwise.

(e) A director may be removed by the shareholders only at a meeting called for the purpose of removing him and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director. (Code 1981, § 14-2-808, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "The Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under Georgia Law," see 37 Mercer L. Rev. 79

(1985). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

## COMMENT

Source: Model Act, § 8.08. This replaces provisions formerly found in § 14-2-145.

Subsection (a) accepts the view that since the shareholders are the owners of the corporation, they should normally have the power to change the directors at will. This section reverses the common law position that directors have a statutory entitlement to their office and can be removed only for cause — fraud, criminal conduct, gross abuse of office amounting to a breach of trust, or similar misconduct. The power to remove directors is subject to several restrictions set forth in Section 14-2-808. First is the power of the shareholders to restrict their own power to removal for cause. This is an addition to § 14-2-145(a) which failed to mention the ability of shareholders to impose limits on their own power to remove directors. This strengthens bargains over the allocation of power in close corporations.

Subsection (b) provides that if the articles of incorporation provide that one or more classes of shares constitute a separate voting group entitled to elect a director (see Section 14-2-804), only the shareholders of that voting group may participate in the vote whether or not to remove that director.



Subsection (c) departs from the Model Act and specifies that where cumulative voting is not in effect the vote required to remove a director is a majority of the votes entitled to be cast, rather than the plurality provided by the Model Act. This follows former § 14-2-145. If cumulative voting is authorized, a director may be removed (with or without cause) only if the votes cast in favor of retaining him would not have been sufficient to elect him pursuant to cumulative voting at that meeting. This provision guarantees that a minority faction with sufficient votes to guarantee the election of a director under cumulative voting will be able to protect that director from removal by the remaining shareholders. In computing whether or not a director elected by cumulative voting is protected from removal from office by subsection (d), the votes should be counted as though (1) the vote to remove the director occurred in an election to elect the number of directors normally elected by the voting group along with the director whose removal is sought, (2) the number of votes cast cumulatively against removal of the director had been cast for his election, and (3) all votes cast for removal of the director had been cast cumulatively in an efficient pattern for the election of a sufficient number of candidates so as to deprive the director whose removal is being sought of his office.

Subsection (d) was added from Del. Code Ann. tit. 8, § 141(k)(1), and restricts removal of members of a staggered board to removal for cause, unless the articles or a bylaw adopted by the shareholders provides otherwise. Classified boards, like cumulatively elected boards, are a means of allocating power, and those arrangements normally should not be subject to disruption unless the shareholders have consented to removal without cause in the articles of incorporation.

Subsection (e) requires the meeting notice for meetings called for the purpose of removal of directors to state that removal of specific directors will be proposed. This prevents surprise.

Former Section 14-2-145(d) provided that new directors could be elected at the same meeting at which old directors were removed. There is no counterpart to this in the Code. This power is nevertheless implicit in Sections 14-2-809 [repealed] and 810, and there is no intent to reverse the former rule.

### Cross-References

Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Cumulative voting, see § 14-2-728. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Election by voting group of shareholders, see § 14-2-804. Election of directors generally, see § 14-2-728. Meeting notice, see § 14-2-705. Quorum for voting group, see § 14-2-725. Shareholders' meetings, see § 14-2-701 et seq. "Voting group" defined, § 14-2-140. Voting by shareholders, see § 14-2-726.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1434-1437.

**C.J.S.** — 19 C.J.S., Corporations, §§ 454-457.

**ALR.** — Removal by court of director or officer of private corporation, 124 ALR 364. Right of corporate officer to recover com-

pensation for time period between original improper discharge and a subsequent legal discharge, 82 ALR2d 965.

Validity of agreement in conjunction with sale of corporate shares that majority of directors will be replaced by purchaser's designees, 13 ALR3d 361.

**14-2-809. Reserved.**

**14-2-810. Vacancy on board.**

(a) Unless the articles of incorporation or a bylaw approved by the shareholders provides otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(1) The shareholders may fill the vacancy;

(2) The board of directors may fill the vacancy; or

(3) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(b) If the vacant office was held by a director elected by a voting group of shareholders, only the holders of shares of that voting group or the remaining directors elected by that voting group are entitled to vote to fill the vacancy.

(c) A vacancy that will occur at a specific later date (by reason of a resignation effective at a later date under subsection (b) of Code Section 14-2-807 or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs. (Code 1981, § 14-2-810, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 32.)

**COMMENT**

Source: Model Act, § 8.10. This replaces provisions formerly found in § 14-2-144.

Section 14-2-810 sets out a general rule for the filling of a vacancy. The vacancy, unless the articles of incorporation provide otherwise, may be filled by either the shareholders or the board of directors (or a majority of the remaining directors, if less than a quorum remain in office). The power is concurrent. The first group to act fills the vacancy. Formerly § 14-2-144(1) provided a sequence for action to fill vacancies: if the directors fail to act, then shareholders could fill the vacancy.

Subsection (b) provides that if a voting group of shares is entitled to elect a director, only that voting group is entitled to fill a vacant office which was held by a director elected by that voting group. Former § 14-2-144(2) provided for replacement by the remaining directors elected by a particular class or series, or if none remain, by the holders of that class or series. This section is part of the consistent treatment of directors elected by a voting group of shareholders. See Sections 14-2-140, 14-2-725, 14-2-726, 14-2-728, 14-2-804, and 14-2-808(b).

Subsection (c) permits vacancies that will arise on a specific later date to be filled in advance of that date so long as the designee does not actually take office until the vacancy occurs. The director in the office that will become vacant may participate in the selection of his successor. In a closely held corporation with a balance of power on the board of directors that was reached by agreement, a prospective resignation followed by the appointment of a successor under this section permits the board to act on the replacement before the change in balance caused by the resignation.

**Note to 1989 Amendment**

The 1989 amendment to subsection (a) permits variance in rules about filling board vacancies in shareholder-approved bylaws as well as in the articles, consistent with other



provisions of the Code. The 1989 amendments also changed subsection (b) of the Code which, following the Model Act, originally provided that if a voting group of shares is entitled to elect a director, only that voting group, was entitled to fill a vacant office which was held by a director elected by that voting group. The 1989 amendment restored the general approach of former § 14-2-144(2), which provided for replacement by the remaining directors elected by a particular class or series, or if they did not act or if none remained, by the holders of that class or series. The 1989 amendment provides concurrent rather than alternative power, so that either directors elected by the class or series or the holders of shares of the class or series may act. When one group acts, the vacancy no longer exists and the power of the other group to act is extinguished.

### Cross-References

Election by voting group of shareholders, see § 14-2-804. Number of directors, see § 14-2-803. Quorum and voting of directors, see § 14-2-824. Removal of directors, see § 14-2-808. Resignation of directors, see § 14-2-807. Shareholders' meetings, see § 14-2-701 et seq. Terms of directors generally, see § 14-2-805. Voting by voting group, see §§ 14-2-725 & 14-2-726. "Voting group" defined, see § 14-2-140.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1400, 1401.

**C.J.S.** — 19 C.J.S., Corporations, §§ 434, 435.

**ALR.** — Provision authorizing directors to fill vacancy as applicable to newly created directorships, 6 ALR2d 174.

## 14-2-811. Compensation of directors.

Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors. (Code 1981, § 14-2-811, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 8.11. There is no change from former law, § 14-2-140(d).

This section puts at rest the question whether the board of directors can fix the compensation of its members for serving as directors.

### Cross-References

Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Committees of board of directors, see § 14-2-825. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Directors' conflicting interest transactions, see § 14-2-860 et seq.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1931-1935.

**C.J.S.** — 19 C.J.S., Corporations, § 534.

**ALR.** — Participation by corporate director in vote or meeting fixing compensation for his own services, 175 ALR 577.

## PART 2

## MEETINGS AND ACTION OF THE BOARD

**14-2-820. Meetings.**

(a) The board of directors may hold regular or special meetings in or out of this state.

(b) Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting. (Code 1981, § 14-2-820, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973).

**COMMENT**

Source: Model Act, § 8.20. There is no substantial change from former law, § 14-2-148(a) (the first sentence of which was the counterpart to subsection (a)), and § 14-2-146(c), which was the counterpart to subsection (b).

This section authorizes meetings of directors anywhere. No distinction is made between meetings in-state and out-of-state. It also authorizes the board of directors to permit any or all directors to participate in a meeting by the use of any means of communication by which all directors participating may simultaneously hear each other.

**Cross-References**

Action without meeting, see § 14-2-821. Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Bylaws, see § 14-2-206 and Article 10, Part 2. Notice of meeting, see § 14-2-822. Quorum and voting, see § 14-2-824. Waiver of meeting notice, see § 14-2-823.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under Ga. L. 1937-38, Ex. Sess., p. 214 and Code Section 14-2-148, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Notice of special meetings.** — Where one

of three directors is not given notice of a special meeting, the meeting will not be competent to proceed with the transaction of business. *Knox v. Commissioner*, 323 F.2d 84 (5th Cir. 1963) (decided under former Ga. L. 1937-38, Ex. Sess., p. 214).

Cited in *Sherrer v. Hale*, 248 Ga. 793, 285 S.E.2d 714 (1982).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1445, 1466, 1475, 1477.

**C.J.S.** — 19 C.J.S., Corporations, §§ 463, 465.



**ALR.** — Informality of meeting of directors as affecting action taken thereat, 64 ALR 712.

### **14-2-821. Action without meeting.**

(a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A consent signed under this Code section has the effect of a meeting vote and may be described as such in any document. (Code 1981, § 14-2-821, enacted by Ga. L. 1988, p. 1070, § 1.)

#### **COMMENT**

Source: Model Act, § 8.21. Section 14-2-821 is substantially the same as former § 14-2-149.

The power of the board of directors to act unanimously without a meeting is based on the pragmatic consideration that in many situations a formal meeting is a waste of time. And, of course, if there is only a single director (as is permitted by Section 14-2-803), a written consent is the natural method of signifying director action. Consent may be signified on one or more documents if desirable.

The Model Act was altered by deletion of the last clause in Section 14-2-821(a), which mandated that written consents must be included in the minutes or filed with the corporate records. There is no intent to make the filing of the consents a condition precedent to the validity of the action taken. The duty to file the consents is provided by Section 14-2-1601(a), which requires the corporation to keep as permanent records a record of all actions taken by the board of directors without a meeting. Thus the Georgia modification only requires delivery of the consents to the corporation for the purpose of inclusion in the minutes or corporate records. Deletion of subsection (b) of the Model Act also eliminated the provision that the directors' action was effective upon signing by the last director "unless the consent specifies a different effective date." This could have been read to imply that back-dating of consents was permissible, which is not intended by the Code. Further discussion of the implications of this approach is found in the Comment to Section 14-2-704.

#### **Cross-References**

Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Bylaws, see § 14-2-206 and Article 10, Part 2. "Notice" defined, see § 14-2-141. Notice of meeting, see § 14-2-822. Waiver of meeting notice, see § 14-2-823.

#### **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-149, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, is included in the annotations for this Code section.

**Cited in** *Elwell v. Nesmith*, 246 Ga. 430, 271 S.E.2d 827 (1980).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1446-1450, 1480.

**C.J.S.** — 19 C.J.S., Corporations, § 462.

**ALR.** — Ratification by corporation of unauthorized contract entered into by of-

ficer, by acceptance and retention of benefits, 7 ALR 1446.

Informality of meeting of directors as affecting action taken thereat, 64 ALR 712.

**14-2-822. Notice of meeting.**

(a) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

(b) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two days' notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws. (Code 1981, § 14-2-822, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Model Act, § 8.22. This replaces provisions formerly found in § 14-2-148(b) & (d).

Regular meetings of the board of directors may be held without notice and special meetings require only two days' notice unless other requirements are imposed by the articles of incorporation or bylaws. The notice may be written or oral. Also, no statement of the purpose of either a regular or special meeting is necessary unless required by the articles of incorporation or bylaws. These requirements differ from the requirements applicable to meetings of shareholders because of fundamental differences in their roles: directors are expected to be more closely involved in corporate affairs than shareholders, and meetings of directors are held more systematically and regularly than meetings of shareholders. They continue the practice of former Georgia law, § 14-2-148(b) and (d).

**Cross-References**

Action without meeting, see § 14-2-821. Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Bylaws, see § 14-2-206 and Article 10, Part 2. Effective date of notice, see § 14-2-141. Meetings of board of directors, see §§ 14-2-820 & 14-2-821. "Notice" defined, see § 14-2-141. Waiver of notice, see § 14-2-823.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1452-1455, 1460-1462.

**C.J.S.** — 19 C.J.S., Corporations, § 464.

**14-2-823. Waiver of notice.**

(a) A director may waive any notice required by this chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b) of this Code section, the waiver



must be in writing, signed by the director entitled to the notice, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting (or promptly upon his arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting. (Code 1981, § 14-2-823, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 8.23. This replaces provisions formerly found in § 14-2-148.

Subsection (a) reverses the common law rule that invalidates waivers of notice by directors after the date and time of the meeting. In modern practice notice is often a technical requirement and waivers should be freely permitted. This was the practice under former law, § 14-2-148. The Model Act language in subsection (a) was altered to delete the requirement that the waiver be filed with the minutes of the corporation, and to replace it with a "delivery" requirement. Like the change in Section 14-2-821, this is intended to be clarifying. The director waiving notice is not under a duty to file the waiver with the minutes or corporate records, but only to deliver it for inclusion in such records. The filing of the waiver with the minutes is not a condition precedent to its validity or effectiveness. The keeping of proper records is governed by Section 14-2-1601.

Subsection (b) recognizes that the function of notice is to inform directors of a meeting. If a director actually appears at the meeting he has probably had notice of it and generally should not be able to raise a technical objection that he was not given notice.

In cases where actual prejudice occurs because of the lack of notice, as may be indicated by the absence of one or more other directors, the director must call attention to the defect at the outset of the meeting or promptly upon his arrival. That director, or a director who did not receive notice and was not present at the meeting, may then attack the validity of the action taken for want of notice. If a director properly objects to the meeting being held, he is not presumed to have assented to actions taken thereafter, but he waives his objection if he thereafter votes for or assents to action taken at the meeting. See Section 14-2-824(d).

#### Cross-References

Action without meeting, see § 14-2-821. Meetings of board of directors, see § 14-2-820. "Notice" defined, see § 14-2-141. Notice of meeting, see § 14-2-822.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1457-1459, 1480.

**C.J.S.** — 19 C.J.S., Corporations, § 464.

**ALR.** — Participation in meeting as waiver of compliance with notice requirement for shareholders' meeting, 64 ALR3d 358.

**14-2-824. Quorum and voting.**

(a) Unless this chapter, the articles of incorporation, or bylaws require a greater number or unless otherwise specifically provided in this chapter, a quorum of a board of directors consists of:

(1) A majority of the fixed number of directors if the corporation has a fixed board size; or

(2) A majority of the number of directors prescribed or, if no number is prescribed, the number in office immediately before the meeting begins, if the corporation has a variable-range size board.

(b) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed or prescribed number of directors determined under subsection (a) of this Code section.

(c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless this chapter, the articles of incorporation, or bylaws require the vote of a greater number of directors.

(d) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless:

(1) He objects at the beginning of the meeting (or promptly upon his arrival) to holding it or transacting business at the meeting;

(2) His dissent or abstention from the action taken is entered in the minutes of the meeting; or

(3) He delivers written notice of his dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting.

The right of dissent or abstention is not available to a director who votes in favor of the action taken.

(e) If a written agreement meeting the requirements of Code Section 14-2-731 provides that any directors shall have more or less than one vote on any matter, every reference in this chapter to a majority or other proportion of directors shall refer to a majority or other proportion of the votes of directors. (Code 1981, § 14-2-824, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 5; Ga. L. 1995, p. 482, § 4.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).



## COMMENT

Source: Model Act, § 8.24. This replaces provisions formerly found in §§ 14-2-146 & 14-2-154(b).

Subsection (a) provides that in the absence of a provision in the articles of incorporation or bylaws, a quorum is determined as follows:

(1) If the board of directors consists of a fixed number — whether fixed by the board or shareholders under Section 14-2-803(b) — a quorum is a majority of that number.

(2) If the board of directors is a variable size board, a quorum consists of a majority of the number of directors prescribed at the time by the board of directors or shareholders. If no number is prescribed, then a quorum consists of a majority of directors in office immediately before the meeting begins.

Subsection (b) provides that the articles of incorporation or bylaws may decrease the size of the quorum to one-third of the number of directors determined under subsection (a).

Subsection (a) allows the articles of incorporation or bylaws to increase the quorum up to and including unanimity while subsection (c) allows these documents similarly to increase the vote necessary to take action. The articles of incorporation or bylaws may also establish quorum or voting requirements with respect to directors elected by voting groups of shareholders pursuant to Section 14-2-804. Special rules for amending bylaws setting voting and quorum requirements appear in Section 14-2-1022. Amendments of articles of incorporation governing these rules are covered by Section 14-2-1003.

The phrase “when the vote is taken” in subsection (c) is designed to make clear that the board of directors may act only when a quorum is present. If directors leave during the course of a meeting, the board of directors may not act after the number of directors present is reduced to less than a quorum.

Under subsection (d) directors, if they object or abstain with respect to action taken by the board of directors or a committee of the board of directors, must make their position clear in one of the ways described in this subsection. Georgia’s former provision, § 14-2-154(b), denied the dissent procedure to directors present at the meeting who failed to vote against the action, while the Code denies it only to a director who voted in favor of the action. If objection is made in the form of a written dissent, it may be transmitted by wire, telecopier, or other medium of data transmission. This written objection serves the important purpose of forcefully bringing the position of the dissenting member to the attention of the balance of the board of directors. The requirement of a written objection also prevents a director from later seeking to avoid responsibility because of secret doubts about the wisdom of the action taken. The Code requires a written dissent to be filed no later than immediately after adjournment of the meeting, and thus shortens the time period during which a director may dissent from board action. Formerly § 14-2-154(b) permitted a director to file a dissent as much as 24 hours after a meeting. In the interest of board candor, any dissent should be filed immediately after a meeting. The right of dissent or abstention is not available to a director who voted in favor of the action taken.

Subsection (d) applies only to directors who are present at the meeting. Directors who are not present are not deemed to have assented to any action taken at the meeting in their absence.

**Note to 1990 Amendment**

The 1990 amendment clarifies the voting procedures applicable to corporations having weighted voting among directors by indicating that all references in the Code to

action by a majority of directors refers to a majority of the votes entitled to be cast by all of the directors and not a simple head-count.

#### Cross-References

Action without meeting, see § 14-2-821. Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Business combinations with interested shareholders, voting by directors, see § 14-2-1111. Bylaw amendments concerning quorums, see § 14-2-1022. Bylaw amendments repealing bylaws governing business combinations with interested shareholders, see § 14-2-1133. Bylaws, see § 14-2-206 and Article 10, Part 2. Committees of board of directors, see § 14-2-825. Director's conflicting interest transactions, quorum for, see § 14-2-862. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Meetings of board of directors, see § 14-2-820. "Notice" defined, see § 14-2-141. Number of directors, see § 14-2-803. "Secretary" defined, see § 14-2-140.

#### RESEARCH REFERENCES

<b>Am. Jur. 2d.</b> — 18B Am. Jur. 2d, Corporations, §§ 1470-1474, 1476.	<b>C.J.S.</b> — 19 C.J.S., Corporations, §§ 438-442.
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#### 14-2-825. Committees.

(a) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees and appoint members of the board of directors to serve on them. Each committee may have one or more members, who serve at the pleasure of the board of directors.

(b) Code Sections 14-2-820 through 14-2-824, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.

(c) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under Code Section 14-2-801.

(d) A committee may not, however:

(1) Approve or propose to shareholders action that this chapter requires to be approved by shareholders;

(2) Fill vacancies on the board of directors or on any of its committees;

(3) Amend articles of incorporation pursuant to Code Section 14-2-1002 except that a committee may, to the extent authorized in a resolution or resolutions adopted by the board of directors, amend the articles of incorporation to fix the designations, preferences, limitations, and relative rights of shares pursuant to Code Section 14-2-602 or to increase or decrease the number of shares contained in a series of shares established in accordance with Code Section 14-2-602 but not below the number of such shares then issued;



(4) Adopt, amend, or repeal bylaws; or

(5) Approve a plan of merger not requiring shareholder approval.

(e) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in Code Section 14-2-830. (Code 1981, § 14-2-825, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2000, p. 1567, § 7.)

**Law reviews.** — For note on 2000 amendment of O.C.G.A. § 14-2-825, see 17 Ga. St. U.L. Rev. 46 (2000).

#### COMMENT

Source: Model Act, § 8.25. It is comparable to former § 14-2-147.

Subsection (a) makes explicit the common law power of a board of directors to act through committees of directors and specifies the powers of the board of directors that are nondelegable, that is, powers that only the full board of directors may exercise. The Code changed the Model Act's provision for the minimum number of members of a committee from two to one. It may be desirable for a committee, such as a pricing committee in a securities offering, to consist of one person. The Code leaves it to the discretion and business judgment of the board to determine when and to whom such delegations are prudent.

Subsection (b) of the Model Act, which required creation and appointment of a committee to be approved by a majority of the entire number of directors, was deleted from the Code. Such strict provisions could easily create some illegal committees, since boards might not be aware of special voting rules for creation of committees. Thus the Code takes the position that creation and appointment of committees should be governed by the usual rules for board action, which permit action by a majority of a quorum, as provided in § 14-2-824(c), unless other voting rules have been adopted by the corporation for board action under Section 14-2-824(a).

Subsection (c) merely applies the usual procedural requirements for board action to committee action. Modification of these rules for particular committees would be permitted to the same extent, and in the same manner, as modification of these rules for board action.

The statement of nondelegable functions set out in subsection (d) is based on the principle that prohibitions against delegation should be limited generally to actions substantially affecting the rights of shareholders. As a result, delegation of authority to committees under subsection (d) may be broader than mere authority to act with respect to matters arising within the ordinary course of business. Model Act prohibitions against authorization of dividends, authorization of reacquisitions of shares, and authorization of issuance or sale, or contracts for sale of shares, were deleted from the Code. Neither repurchase nor issuance of shares were prohibited by former Georgia law, under § 14-2-147, and dividend decisions are seen as essentially identical to repurchase decisions, since both involve distributions to shareholders.

Subsection (e) makes clear that although the board of directors may delegate to a committee the authority to take action, the designation of the committee, the

delegation of authority to it, and action by the committee will not alone constitute compliance by a noncommittee board member with his responsibility under Section 14-2-830. On the other hand, a noncommittee director also will not automatically incur liability should the action of the particular committee fail to meet the standard of care set out in Section 14-2-830. The noncommittee member's liability in these cases will depend upon whether he failed to comply with Section 14-2-830(b)(3).

Section 14-2-825(e) has no application to a member of the committee itself. The standard applicable to a committee member is set forth in Section 14-2-830(a).

#### **Note to 2000 Amendment**

The amendment to Code Section 14-2-825(d)(3) is based on Delaware Section 141(c)(1) and is intended to eliminate any question that a committee of the board, such as a pricing committee, may be authorized by a resolution of the board, to approve an amendment to the articles of incorporation that fixes the designations, preferences, limitations and relative rights of shares under Code Section 14-2-602(a) or increases or decreases the number of shares in a series (but not below the number of such shares then issued) under Code Section 14-2-602(e).

#### **Cross-References**

Amendment of articles of incorporation by board of directors, see § 14-2-1002. Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Bylaws, see § 14-2-206 and Article 10, Part 2. Directors' standards of conduct, see §§ 14-2-830 & 14-2-831. Dissolution, see Article 14. Distributions, see § 14-2-640. Duties of board of directors, see § 14-2-801. Indemnification determination and authorization, see § 14-2-855. Issuance of shares, see §§ 14-2-601 & 14-2-602. Mergers, see Article 11. Quorum and voting, see § 14-2-824. Recquisition of shares, see §§ 14-2-603 & 14-2-631. Terms of class or series determined by board of directors, see § 14-2-602. Vacancies on board, see § 14-2-810.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1508-1512. **C.J.S.** — 19 C.J.S., Corporations, §§ 473, 474.

### **PART 3**

#### **STANDARDS OF CONDUCT**

#### **14-2-830. General standards for directors.**

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

- (1) In a manner he believes in good faith to be in the best interests of the corporation; and
- (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:



(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(2) Legal counsel, public accountants, investment bankers, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) In the instances described in subsection (b) of this Code section, a director is not entitled to rely if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) of this Code section unwarranted.

(d) A director is not liable to the corporation or to its shareholders for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this Code section. (Code 1981, § 14-2-830, enacted by Ga. L. 1988, p. 1070, § 1.)

**Cross references.** — Duty of board of directors in protecting insureds, creditors and the general public regarding investments, § 33-11-54.

**Law reviews.** — For article discussing corporation director's liability for improper payments to shareholders, see 3 Ga. L. Rev. 11 (1968). For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, and as affected by provisions of the

Georgia Civil Practice Act, see 7 Ga. St. B.J. 277 (1971). For article, "Corporate Governance in the Aftermath of the Insurance Crisis," see 39 Emory L.J. 1155 (1990). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

For comment, "Poison Pills: Are Dead Hand Pills Dead in Georgia?," see 50 Mercer L. Rev. 809 (1999).

## COMMENT

Source: Model Act, § 8.30.

Section 14-2-830 defines the general standard of conduct for directors. It sets forth the standard by focusing on the manner in which the director performs his duties, not the correctness of his decisions. Section 14-2-830(a) thus requires a director to perform his duties in the good faith belief that he acts in the best interests of the corporation and with the care of an ordinarily prudent person in a like position. This standard is based on former Section 35 of the 1969 Model Act, as previously adopted in Georgia, as former § 14-2-152.1, as amended, Act 657, Laws 1987, § 14-2-1. This, in turn, was drawn from the 1969 Model Act, Section 35, as amended in 1974. In adopting this formulation in 1987, Georgia preserved its former formulation, in § 14-2-152, which was drawn from New York Bus. Corp. Law § 717 (see the discussion of subsection (a) below).

In determining whether to impose liability, the courts recognize that boards of directors and corporate managers continuously make decisions that involve the balancing of risks and benefits for the enterprise. Although some decisions turn out to be unwise or the result of a mistake of judgment, it is unreasonable to reexamine these decisions with the benefit of hindsight. Therefore, a director is not liable for injury or damage caused by his decision, no matter how unwise or mistaken it may turn out to be, if in performing his duties he met the requirements of Section 14-2-830.

Even before statutory formulations of directors' duty of care, courts sometimes invoked the business judgment rule in determining whether to impose liability in a particular case. In doing so, courts have sometimes used language similar to the standards set forth in Section 14-2-830(a). The elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts. In view of that continuing judicial development, Section 14-2-830 does not try to codify the business judgment rule or to delineate the differences, if any, between that rule and the standards of director conduct set forth in this section. That is a task left to the courts.

The Code preserves the approach of prior law in permitting contractual variation of directors' liabilities. Thus Section 14-2-202(b)(4) permits the articles of incorporation to relieve directors from liability to the corporation or its shareholders for breaches of the duty of care set out in Section 14-2-830(a)(2). Similarly, where such exculpation has not been provided in advance, shareholders can indemnify directors for such liability under Section 14-2-856.

The statement of the director's duties in subsection (a) follows former Georgia law more closely than the Model Act. It preserves the "good faith" description of the duty of loyalty. But where former law required only a general "good faith," this formulation specifies the object of the good faith — the best interests of the corporation.

Subsection (a)(2) establishes a general standard of care for all directors. It requires a director to exercise "the care an ordinarily prudent person in a like position would exercise." Subsection (a) does not use the term "fiduciary" because that term could be confused with the unique attributes and obligations of a fiduciary imposed by the law of trusts, some of which are not appropriate for directors of a corporation.

Subsection (a)'s reference to "ordinary prudent person" recognizes the need for innovation, essential to profit orientation, and focuses on the basic director attributes of common sense, practical wisdom, and informed judgment. The phrase "in a like position" recognizes that the "care" under consideration is that which would be used by the "ordinarily prudent person" if he or she were a director of the particular corporation. The combined phrase "in a like position ... under similar circumstances" is intended to recognize that (a) the nature and extent of responsibilities will vary, depending upon such factors as the size, complexity, urgency, and location of activities carried on by the particular corporation, (b) decisions must be made on the basis of the information known to the directors without the benefit of hindsight, and (c) the special background, qualifications, and management responsibilities of a particular director may be relevant in evaluating his compliance with the standard of care. Even though the quoted phrase takes into account the special background, qualifications and management responsibilities of a particular director, it does not excuse a director lacking business experience or particular expertise from exercising the common sense, practical wisdom, and informed judgment of an "ordinarily prudent person." As Learned Hand wrote in *Barnes v. Andrews*, 298 F. 614 (S.D.N.Y. 1924), directors "need not — indeed, perhaps they should not — have any technical talent."

Subsection (a)(3) of the Model Act, which required a director to act "in a manner he reasonably believes to be in the best interests of the corporation," was deleted from the Code as a departure from existing Georgia law. The Code combined the requirements of Model Act subsections (a)(1) and (a)(3), to require a good faith belief, rather than separate requirements of good faith and a reasonable belief. The reasonableness of the board's action is to be tested in the totality of the situation. Thus the belief that action is in the best interests of the corporation is a facet of the good faith requirement. The good faith must relate to the director's belief that the action is in the best interests of the corporation. The "reasonably believes" language was omitted because it could have the effect of isolating a specific piece of information, or a specific source of information.

Subsection (b) provides that a director complying with the standards expressed in Section 14-2-830(a) is entitled to rely upon information, opinions, reports or state-



ments, including financial statements and other financial data, prepared or presented by the persons or committees described in subsection (b). The right to rely under this section applies to the entire range of matters for which the board of directors is responsible. Under subsection (c), however, a director so relying must be without knowledge concerning the matter in question that would cause his reliance to be unwarranted. Implicit in this is the understanding that directors are not required to be suspicious of employees and experts they have hired in good faith.

Subsection (b) permits reliance upon outside advisers, including not only those in the professional disciplines customarily supervised by state authorities, such as lawyers, accountants, and engineers, but also those in other fields involving special experience and skills, such as investment bankers, geologists, management consultants, actuaries, and real estate appraisers. The concept of "expert competence" in subsection (b)(2) embraces a wide variety of qualifications and is not limited to the more precise and narrower recognition of experts under the Securities Act of 1933.

Subsection (b)(2) of the Model Act was amended by adding a reference to investment bankers as experts upon whom directors may rely, if the matter is within their professional competence. This preserves former law.

Subsection (b) permits reliance upon a committee of the board of directors, whether performing supervisory or other functions, as well as in instances where either the full board of directors or the committee take dispositive action. In conditioning reliance upon reasonable belief that the board committee merits the director's "confidence," subsection (b)(3) recognizes a difference between a board committee and an expert. In subsection (b)(1) and (2) the reference is to "competence of an expert," which recognizes the expectation of experience and in most instances technical skills on the part of those upon whom the director may rely. In subsection (b)(3), the concept of "confidence" is substituted for "competence" in order to avoid any inference that technical skills are a prerequisite.

By identifying those upon whom a director may rely in discharging his duties, Section 14-2-830(b) does not limit the ability of directors to delegate their powers under Section 14-2-801(a) to committees of the board of directors or officers of the corporation, except where this delegation is expressly prohibited by the Act. Delegation should be carried out in accordance with the standards set forth in subsection (a). See also Section 14-2-825 and its Comment with respect to delegation to committees.

Subsection (c) expressly prevents a director from "hiding his head in the sand" and relying on information, opinions, reports, or statements when he has actual knowledge which makes reliance unwarranted.

Subsection (d) is self-executing, and the individual director's exoneration from liability is automatic, if compliance with the standard of conduct set forth in this section is established. Like the exculpation provisions of Section 14-2-202(b) (4) and the indemnification provisions of Section 14-2-856, it provides relief only from liability to the corporation or the shareholders. The Model Act provision was amended by the addition of the phrase "to the corporation or to its shareholders," to emphasize the limits of this provision. Section 14-2-830 is intended to regulate only relationships among the participants in the corporate enterprise — shareholders, directors, and the corporation itself. As was stated in the Comment to the comparable statement of directors' duties and liabilities in the American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations* (T.D. No. 4), § 14-2-401, at 12:

"The duty of care standards set forth in § 14-2-401 involve duties owed directly to the corporation. It should be emphasized that § 14-2-401 is not intended to create new third-party rights (e.g., for tort claimants or government agencies) against directors or officers. The standards set forth in Part IV apply only to the relationships among directors, officers, shareholders, and their corporations."

Where the standards of this section are met, there is no need to consider possible application of the business judgment rule. The possible application of the business judgment rule need only be considered if compliance with the standard of conduct set forth is not established. Subsection (d) makes clear that this subsection will apply whether or not affirmative action was in fact taken. Subsection (d) applies (assuming its requirements are satisfied) to any conscious consideration or matters involving the affairs of the corporation. It also applies to the determination by the board of directors of which matters to address and which not to address. Section 14-2-830(d) does not apply only when the director has failed to consider taking action which under the circumstances he is obliged to consider taking.

Section 14-2-830 generally deals only with directors. Section 14-2-842 and its Comment explain the extent to which the provisions of Section 14-2-830 apply to officers.

### Cross-References

Committees of board of directors, see § 14-2-825. Conflict of interest, see § 14-2-860 et seq. Derivative proceedings, see § 14-2-740. Duty of board of directors, see § 14-2-801. Exculpation, see § 14-2-202. Indemnification, see § 14-2-850 et seq. Meetings of board of directors, see §§ 14-2-820 & 14-2-821. Officer standards of conduct, see § 14-2-842. Officers, see §§ 14-2-840 & 14-2-841. Quorum of directors, see § 14-2-824. Removal of directors, see § 14-2-808. Unlawful distributions, see § 14-2-831.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-713 and former Code Section 14-2-152, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Director serves interests of all stockholders.** — A director serves the interests of the entire body of stockholders, as well as those of the individual shareholder. Therefore, a director may not become the active and successful opponent of an individual stockholder but must attempt to promote the interests of all stockholders. *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.), cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991), cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991).

**Officers and directors owe fiduciary duty of good faith and due care.** — An officer or a director, even an inactive one, owes a fiduciary duty of good faith and due care to the corporation. *Super Valu Stores, Inc. v. First Nat'l Bank*, 463 F. Supp. 1183 (M.D. Ga. 1979) (decided under former Code 1933, § 22-713).

**Duty to the corporation.** — The duty is one owed to the corporation which possesses the cause of action for breach of duty. *Super Valu Stores, Inc. v. First Nat'l Bank*, 463 F. Supp. 1183 (M.D. Ga. 1979).

**Fiduciary duty in corporate bankruptcy.** — In a bankruptcy proceeding, vesting of corporate governance to the directors and officers carries with it a fiduciary obligation to creditors under both state law and the Bankruptcy Code. In *re Concrete Prods., Inc.*, 208 Bankr. 1000 (Bankr. S.D. Ga. 1996).

**Good faith also requires that stockholders be treated fairly.** — Good faith is not just a question of what is proper for the corporation. It also requires that the stockholders be treated fairly, that their investments be protected, and that a corporation be managed in a prudent manner for the benefit of all stockholders. *Comolli v. Comolli*, 241 Ga. 471, 246 S.E.2d 278 (1978) (decided under former Code 1933, § 22-713).

**Authority of board.** — Board of directors had authority to adopt a shareholders rights plan with a continuing director feature to protect against hostile takeovers without amendment of the articles of incorporation or bylaws. *Invacare Corp. v. Healthdyne Technologies, Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997).

**Cited in** *Boddy v. Theiling*, 129 Ga. App. 273, 199 S.E.2d 379 (1973); *Hamilton Bank & Trust Co. v. Holliday*, 469 F. Supp. 1229 (N.D. Ga. 1979); *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981); *Quinn v. Cardiovascular Physicians*, 254 Ga. 216, 326



S.E.2d 460 (1985); *Corporate Jet Aviation, Inc. v. Vantress*, 45 Bankr. 629 (Bankr. N.D. Ga. 1985); *Parks v. Multimedia Techs., Inc.*,

239 Ga. App. 282, 520 S.E.2d 517 (1999); *Fisher v. State Mut. Ins. Co.*, 290 F.3d 1256 (11th Cir. 2002).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1684, 1689-1710.

**C.J.S.** — 19 C.J.S., Corporations, §§ 476-480, 489.

**ALR.** — Motive as affecting personal liability of directors in voting for acts not in themselves illegal, 4 ALR 166.

Power of directors to sell property of corporation without consent of stockholders, 5 ALR 930; 60 ALR 1210.

Liability of public corporation for money received by it for unlawfully issued instrument of indebtedness, 7 ALR 353.

Laches as affecting right of corporation or its stockholders to relief against directors for violations of trust, 10 ALR 370.

Personal liability of directors as affected by terms of contract or form of signature, 33 ALR 1353; 51 ALR 319.

Provision of constitution or statute making directors or officers of corporation liable for money embezzled or misappropriated, 46 ALR 1164.

Right of creditor of corporation to maintain personal action against directors or officers for mismanagement, 50 ALR 462.

Personal liability on contract made by "trustees" or others in closing affairs of dissolved corporation, 76 ALR 1478.

Assignability of claim against officers or directors of corporation for breach of duty, 80 ALR 875.

Validity, construction, and effect of clause in obligation of corporation that it is issued without recourse against officers or directors, 97 ALR 1157.

Personal liability of directors to holders of corporate securities because of false statements therein, 99 ALR 852.

Recovery against corporate directors or officers for fraud or mismanagement as affected by releases, ratification, waiver, or consent by some, but not all, of the stockholders, 120 ALR 238.

Construction and application of statutes making corporate officers or directors liable in respect of loans or advances to stockholders or officers, 129 ALR 1258.

Personal liability of corporate directors or

officers under statute imposing liability in respect of excessive indebtedness, as affected by payment by the corporation (or its receiver, assignee in insolvency, or trustee in bankruptcy) of all or part of the excessive indebtedness, 130 ALR 824.

Personal liability of corporate directors or officers to third persons for restitution, or for damages for conversion, under circumstances rendering the corporation itself liable, 152 ALR 696.

Accountability of corporate directors or officers for profit from activities beyond the corporate powers, but involving the use of information or opportunities available to them by reason of their position in the corporation, 153 ALR 663.

Duty and liability of closely held corporation, its directors, officers, or majority stockholders, in acquiring stock of minority shareholder, 7 ALR3d 500.

Liability of corporate directors for negligence in permitting mismanagement or defalcations by officers or employees, 25 ALR3d 941.

Liability of corporate directors or officers for negligence in permitting conversion of property of third persons by corporation, 29 ALR3d 660.

Liability of corporate officer or director for commission or compensation received from third person in connection with that person's transaction with corporation, 47 ALR3d 373.

Personal liability of officers or directors of corporation on corporate checks issued against insufficient funds, 47 ALR3d 1250.

Personal civil liability of officer or director of corporation for negligence of subordinate corporate employee causing personal injury or death of third person, 90 ALR3d 916.

Negligence, nonfeasance, or ratification of wrongdoing as excusing demand on directors as prerequisite to bringing of stockholder's derivative suit on behalf of corporation, 99 ALR3d 1034.

Propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder, 1 ALR4th 1124.

Financial inability of corporation to take advantage of business opportunity as affecting determination whether "corporate opportunity" was presented, 16 ALR4th 185.

Purchase of shares of corporation by director or officer as usurpation of "corporate opportunity," 16 ALR4th 784.

Fairness to corporation where "corporate opportunity" is allegedly usurped by officer or director, 17 ALR4th 479.

Duty of corporate directors to exercise "informed" judgment in recommending responses to merger or tender offers, 46 ALR4th 887.

Liability of corporate director, officer, or employee for tortious interference with corporation's contract with another, 72 ALR4th 492.

### 14-2-831. Derivative actions.

(a) A derivative proceeding, as defined in subsection (a) of Code Section 14-2-740, may be brought by a shareholder, or an action may be brought by the corporation, against one or more directors or officers of the corporation to procure for the benefit of the corporation a judgment for the following relief:

(1) To compel the defendant to account for official conduct or to decree any other relief called for by his official conduct in the following cases:

(A) The neglect of, failure to perform, or other violation of his duties in the management of the corporation or in the disposition of corporate assets;

(B) The acquisition, transfer to others, loss, or waste of corporate assets due to any neglect of, failure to perform, or other violation of duties; or

(C) The appropriation, in violation of his duties, of any business opportunity of the corporation;

(2) To enjoin a proposed unlawful conveyance, assignment, or transfer of corporate assets or other unlawful transaction where there is sufficient evidence that it will be made; and

(3) To set aside an unlawful conveyance, assignment, or transfer of corporate assets where the transferee knew of its unlawfulness and is made a party to the action.

(b) No action shall be brought for the relief provided in subsection (a) of this Code section more than four years from the time the cause of action accrued.

(c) This Code section shall not limit any liability otherwise imposed by law upon any director or officer or any third party. (Code 1981, § 14-2-831, enacted by Ga. L. 1989, p. 946, § 34.)

**Editor's notes.** — Ga. L. 1989, p. 946, § 33, effective July 1, 1989, renumbered former Code Section 14-2-831 as present Code Section 14-2-832.



## COMMENT

Source: Former § 14-2-153.

The 1989 amendments added this section, and renumbered former section 14-2-831 as section 14-2-832. Subsection (a) restored the general approach of former § 14-2-153(a), and expressly authorizes actions against officers and directors. Unlike former law, it authorizes derivative actions only for "shareholders" as defined in § 14-2-740, and for the corporation itself. While former law granted standing to receivers, trustees in bankruptcy, officers, directors, and judgment creditors, the general rule is to limit standing to shareholders. W. Fletcher, 13 *CYCLOPEDIA CORPORATIONS* (1984 Rev. Vol.) §§ 5972-5972.2. Common law courts have generally denied standing to creditors to bring derivative actions; other forms of action are available to creditors and their representatives. DeMott, *SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE*, § 4.03 (1987). While derivative actions are a judicial development, and are authorized without statutory expression, this subsection was added out of concern that repeal of the express grant of former law might imply a denial of the right to bring such actions. Former § 14-2-153 was based on N.Y. Bus. Corp. Law § 720, and was added in 1968.

Subsection (b) preserves the four year statute of limitations of former § 14-2-153(c).

Subsection (c) preserves former §14-2-153(d), and was intended to make it clear that this section is not to be construed as limiting any liability otherwise imposed by law upon any officer or director.

## JUDICIAL DECISIONS

**Shareholder selling stock could not require accounting.** — Shareholder who sold personal stock to the corporation under an installment agreement lacked standing to bring an action for an accounting of profits from a sale of the corporation's real estate made prior to payment in full under the installment contract. *McNeil v. Southern Golf Invests. of Ga., Inc.*, 228 Ga. App. 512, 492 S.E.2d 283 (1997).

**Corporate misappropriation.** — If a corporate officer or director is presented with a business opportunity which: (1) the corporation is financially able to undertake; (2) is in the line of the corporation's business; (3) is of practical advantage to the corporation; (4) is an opportunity in which the corporation has an interest or reasonable expectancy; and (5) is one where the self-interest of the officer or director, by embracing the opportunity, would be brought into conflict with the corporation's interests, then the law

will not permit that officer or director to personally seize the opportunity. *Parks v. Multimedia Techs., Inc.*, 239 Ga. App. 282, 520 S.E.2d 517 (1999).

**Recovery for misappropriation of corporate opportunity rejected.** — After an officer in a professional corporation withdrew from the firm, the officer's continued operation of a law practice, including closing real estate loans for a broker's office, which the officer had done while associated with the firm, did not constitute misappropriation of a corporate opportunity in the absence of evidence that a contractual relationship existed between the broker and the firm, or that the broker gave the firm all of its business. *Jenkins v. Smith*, 244 Ga. App. 541, 535 S.E.2d 521 (2000).

**Cited in** *Bob Davidson & Assocs. v. Norm Webster & Assocs.*, 251 Ga. App. 56, 553 S.E.2d 365 (2001); *Fisher v. State Mut. Ins. Co.*, 290 F.3d 1256 (11th Cir. 2002).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1307-1331.

**C.J.S.** — 19 C.J.S., Corporations, §§ 485, 489, 497.

**ALR.** — Right or duty of corporation to pay dividends, and liability for wrongful payment, 55 ALR 8; 76 ALR 885; 109 ALR 1381.

### 14-2-832. Liability for unlawful distributions.

(a) A director who votes for or assents to a distribution made in violation of Code Section 14-2-640 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating Code Section 14-2-640 or the articles of incorporation if it is established that he did not perform his duties in compliance with Code Section 14-2-830. In any proceeding commenced under this Code section, a director has all of the defenses ordinarily available to a director.

(b) A director held liable under subsection (a) of this Code section for an unlawful distribution is entitled to contribution:

(1) From every other director who could be held liable under subsection (a) of this Code section for the unlawful distribution; and

(2) From each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of Code Section 14-2-640 or the articles of incorporation.

(c) A proceeding under this Code section is barred unless it is commenced within two years after the date on which the effect of the distribution was measured under subsection (e) or (g) of Code Section 14-2-640. (Code 1981, § 14-2-831, enacted by Ga. L. 1988, p. 1070, § 1; Code 1981, § 14-2-832, as redesignated by Ga. L. 1989, p. 946, § 33.)

**Editor's notes.** — Ga. L. 1989, p. 946, former Code Section 14-2-831 as present § 33, effective July 1, 1989, renumbered Code Section 14-2-832.

### COMMENT

Source: Model Act, § 8.33. This section preserves the essential features of director liability for unlawful distributions formerly found in § 14-2-154.

Subsection (a) provides that if it is established that a director failed to meet the standards of conduct of Section 14-2-830 and voted for or assented to an unlawful distribution, the director is personally liable for the portion of the distribution that exceeds the maximum amount that could have been lawfully distributed. It also expressly preserves for a director all defenses that would ordinarily be available, notably the common law business judgment rule. The explicit reference in subsection (a) to the availability of defenses ordinarily available to a director was formulated somewhat more narrowly in former § 14-2-154(c), which provided a defense "if he relied and acted in good faith and upon financial information ... represented ... to be correct..."

Subsection (b) provides that a director who is compelled to restore the amount of an unlawful distribution to the corporation is entitled to contribution from every other director who could have been held liable for the unlawful distribution. This preserves the approach of former § 14-2-154(e). The director may also recover the amounts paid to any shareholder who accepted the payments knowing that they were in violation of



the statute. A shareholder who receives a payment not knowing of its invalidity is entitled to retain it. This follows former § 14-2-154(d).

Subsection (c) limits the time within which a proceeding may be commenced against a director for an unlawful distribution to two years after the date on which the effect of the distribution was measured. Formerly § 114-2-154(f) provided a six year statute of limitations. Georgia's former statute was among the longest in the nation, and was inconsistent with other provisions of the Code that attempt to clear up contingent claims in shorter periods. The provisions of Sections 14-2-1406 and 14-2-1407, dealing with claims upon dissolution of a corporation, for example, have been shortened to two years.

#### Cross-References

Director standards of conduct, see § 14-2-830. "Distribution" defined, see § 14-2-140. Distributions generally, see § 14-2-640. Indemnification, see § 14-2-850 et seq.

### JUDICIAL DECISIONS

**Cited in** *Hickman v. Hyzer*, 261 Ga. 38, 401 S.E.2d 738 (1991).

## PART 4

### OFFICERS

**Law reviews.** — For article, "The Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under Georgia Law," see 37 Mercer L. Rev. 79 (1985).

For note on procedure to be followed to

determine whether a corporation officer or director has appropriated wrongfully a business opportunity of his corporation for himself under former § 14-2-153, see 33 Mercer L. Rev. 407 (1981).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1895, § 1861, former Civil Code 1910, § 2225 and former Code Section 14-2-150, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Implied ratification of contract.** — Where a corporation, after learning of any relevant facts previously unknown to it, retains the benefits of an allegedly unauthorized contract, such a retention of benefits is "implied ratification." *Lanier Ins. Agency, Inc. v. Citizens Bank*, 168 Ga. App. 424, 309 S.E.2d 419 (1983) (decided under former § 14-2-150).

**Officer liable for participation in corporate tort.** — In Georgia, where a corporate tort is committed, an officer who takes part in its commission or who specifically directs the particular act to be done or who partici-

ipates or cooperates therein is personally liable for the commission of the tort. *Alexie, Inc. v. Old S. Bottle Shop Corp.*, 179 Ga. App. 190, 345 S.E.2d 875 (1986) (decided under former § 14-2-150).

**Burden of determining agency and its extent.** — Persons dealing with one who purports to act in behalf of a corporation are protected if the agent is held out by the company as being the agent empowered to transact such business. *Fitzgerald Cotton Oil Co. v. Farmers Supply Co.*, 3 Ga. App. 212, 59 S.E. 713 (1907) (decided under former Civil Code 1895, § 1861).

If the agent is held out by the company as being the agent empowered to transact such business a corporate bylaw or other limitation upon the power of the officer, not known to a party dealing with the agent, is not relevant. *Eminent Household of Columbian Woodmen v. George E. Benz &*

Co., 11 Ga. App. 733, 76 S.E. 99 (1912); *Stubbs v. Fourth Nat'l Bank*, 12 Ga. App. 539, 77 S.E. 893 (1913); *Blakely Artesian Ice Co. v. Clarke*, 13 Ga. App. 574, 79 S.E. 526 (1913); *Georgia Hussars v. Haar*, 156 Ga. 21, 118 S.E. 563 (1923) (decided under former Civil Code 1895, § 18961, and former Civil Code 1910, § 2225).

**Where bylaw not known to third person.**

— In a suit upon a note executed in behalf of a corporation by one as manager, the corporation having authority under its charter to issue negotiable paper in the due and ordinary course of its business, it is no defense that by reason of a bylaw not known to the plaintiff only the president could execute notes in behalf of the corporation. *LaGrange Lumber & Supply Co. v. Farmers & Traders Bank*, 37 Ga. App. 409, 140 S.E. 766 (1927) (decided under former Civil Code 1910, § 2225).

**Where assistant manager with apparent authority** to execute indorsements, even the corporation represented by him could not defeat such indorsements merely by alleging that in truth and in fact the assistant manager had no such authority and that the act of indorsing the paper had not been ratified. Much less could the indorsement be defeated by a third person (as in this case the defendant acceptor) by allegations which altogether fail to charge the plaintiff with notice of such lack of authority in the agent. *Massell v. Fourth Nat'l Bank*, 38 Ga. App. 631, 144 S.E. 806 (1928) (decided under former Civil Code 1910, § 2225).

**Cited in** *Patterson v. Duron Paints of Ga., Inc.*, 144 Ga. App. 123, 240 S.E.2d 603 (1977); *McCreery v. RSA Mgt., Inc.*, 249 Ga. 43, 287 S.E.2d 203 (1982); *Hickman v. Hyzer*, 261 Ga. 38, 401 S.E.2d 738 (1991).

## 14-2-840. Required officers.

(a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(c) The bylaws or the board of directors shall delegate to one of the officers responsibility for preparing minutes of the directors' and shareholders' meetings and for authenticating records of the corporation.

(d) The same individual may simultaneously hold more than one office in a corporation. (Code 1981, § 14-2-840, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 8.40.

Subsection (a) permits every corporation to designate the officers it wants. The designation may be made in the bylaws or by the board of directors consistently with the bylaws. This is a departure from former § 14-2-150, which required the board to elect or appoint the president, the secretary, and the treasurer.

Subsection (b) permits the board of directors to appoint assistant officers pursuant to its general powers under subsection (a); duly appointed officers may also appoint assistant officers if authorized by the board under subsection (b).

Subsection (c) provides that the bylaws or the board of directors must also delegate to an officer the responsibility to prepare minutes and authenticate records of the corporation; the person performing this function is referred to as the "secretary" of the corporation throughout the Code. See Section 14-2-140. The person who is designated by the bylaws or the board as responsible for maintaining minutes of meetings and



authenticating records of the corporation thereby has authority to bind the corporation by his authentication under this section. This delegation of authority, traditionally vested in the corporate "secretary," allows third persons to rely on authenticated records without inquiring into their truth or accuracy.

Under subsection (d) a corporation may have this secretarial and all other corporate functions performed by a single individual.

#### Cross-References

Agents of corporation, see § 14-2-302. Bylaws, see § 14-2-206 and Article 10, Part 2. Contract rights of officers, see § 14-2-844. Duties of officers, see § 14-2-841. Officer as employee of corporation, see § 14-2-140. Officer standards of conduct, see § 14-2-842. Resignation and removal of officers, see § 14-2-843. "Secretary" defined, see § 14-2-140. Tenure of officers, see § 14-2-844.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 951. 18B Am. Jur. 2d, Corporations, §§ 1342, 1344, 1360, 1361, 1479, 1538.

**C.J.S.** — 18 C.J.S., Corporations, § 371. 19 C.J.S., Corporations, §§ 443, 467, 470, 473.

**ALR.** — Power of officer (or officers not

acting as board of directors) to fix compensation of another officer, 72 ALR 238.

Authority of corporate officer to employ agent or broker to sell property, 159 ALR 796.

### 14-2-841. Duties of officers.

Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers. Unless the articles of incorporation, bylaws, or a resolution of the board of directors of a corporation provide otherwise, the chief executive officer (or the president if no person has been designated as chief executive officer) of a corporation shall have authority to conduct all ordinary business on behalf of such corporation and may execute and deliver on behalf of a corporation any contract, conveyance, or similar document not requiring approval by the board of directors or shareholders as provided in this chapter. (Code 1981, § 14-2-841, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 9.)

#### COMMENT

Source: Model Act, § 8.41.

Section 14-2-841 recognizes that persons designated as officers have the formal authority set forth for that position (1) by its description in the bylaws, (2) by specific resolution of the board of directors, or (3) by direction of another officer authorized by the board of directors to prescribe the duties of other officers. It preserves the approach of former § 14-2-150.

#### Note to 1993 Amendment

The 1993 amendment changes existing Georgia law by conferring general authority on the chief executive officer or president of a company to conduct ordinary business

and execute and deliver contracts, conveyances or similar documents on behalf of the corporation, excluding agreements which expressly require approval of the board of directors or shareholders pursuant to other provisions of the Code. The 1993 amendment thus rejects Georgia case law which hold that a president of a corporation has no such inherent authority. The 1993 Amendment permits a corporation to negate such a delegation of authority by including an appropriate provision in its articles of incorporation or bylaws, or through resolution of its board of directors.

#### Cross-References

Assistant officers, see § 14-2-840. Bylaws, see § 14-2-206 and Article 10, Part 2. Duties of officer serving as secretary, see § 14-2-840. Officer as employee, see § 14-2-140. Secretary, see § 14-2-140. Standards of conduct: directors, see § 14-2-830; officers, see § 14-2-842.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1521, 1523-1525.

**C.J.S.** — 19 C.J.S., Corporations, §§ 468, 473.

**ALR.** — Applicability to corporate officers and employees of statute requiring agent's authority to be in writing, 1 ALR 1132.

Liability of corporation for fraud of officer for his own benefit but within his apparent authority, 43 ALR 615.

Responsibility of corporation for misstatements by officer or employee to induce or influence purchase of stock, 66 ALR 1450.

Power of officer (or officers not acting as board of directors) to fix compensation of another officer, 72 ALR 238.

Liability of payee who accepts checks of corporation in payment of personal debts of officer who was authorized to use corporate funds for that purpose, 100 ALR 60.

Authority of corporate officer to employ agent or broker to sell property, 159 ALR 796.

Authority of officer or employee of corporation to acknowledge corporate debt, make partial payment or new promise, or do other act which will have effect of tolling or sus-

pending statute of limitations, 161 ALR 1443.

Power of president of corporation to have litigation instituted by it where board of directors has failed or refused to grant permission, 10 ALR2d 701.

Power of corporation or its officers with respect to payment of remuneration, bonus, and the like, to widow or family of deceased officer, 29 ALR2d 1262.

Power of a particular officer or agent of business corporation to bind it by a donation to a charity or similar institution, 50 ALR2d 447.

Authority of president to subordinate corporation's claim, assignment, lien, or the like, 53 ALR2d 1421.

Power of secretary or treasurer of corporation to institute litigation for it, 64 ALR2d 900.

Power of president of corporation to commence or to carry on arbitration proceedings, 65 ALR2d 1321.

Power and authority of president of business corporation to execute commercial paper, 96 ALR2d 549.

#### 14-2-842. Standards of conduct for officers.

(a) An officer with discretionary authority shall discharge his duties under that authority:

(1) In a manner he believes in good faith to be in the best interests of the corporation; and

(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.



(b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

(2) Legal counsel, public accountants, investment bankers, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

(c) In the instances described in subsection (b) of this Code section, an officer is not entitled to rely if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) of this Code section unwarranted.

(d) An officer is not liable to the corporation or to its shareholders for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this Code section. (Code 1981, § 14-2-842, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 8.42.

This section provides that a nondirector officer with discretionary authority must meet the same standards of conduct required of directors under Section 14-2-830. This preserves the identity of treatment that formerly existed in Georgia, under § 14-2-152.1. But an officer's ability to rely on information, reports, or statements, may, depending upon the circumstances of the particular case, be more limited than in the case of a director in view of the greater obligation he may have to be familiar with the affairs of the corporation. See Section 14-2-842(b). This preserves their treatment in former § 14-2-152.1(b)(2). Nondirector officers with more limited discretionary authority may be judged by a narrower standard, though every corporate officer or agent owes duties of fidelity, honesty, good faith, and fair dealing to the corporation. The Comment to Section 14-2-830 is generally applicable to nondirector officers as well as to directors.

Subsection (a)(3) of the Model Act, which required officers to act in a manner they reasonably believe to be in the best interests of the corporation, was deleted from the Code. This is consistent with the provisions relating to directors, and preserves the existing standards of Georgia law. See Section 14-2-830(a).

Subsection (b)(2) of the Model Act was amended to specifically mention investment bankers as experts upon whom officers may rely. This preserves former law under § 14-2-152.1(2)(B). This is consistent with the treatment of directors. See Section 14-2-830(b)(2).

Subsection (d) of the Model Act was amended to limit its protection to claims brought on behalf of the corporation or its shareholders, in the same manner as Section 14-2-830(d).

#### Cross-References

Appointment of officers, see § 14-2-840. Director conflict of interest, see § 14-2-860 et seq. Director standards of conduct, see § 14-2-830. Duties of officers, see § 14-2-841.

Indemnification, see § 14-2-850 et seq. Resignation and removal of officers, see § 14-2-843.

### JUDICIAL DECISIONS

**Business judgment rule applied.** — In an action against directors and officers of a corporation for breach of fiduciary obligations, where there was evidence that the directors and officers consulted legal and financial experts throughout the solicitation and negotiation for a purchaser for the corporation, applying the business judgment rule, the directors and officers satisfied their statutory duties. *Munford v. Valuation Research Corp.*, 98 F.3d 604 (11th Cir. 1996), cert. denied, 522 U.S. 1068, 118 S. Ct. 738, 139 L. Ed. 2d 675 (1998).

**Tortious interference with fiduciary relationship.** — A claim against a third party for tortious interference with the fiduciary rela-

tionship between a corporation and its officer is one for tortious interference with contractual rights, and states a claim under Georgia law sufficient to withstand summary judgment. *Rome Indus., Inc. v. Jonsson*, 202 Ga. App. 682, 415 S.E.2d 651, cert. denied, 202 Ga. App. 903, 415 S.E.2d 651 (1992).

**Fiduciary duty in corporate bankruptcy.** — In a bankruptcy proceeding, revesting of corporate governance to the directors and officers carries with it a fiduciary obligation to creditors under both state law and the Bankruptcy Code. *In re Concrete Prods., Inc.*, 208 Bankr. 1000 (Bankr. S.D. Ga. 1996).

Cited in *Parks v. Multimedia Techs., Inc.*, 239 Ga. App. 282, 520 S.E.2d 517 (1999).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1684, 1689-1708.

**C.J.S.** — 19 C.J.S., Corporations, §§ 476-480, 489.

**ALR.** — Liability of corporation for fraud of officer for his own benefit but within his apparent authority, 43 ALR 615.

Provision of constitution or statute making directors or officers of corporation liable for money embezzled or misappropriated, 46 ALR 1164.

Right of creditor of corporation to maintain personal action against directors or officers for mismanagement, 50 ALR 462.

Responsibility of corporation for misstatements by officer or employee to induce or influence purchase of stock, 66 ALR 1450.

Assignability of claim against officers or directors of corporation for breach of duty, 80 ALR 875.

Validity, construction, and effect of clause in obligation of corporation that it is issued without recourse against officers or directors, 97 ALR 1157.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 ALR 665.

Recovery against corporate directors or officers for fraud or mismanagement as affected by releases, ratification, waiver, or

consent by some, but not all, of the stockholders, 120 ALR 238.

Construction and application of statutes making corporate officers or directors liable in respect of loans or advances to stockholders or officers, 129 ALR 1258.

Personal liability of corporate directors or officers under statute imposing liability in respect of excessive indebtedness, as affected by payment by the corporation (or its receiver, assignee in insolvency, or trustee in bankruptcy) of all or part of the excessive indebtedness, 130 ALR 824.

Personal liability of corporate directors or officers to third persons for restitution, or for damages for conversion, under circumstances rendering the corporation itself liable, 152 ALR 696.

Accountability of corporate directors or officers for profit from activities beyond the corporate powers, but involving the use of information or opportunities available to them by reason of their position in the corporation, 153 ALR 663.

Right of corporate officer to purchase corporate assets from corporation, 24 ALR2d 71.

Liability of corporate directors or officers for negligence in permitting conversion of property of third persons by corporation, 29 ALR3d 660.



Liability of corporate officer or director for commission or compensation received from third person in connection with that person's transaction with corporation, 47 ALR3d 373.

What business opportunities are in "line of business" of corporation for purposes of determining whether a corporate opportunity was presented, 77 ALR3d 961.

Personal civil liability of officer or director of corporation for negligence of subordinate corporate employee causing personal injury or death of third person, 90 ALR3d 916.

Propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder, 1 ALR4th 1124.

Financial inability of corporation to take advantage of business opportunity as affecting determination whether "corporate opportunity" was presented, 16 ALR4th 185.

Purchase of shares of corporation by director or officer as usurpation of "corporate opportunity," 16 ALR4th 784.

Fairness to corporation where "corporate opportunity" is allegedly usurped by officer or director, 17 ALR4th 479.

Liability of corporate director, officer, or employee for tortious interference with corporation's contract with another, 72 ALR4th 492.

### 14-2-843. Resignation and removal of officers.

(a) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is delivered unless the notice specifies a later effective date. A copy of the notice of resignation as delivered to the corporation may be filed with the Secretary of State.

(b) A board of directors may remove any officer at any time with or without cause. Unless the bylaws provide otherwise, any officer or assistant officer appointed by an authorized officer pursuant to subsection (b) of Code Section 14-2-840 may be removed at any time with or without cause by any officer having authority to appoint such officer or assistant officer. (Code 1981, § 14-2-843, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1995, p. 482, § 5; Ga. L. 1996, p. 1203, § 4.)

**Law reviews.** — For article, "The Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under

Georgia Law," see 37 Mercer L. Rev. 79 (1985).

### COMMENT

Source: Model Act, § 8.43.

Subsection (a) is declarative of former law, although no comparable language was found in former Georgia law, which only recognized that officers could resign, under former § 14-2-150(d). The Code also recognizes that, with the consent of the board of directors, they may resign effective at a later date, and that the board of directors may fill a future vacancy to become effective as of the effective date of the resignation. The last sentence of subsection (a) of the Model Act, generally to this effect, was deleted as superfluous and confusing.

In part because of the unlimited power of removal, confirmed by subsection (b), a board of directors may grant an officer an employment contract that extends beyond the term of the board of directors. If a later board of directors refuses to reappoint that person as an officer, he has the right to sue for damages but not for specific performance of his employment contract.

Subsection (b) is also declarative of former law under § 14-2-151(a). The tenure of all corporate officers is subject to the will of the board of directors. If the board of directors loses confidence in a corporate officer, that officer may be removed irrespective to contract rights or the presence or absence of "cause" in a legal sense. Section 14-2-844 provides that removal of an officer who has contract rights is without prejudice to whatever rights the former officer may assert in a suit for damages for breach of contract.

#### Note to 1996 Amendments

The 1996 amendments permit, but do not require, a resigning corporate officer to file a copy of the notice of resignation with the Secretary of State. Corporations are not required to amend annual registrations to reflect changes in their officers until the next annual registration. In the case of corporations that fail to file an annual registration, no notice of a resignation will be reflected in the records of the Secretary of State. The amendment permits, but does not require, the Secretary of State to amend its records to reflect such resignations.

#### Cross-References

Contract rights of officers, see § 14-2-844. "Deliver" includes mail, see § 14-2-140. Effective date of notice, see § 14-2-141. Notice to the corporation, see § 14-2-141.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-712 and former Code Section 14-2-151, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Contract rights of officer.** — Although, in electing an attorney to the position of general counsel, the board expressly reserved the right to remove the attorney at any time, this was not necessarily inconsistent with the existence of long-term contractual rights on

the attorney's part. *Henson v. American Family Corp.*, 171 Ga. App. 724, 321 S.E.2d 205 (1984) (decided under former § 14-2-151).

**Ratification of illegal firing of an officer** does not operate to deprive him of his salary from the date of the illegal firing to the time of ratification. *McCreery v. RSA Mgt., Inc.*, 249 Ga. 43, 287 S.E.2d 203 (1982) (decided under former Code 1933, § 22-712).

**Cited in** *J.M. Clayton Co. v. Martin*, 177 Ga. App. 228, 339 S.E.2d 280 (1985).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1419-1423, 1427, 1428.

**C.J.S.** — 19 C.J.S., Corporations, §§ 452, 454-457.

**ALR.** — When resignation of officer of private corporation becomes effective, 20 ALR 367; 153 ALR 1112.

Power of directors of private corporation

to remove officers or fellow directors, 63 ALR 776.

Removal by court of director or officer of private corporation, 124 ALR 364.

Right of corporate officer to recover compensation for time period between original improper discharge and a subsequent legal discharge, 82 ALR2d 965.

#### 14-2-844. Contract rights of officers.

(a) The appointment of an officer does not itself create contract rights.

(b) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the



corporation's contract rights, if any, with the officer. (Code 1981, § 14-2-844, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 8.44. There is no change from former law, § 14-2-151(d).

Section 14-2-844 makes clear that the appointment of an officer does not itself create contract rights in the officer. The removal of an officer with contract rights is without prejudice to his later enforcement of contract rights in a suit for damages for breach of contract. See the Comment to Section 14-2-843. Similarly, an officer with an employment contract who prematurely resigns may be in breach of his employment contract. The mere appointment of an officer for a term does not create a contractual obligation on his part to complete the term.

### Cross-References

Appointment of officers and assistant officers, see § 14-2-840. Resignation or removal of officers, see § 14-2-843.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1431, 1444.

**C.J.S.** — 19 C.J.S., Corporations, §§ 454-457, 530, 532.

**ALR.** — Construction of contract which fixes compensation of officer or employee with reference to dividends, 41 ALR 871.

Right of court to interfere with amount of salaries voted to officers of private corporations by directors, 44 ALR 570.

Estoppel of stockholder to recover back or

to secure restoration of compensation of corporate officers claimed to be exorbitant or unauthorized, 16 ALR2d 467.

Right of corporate officer to recover compensation for time period between original improper discharge and a subsequent legal discharge, 82 ALR2d 965.

Payment of premiums by corporation on corporate officer's life insurance policy as affecting right to policy, 56 ALR3d 1086.

## PART 5

### INDEMNIFICATION

**Law reviews.** — For article discussing liability of corporate directors, officers, and shareholders under the Georgia Business Corporation Code, and as affected by provisions of the Georgia Civil Practice Act, see 7

Ga. St. B.J. 277 (1971). For article, "The Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under Georgia Law," see 37 Mercer L. Rev. 79 (1985).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-156, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this part.

**Premature claim for indemnification.** — In the corporation's action to obtain injunctive relief against the corporation's former

counsel where the corporation prevailed, and no proper determination had been made that counsel had acted in the best interests of the corporation in any phase of the litigation, counsel's claim for indemnification was premature and should have been dismissed. *Henson v. American Family Corp.*, 171 Ga. App. 724, 321 S.E.2d 205 (1984) (decided under former § 14-2-156).

**14-2-850. Part definitions.**

As used in this part, the term:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(2) "Director" or "officer" means an individual who is or was a director or officer, respectively, of a corporation or who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan, or other entity. A director or officer is considered to be serving an employee benefit plan at the corporation's request if his or her duties to the corporation also impose duties on, or otherwise involve services by, the director or officer to the plan or to participants in or beneficiaries of the plan. Director or officer includes, unless the context otherwise requires, the estate or personal representative of a director or officer.

(3) "Disinterested director" means a director who at the time of a vote referred to in subsection (c) of Code Section 14-2-853 or a vote or selection referred to in subsection (b) or (c) of Code Section 14-2-855 or subsection (a) of Code Section 14-2-856 is not:

(A) A party to the proceeding; or

(B) An individual who is a party to a proceeding having a familial, financial, professional, or employment relationship with the director whose indemnification or advance for expenses is the subject of the decision being made with respect to the proceeding, which relationship would, in the circumstances, reasonably be expected to exert an influence on the director's judgment when voting on the decision being made.

(4) "Expenses" includes counsel fees.

(5) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

(6) "Official capacity" means:

(A) When used with respect to a director, the office of director in a corporation; and

(B) When used with respect to an officer, as contemplated in Code Section 14-2-857, the office in a corporation held by the officer.



Official capacity does not include service for any other domestic or foreign corporation or any partnership, joint venture, trust, employee benefit plan, or other entity.

(7) "Party" means an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(8) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitral, or investigative and whether formal or informal. (Code 1981, § 14-2-850, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1996, p. 1203, § 5.)

**Law reviews.** — For article, "Corporate Governance in the Aftermath of the Insurance Crisis," see 39 Emory L.J. 1155 (1990).

For review of 1996 corporation, partnership, and association legislation, see 13 Ga. St. U. L. Rev. 70.

### COMMENT

Source: Model Act, § 8.50.

The definitions set forth in Section 14-2-850 apply to Part 5 and have no application elsewhere in the Code. Former law did not provide a set of definitions.

A special definition of "corporation" is included in Part 5 to make it clear that predecessor entities that have been absorbed in mergers or other transactions are included within the definition. The approach of this subsection is similar to that of former § 14-2-156(i), as amended in 1975, which expressly covered successor corporations in business combinations.

A special definition of "director" is included in Part 5 to make it clear that a person who is or was a director is covered by this part while serving at the corporation's request in another enterprise. The purpose of this definition is to give directors the benefits of the protection of this part while serving at the corporation's request in a responsible position in employee benefits plans, trade associations, nonprofit or charitable entities, foreign or domestic entities, and other kinds of profit or nonprofit ventures. This is consistent with former § 14-2-156(a). The only significant departure from former law is the addition of the second sentence of Section 14-2-850(2), which makes clear that a director who is serving as a fiduciary of an employee benefit plan is nevertheless viewed as acting as a director for purposes of this part. Former Georgia law authorized indemnification of officers, agents and employees. The Code provides for such authorization in Section 14-2-857.

The estate or personal representative of a director is entitled to the rights of indemnification possessed by the director himself. See the last sentence of Section 14-2-850(2). The phrase, "unless the context requires otherwise," was added to make clear that the estate or personal representative did not have the right to participate in directoral decisions whether to grant indemnification authorized in this part.

"Expenses" is defined to include counsel fees to avoid repeated references to such fees every time "expenses" appears throughout the part.

"Liability" is defined for convenience, to avoid repeated references to recoverable items throughout the part. Even though the definition of "liability" includes both expenses and amounts paid to satisfy or to settle substantive claims, indemnification against substantive claims is not allowed in several provisions in Part 5. For example, indemnification in suits brought by or in the name of the corporation is limited to

actions other than those where the director is held liable for specified actions, and to cases where shareholder approval is obtained. See Sections 15-2-851(d) and 14-2-856.

The definition of "liability" permits the indemnification only of "reasonable expenses incurred." The intention is that any portion of expenses falling outside the perimeter of reasonableness should not be indemnified, and that, if necessary, an allocation of expenses should be made. By contrast, unlike former § 14-2-156(a), Section 14-2-850(4) provides that amounts paid to settle or satisfy substantive claims are not subject to a reasonableness test. Since payment of these amounts is permissive, a special limitation of "reasonableness" for settlements is inappropriate. Further, it is undesirable to base the statutory test of power to indemnify on an affirmative finding that a settlement is reasonable. Indeed, the grant of authority to indemnify only those settlements that are "reasonable" would suggest an "all or nothing" approach inconsistent with the basic philosophy of indemnification of "reasonable" expenses.

"Penalties" and "fines" are expressly included within the definition of "liability" so that in appropriate cases these items may also be indemnified. See Section 14-2-851. The purpose of this definition is to cover every type of monetary obligation that may be imposed upon a director, including civil penalties (which have been authorized in a number of recent statutes), restitution, and obligations to give notice (which are proposed as part of the revision of the federal criminal code). This definition also expressly includes the levy of excise taxes under the Internal Revenue Code pursuant to ERISA within the definition of "fines."

The Model Act contained a definition of "official capacity" which was deleted from the Code. The Code rejects the distinction developed by the Model Act, between indemnification for acts taken in one's official capacity, which required, under Section 8.51 of the Model Act, that the person to be indemnified must have reasonably believed he was acting in the best interests of the corporation, while if the action in question was not taken in his "official capacity," he need only have reasonably believed that the conduct was not opposed to the best interests of the corporation. This distinction did not exist in former Georgia law, § 14-2-156.

The definition of "party" establishes the basic coverage of the part. The definition includes every individual "who was, is, or is threatened to be made a named defendant or respondent in a proceeding." A person who is only called as a witness is not a "party" within this definition, and as specifically provided in Section 14-2-859b), indemnification of this person is not limited by this part.

The broad definition of "proceeding" ensures that the benefits of this part will be available to directors in new and unexpected, as well as traditional, types of proceedings whether civil, criminal, administrative, or investigative. It also includes appeals in lawsuits and petitions to review administrative actions.

#### **Note to 1996 Amendments**

These changes were made to conform to 1994 changes in the Revised Model Business Corporation Act, as were other changes in Part 5 of Article 8. See 49 Bus. Law. 741 (Feb. 1994) and 49 Bus. Law. 1823 (Aug. 1994). Readers are referred to the official comments to the Revised Model Business Corporation Act for more extensive discussion of the text of this section. While the definition of corporation in subsection (1) was abbreviated in the 1994 amendments to the Revised Model Business Corporation Act, the Georgia definition was not changed. Under Code Section 14-11-212, a corporation can convert into a limited liability company without a merger. This provides a good reason to retain the language eliminated in the Model Act. Changes to subsection (2) add references to officers as well as directors, which provides definitions for purposes of both the indemnification provisions dealing with directors as well as Code Section 14-2-857, which authorizes indemnification of officers. Other stylistic changes, which were made



to conform to 1994 changes to the Revised Model Business Corporation Act, substitute "entity" for "enterprise" and relocate the word "foreign". "Entity" is a defined term in Code Section 14-2-140, while "enterprise" was not defined.

Subsection (3) is new. It provides a separate definition of "disinterested director" for purposes of this part.

Corresponding with Model Act changes, a new definition of "official capacity" was included in subsection (6), because the term determines which of the two alternative standards of conduct set forth in Code section 14-2-851(a)(1)(B) applies to civil proceedings.

#### **Cross-References**

Act definitions, see § 14-2-140. Witness indemnification, see § 14-2-859.

### **14-2-851. Authority to indemnify.**

(a) Except as otherwise provided in this Code section, a corporation may indemnify an individual who is a party to a proceeding because he or she is or was a director against liability incurred in the proceeding if:

- (1) Such individual conducted himself or herself in good faith; and
- (2) Such individual reasonably believed:

(A) In the case of conduct in his or her official capacity, that such conduct was in the best interests of the corporation;

(B) In all other cases, that such conduct was at least not opposed to the best interests of the corporation; and

(C) In the case of any criminal proceeding, that the individual had no reasonable cause to believe such conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose he or she believed in good faith to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subparagraph (a)(2)(B) of this Code section.

(c) The termination of a proceeding by judgment, order, settlement, or conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this Code section.

(d) A corporation may not indemnify a director under this Code section:

(1) In connection with a proceeding by or in the right of the corporation, except for reasonable expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under this Code section; or

(2) In connection with any proceeding with respect to conduct for which he or she was adjudged liable on the basis that personal benefit was improperly received by him or her, whether or not involving action in his

or her official capacity. (Code 1981, § 14-2-851, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1996, p. 1203, § 5; Ga. L. 1997, p. 143, § 14.)

#### COMMENT

Source: Model Act, § 8.51. This replaces provisions found in former § 14-2-156.

The provisions on indemnification have undergone considerable revision, in response to recent concerns about excessive director liability. These concerns have raised legitimate concerns that qualified persons will refuse to serve on boards of Georgia corporations, and led to broad corporate authority to exculpate directors from liability in 1987, now contained in Section 14-2-202(b)(4) of the Code. The indemnification provisions have been revised to reflect the approach of the exculpatory provisions.

Subject to the procedural safeguards provided in Part 5, authorization for indemnification is made virtually coextensive with authorization for liability insurance. Section 14-2-858 of the Code, drawn from the Model Act, and former § 14-2-156(g), permits liability insurance protection to extend as far as commercial insurance markets would extend. Commercial insurers are not in the business of writing insurance policies that encourage wrongful behavior, and thus have traditionally written exceptions for willful wrongdoing, active dishonesty, or illegal personal profit, including knowing violations of the securities laws. See generally Johnston, "Corporate Indemnification and Liability Insurance," 33 BUS. LAW. 1993 (1978) and Hinsey, "The New Lloyd's Policy Form for Directors and Officers Liability Insurance — An Analysis," 33 BUS. LAW. 1961 (1978). The purpose of the indemnification provisions is to permit indemnification to essentially the same extent, where it is properly approved.

Section 14-2-851 permits indemnification subject to the commonly provided limitations contained therein and in Section 14-2-855, without the necessity of shareholder approval, except as provided in Section 14-2-855(c)(4). The broader indemnification authority of Section 14-2-856, however, requires shareholder approval.

Subsection (a) is a self-implementing general grant of corporate power to indemnify directors. Its limits, a good faith regard for the corporation's interests, parallel the duties of Section 14-2-830, with the exception of the standard of care. This preserves the approach of former Georgia law, § 14-2-156(a). The limits on that power are set out in subsections (d) and (e), and are subject to the procedural safeguards of Sections 14-2-855 and 14-2-856.

Subsection (b) makes clear that a director who is serving as a trustee or fiduciary for an employee benefit plan under ERISA meets the standard for indemnification under Section 14-2-851(b) if he believes in good faith that his conduct was not opposed to the best interests of the participants in and beneficiaries of the plan. This follows Model Act § 14-2-851(b), except that the Model Act required a reasonable belief that his acts were in the interests of plan participants and beneficiaries. The "reasonably believed" language has been replaced with a "good faith" belief standard, consistent with the approach of Section 14-2-830.

The purpose of subsection (c) is to reject the argument that indemnification is automatically improper whenever a proceeding has been terminated on a basis that does not exonerate the director claiming indemnification. Even though a final judgment or conviction is not automatically determinative of the issue whether the minimum standard of conduct was met, any judicial determination of substantive liability would in most instances be entitled to considerable weight. By the same token, it is clear that the termination of a proceeding by settlement or plea of *nolo contendere* should not of itself create a presumption either that conduct met or did not meet the standard of Section 14-2-851. This follows the approach of former law, § 14-2-156(a). On the other hand, a final determination of nonliability or acquittal automatically entitles the director to indemnification of expenses under Section 14-2-852.



Subsection (d) imposes limits on the authority of a corporation to indemnify a director under Section 14-2-851. These provisions forbid indemnification under Section 14-2-851 where the director is adjudged liable to the corporation, preserving the rule of former § 14-2-156(b) as to derivative actions. Subsection (d) also prohibits indemnification under Section 14-2-851 if the director was adjudged liable for an improper personal benefit, which was not found in former Georgia law. This parallels limits on exculpation found in Code Section 14-2-202(b)(4)(iv).

Subsection (e) limits indemnification under Section 14-2-851 in actions brought by the corporation, and in derivative actions, to expenses incurred in connection with the proceeding. This avoids circularity, since otherwise the director would be able to seek indemnification where the director had settled a claim brought by or for the corporation. This preserves the approach of former § 14-2-156(b). However, Section 14-2-856 permits indemnification as to certain actions by the corporation or derivative actions, with shareholder approval.

Provisions added to former § 14-2-156(j) by § 3, Act 657, Ga. Laws 1987, to the effect that advance of expenses and indemnification granted shall inure to the benefit of heirs, executors and administrators are not repeated in the Code because "director" is defined in Section 14-2-850 to include the estate of a deceased individual.

#### Note to 1996 Amendments

Changes were made to conform to 1994 amendments to the Revised Model Business Corporation Act. See 49 Bus. Law. 741 (Feb. 1994) and 49 Bus. Law. 1823 (August, 1994). Readers are referred to the official comments to the Revised Model Business Corporation Act for more extensive discussions of the text of this section.

Subsection (a) has been substantially revised. Subsection (a)(1) distinguishes between conduct performed in a director's official capacity and that outside of such capacity.

Former subsection (e), limiting indemnification to reasonable expenses incurred in connection with a derivative proceeding, has been repealed, and its language moved to subsection (d)(1). But subsection (d)(1) authorizes such indemnification only if it is determined that the director has met the relevant standard of conduct under subsection (a). This eliminates the possibility that a director could be found liable for conduct that he did not believe was in the best interests of the corporation, and then obtain indemnification for those expenses.

#### Cross-References

Advance of expenses, see § 14-2-853. Determination and authorization of indemnification, see § 14-2-855. Court-ordered indemnification, see § 14-2-854. Derivative proceedings, see § 14-2-740 et seq. Director standards of conduct, see §§ 14-2-830 and 14-2-831. "Expenses" defined, see § 14-2-850. "Liability" defined, see § 14-2-850. Mandatory indemnification, see § 14-2-852. "Official capacity" defined, see § 14-2-850. "Proceeding" defined, see § 14-2-850. Report to shareholders on indemnification, see § 14-2-1621.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1897-1909.

**ALR.** — Attorneys' fees and other expenses incident to controversy respecting internal affairs of corporation as charge against the corporation, 39 ALR2d 580.

Insurance: construction of policy or bond

indemnifying directors or officers of corporation for expenses incurred in defending actions brought against them in their capacity as such, 49 ALR3d 1250.

Validity, construction, and effect of "regulatory exclusion" in directors' and officers' liability insurance policy, 21 ALR5th 292.

**14-2-852. Mandatory indemnification.**

A corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he or she was a party because he or she was a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding. (Code 1981, § 14-2-852, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1996, p. 1203, § 5.)

**Law reviews.** — For review of 1996 corporation, partnership, and association legislation, see 13 Ga. St. U. L. Rev. 70.

**COMMENT**

Source: Model Act, § 8.52. This replaces provisions found in former § 14-2-156(c).

Section 14-2-851 determines whether indemnification may be made voluntarily by a corporation if it elects to do so. Section 14-2-852 determines whether a corporation must indemnify a director for his expenses; in other words, Section 14-2-852 creates a statutory right of indemnification in favor of the director who meets the requirements of that section.

Enforcement of this right by judicial proceeding is specifically contemplated by Section 14-2-854(1), which also gives the director a statutory right to recover expenses incurred by him in enforcing his statutory right to indemnification under Section 14-2-852.

The basic standard for mandatory indemnification is that the director has been "successful, on the merits or otherwise," in the defense of the proceeding. The word "wholly" was deleted from the Model Act provision, and the phrase "or in defense of any claim, issue, or matter therein," was added, to restore the approach of former law, § 14-2-156(c). This rejects the Model Act approach and endorses the approach of *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138 (Del. 1974), that a defendant may be entitled to partial mandatory indemnification if he succeeded by plea bargaining or otherwise to obtain the dismissal of some but not all counts of an indictment.

**Note to 1996 Amendments**

Stylistic changes were made to conform this section to the 1994 revisions of the Model Business Corporation Act. See 49 Bus. Law. 741 (Feb. 1994) and 49 Bus. Law. 1823 (August, 1994). Readers are referred to the official comments to the Revised Model Business Corporation Act for more extensive discussion of the text of this section. The only substantive change is that the word "successful" is now modified by "wholly." As the Official Comments to the Revised Model Act point out: "The word 'wholly' is added to avoid the argument accepted in *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138 (Del. 1974), that a defendant may be entitled to partial mandatory indemnification if, by plea bargaining or otherwise, he was able to obtain the dismissal of some but not all counts of an indictment." 49 Bus. Law. at 763.

**Cross-References**

Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Court-ordered indemnification, see § 14-2-854. "Expenses" defined, see § 14-2-850. "Party" defined, see § 14-2-850. "Proceeding" defined, see § 14-2-850. Report to shareholders on indemnification, see § 14-2-1621. Voluntary indemnification, see § 14-2-851.



## JUDICIAL DECISIONS

**Right to indemnification.** — Church corporation's liability to pastor, who, as a director, was a defendant in a liquidation proceeding, would have priority in the distribution of the corporate assets. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994).

The pastor, as a director of a church corporation, was entitled to mandatory in-

demnification of the reasonable expenses incurred in the defense of a liquidation proceeding; however, the indemnification must be proportionate to the extent that the pastor was successful in the claims confronted. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1910, 1911.

**14-2-853. Advance for expenses.**

(a) A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding because he or she is a director if he or she delivers to the corporation:

(1) A written affirmation of his or her good faith belief that he or she has met the relevant standard of conduct described in Code Section 14-2-851 or that the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by paragraph (4) of subsection (b) of Code Section 14-2-202; and

(2) His or her written undertaking to repay any funds advanced if it is ultimately determined that the director is not entitled to indemnification under this part.

(b) The undertaking required by paragraph (2) of subsection (a) of this Code section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to the financial ability of the director to make repayment.

(c) Authorizations under this Code section shall be made:

(1) By the board of directors:

(A) When there are two or more disinterested directors, by a majority vote of all the disinterested directors (a majority of whom shall for such purpose constitute a quorum) or by a majority of the members of a committee of two or more disinterested directors appointed by such a vote; or

(B) When there are fewer than two disinterested directors, by the vote necessary for action by the board in accordance with subsection

(c) of Code Section 14-2-824, in which authorization directors who do not qualify as disinterested directors may participate; or

(2) By the shareholders, but shares owned or voted under the control of a director who at the time does not qualify as a disinterested director with respect to the proceeding may not be voted on the authorization. (Code 1981, § 14-2-853, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1996, p. 1203, § 5.)

**Law reviews.** — For annual survey article discussing advancement of directors' expenses, see 46 Mercer L. Rev. 71 (1994).

### COMMENT

Source: Model Act, § 8.53.

Section 14-2-853 establishes a workable standard for advancement of expenses to directors facing protracted and costly litigation as a result of their service to the corporation: indemnification is permitted when the director assures the corporation of his belief that he has met applicable standards of conduct and promises to repay funds advanced if he ultimately is not entitled to indemnification. This conforms closely to former § 14-2-156(e), and rejects the Model Act requirement of a determination by the board or other decision-making authority that the director is entitled to advances of expenses because the facts then known would not preclude ultimate indemnification. Because all of the board are frequently named defendants, such a determination would involve a conflict of interests, and implementation of the costly procedures of Section 14-2-855 to obtain an authorization. Elimination of these procedural requirements is intended to leave these questions to the general conflict of interest rules of Part 6. Thus authorization of advances may be subject to attack on the ground of unfairness to the corporation unless the director's affirmation meets the standards of required disclosure of Section 14-2-860(4), and the advance is approved by disinterested directors in compliance with Section 14-2-862, or by qualified shareholders in compliance with Section 14-2-863. Alternatively, directors may choose to utilize the procedures of Section 14-2-855.

Elimination of the Model Act's requirement of a "determination" of eligibility for advancement of expenses means that the board need only "authorize" the advance. This authority is limited by subsection (a) to reasonable expenses, and the determination of reasonableness is a business judgment to be made by or under general guidelines dictated by the board of directors. It is not required that the board review individual applications for advances once authorized for a proceeding, if the board has provided standards or procedures for reviewing the reasonableness of these expenses.

Subsection (a) requires a written affirmation by the director of his good faith belief that he has met the standard of conduct necessary for indemnification by the corporation and a written undertaking by or on behalf of the director to repay the advance if it is ultimately determined that he has not met the standard of conduct. The additional requirement of a written affirmation that the standard has been met is the only significant change from former law under § 14-2-156(e). Under subsection (b) the undertaking need not be secured and financial ability to repay is not a prerequisite. The theory underlying this subsection is that, in advancing expenses, wealthy directors should not be favored over directors whose financial resources are modest.

Subsection (c) of the Model Act, which required authorization of advances and payments to be made in accordance with Section 14-2-855, has been eliminated in the Code, for the reasons stated.



A director can also seek advances for expenses pursuant to any arrangements approved by shareholders under Section 14-2-856, which is separate authority from that contained in Section 14-2-853.

#### Note to 1996 Amendments

Changes were made to conform to the 1994 amendments to the Revised Model Business Corporation Act. See 49 Bus. Law. 741 (Feb. 1994) and 49 Bus. Law. 1823 (August, 1994). Readers are referred to the official comments to the Revised Model Business Corporation Act for more extensive discussions of the text of this section. Changes in subsection (a)(1) expand the cases in which advance of funds is permitted by adding the phrase "or that the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by Code Section 14-2-202(b)(4)." Changes in subsection (a)(2) are primarily stylistic. Model Act references to the various sections under which indemnification is permitted were excluded as redundant. Changes to subsection (b) are minor and stylistic. Subsection (c) is new, and specifies the procedures for approval of indemnification. While subsection (c)(1)(A) resembles procedures for directors' conflicting interest transactions under section 14-2-862, subsection (c)(1)(B) departs from that model by allowing all the directors to participate where there are not two disinterested directors. This is a rule of necessity, to prevent board paralysis on advance of funds pending a final decision. Because the director is obligated to repay the funds if not ultimately entitled to indemnification, there is little risk to the corporation from this more relaxed procedure. As the official comments to the Revised Model Act point out, this procedure is only available when a decision under subsection (c)(1)(A) is not possible because there are not two disinterested directors. Subsection (c)(2) adds to the Model Act language an exception for interested shareholder voting in the case of properly adopted contractual obligations.

#### Cross-References

Determination and authorization of indemnification, see § 14-2-855. "Expenses" defined, see § 14-2-850. "Proceeding" defined, see § 14-2-850. Report to shareholders on indemnification, see § 14-2-1621. Standard for indemnification, see § 14-2-851.

### JUDICIAL DECISIONS

**Compliance with O.C.G.A. § 14-2-853 is sufficient** to warrant advancement of expenses without the necessity of satisfying any other statutory preconditions. This is consistent with the expense advancement provision in O.C.G.A. § 14-2-856, which enables a corporation, from its inception by the inclu-

sion of a provision in its articles of incorporation, to preapprove the advancement of expenses upon a director's compliance with the requirements in O.C.G.A. § 14-2-856(c). *Service Corp. Int'l v. H.M. Patterson & Son*, 263 Ga. 412, 434 S.E.2d 455 (1993).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1912, 1913.

**ALR.** — Reimbursement of stockholder or officer of corporation for expenses incurred in connection with transaction conducted in his name but in interest of corporation, 56 ALR 973.

Attorneys' fees and other expenses inci-

dent to controversy respecting internal affairs of corporation as charge against the corporation, 39 ALR2d 580.

Insurance: construction of policy or bond indemnifying directors or officers of corporation for expenses incurred in defending actions brought against them in their capacity as such, 49 ALR3d 1250.

**14-2-854. Court-ordered indemnification and advances for expenses.**

(a) A director who is a party to a proceeding because he or she is a director may apply for indemnification or advance for expenses to the court conducting the proceeding or to another court of competent jurisdiction. After receipt of an application and after giving any notice it considers necessary, the court shall:

(1) Order indemnification or advance for expenses if it determines that the director is entitled to indemnification under this part; or

(2) Order indemnification or advance for expenses if it determines, in view of all the relevant circumstances, that it is fair and reasonable to indemnify the director or to advance expenses to the director, even if the director has not met the relevant standard of conduct set forth in subsections (a) and (b) of Code Section 14-2-851, failed to comply with Code Section 14-2-853, or was adjudged liable in a proceeding referred to in paragraph (1) or (2) of subsection (d) of Code Section 14-2-851, but if the director was adjudged so liable, the indemnification shall be limited to reasonable expenses incurred in connection with the proceeding.

(b) If the court determines that the director is entitled to indemnification or advance for expenses under this part, it may also order the corporation to pay the director's reasonable expenses to obtain court-ordered indemnification or advance for expenses. (Code 1981, § 14-2-854, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 35; Ga. L. 1996, p. 1203, § 5.)

**COMMENT**

Source: Model Act, § 8.54.

Section 14-2-854 permits court-ordered indemnification in three situations: (1) a director entitled to mandatory indemnification may enforce that entitlement by judicial proceeding (in which case the court may also order the corporation to pay the reasonable expenses incurred in connection with the proceeding); (2) indemnification at the court's discretion is permitted in all cases whether or not the director met the requisite standard of conduct in Section 14-2-851 or is otherwise ineligible for indemnification; and (3) a director secures a court order for advancement of expenses. Indemnification with respect to derivative suits or improper benefit is limited to expenses by the last clause of Section 14-2-854(2), except that subsection (2) of the Model Act has been modified to permit court-ordered indemnification of amounts paid in a judgment if the shareholders have authorized such indemnification pursuant to Section 14-2-856. This has no counterpart in former Georgia law, but is designed to parallel the director exculpatory provisions of the Code.

Subsection (3) is new and has no counterpart in either the Model Act or former Georgia law. It permits a director to sue for expense advancement pursuant to charter, bylaw or other provision committing the corporation to advance expenses. This permits a director to enforce previously bargained for contract rights to expense advancement in the proceeding in which the expenses are being incurred.

Application for indemnification under Section 14-2-854 may be made either to the court in which the proceeding was heard or to another court of appropriate jurisdiction.



For example, a defendant in a criminal action who has been convicted but believes that indemnification would be proper could apply either to the court which heard the criminal action or bring an action against the corporation in another court. A decision by the board of directors not to oppose the request for indemnification is governed by the general standards of conduct found in Section 14-2-830. Even if the corporation decided not to oppose the request, the court must satisfy itself that the person seeking indemnification is properly entitled to it.

A corporation may limit the right of a director under Section 14-2-854 by a provision in its articles of incorporation. In the absence of such a provision, however, the court has general power to grant indemnification under this section.

#### **Note to 1996 Amendments**

Changes were made to conform to some of the 1994 Revised Model Business Corporation Act amendments. See 49 Bus. Law. 741 (Feb. 1994) and 49 Bus. Law. 1823 (Aug. 1994). Most changes were of form and not substance. Certain portions of the Model Act language were deleted as surplus cross references. Reference is made to the official Model Act comments for a more detailed explanation of this section.

Changes to the introductory clause of subsection (a) were largely stylistic, although the end of the clause was changed from permissive "may order indemnification" to mandatory "shall." Subsection (a)(1) formerly provided that the court may order indemnification if it determines that the director is entitled to mandatory indemnification. This has been eliminated as surplusage, in view of the statutory rights granted in Code Section 14-2-852. Former subsection (a)(2) authorized indemnification even where a director failed to meet the standard of conduct set forth in Code Section 14-2-851(a) or was adjudged liable in a derivative proceeding or for receipt of an improper personal benefit, if the court determined that the director was fairly and reasonably entitled to indemnification, although if a director was found liable in the latter two instances indemnification was limited to reasonable expenses incurred unless broader indemnification was authorized by the shareholders. This has been replaced by a much briefer reference to shareholder-authorized indemnification in new subsection (a)(1), while questions of judicial discretion are now covered in subsection (a)(2). Subsection (a)(2) is a more elaborate restatement of the court's power to order indemnification contained in former subsection (a)(2). As the Model Act comments state, there are no statutory outer limits on the court's power to order indemnification under section [14-2-854(a)(3)?]. In the case of settlement of derivative actions, the court may want to examine whether the corporation has joined the director in the application for indemnification or advance of expenses, in determining the fairness and reasonableness of such action.

Subsection (b) is a restatement of rules for awarding directors' expenses in proceedings brought to enforce indemnification rights, previously scattered through subsection (a).

#### **Cross-References**

Articles of incorporation, see § 14-2-202 and Article 10, Part 1. "Expenses" defined, see § 14-2-850. Mandatory indemnification, see § 14-2-852. "Party" defined, see § 14-2-850. "Proceeding" defined, see § 14-2-850. Report to shareholders on indemnification, see § 14-2-1621. Voluntary indemnification, see § 14-2-851.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1904, 1905.

**14-2-855. Determination and authorization of indemnification.**

(a) A corporation may not indemnify a director under Code Section 14-2-851 unless authorized thereunder and a determination has been made for a specific proceeding that indemnification of the director is permissible in the circumstances because he or she has met the relevant standard of conduct set forth in Code Section 14-2-851.

(b) The determination shall be made:

(1) If there are two or more disinterested directors, by the board of directors by a majority vote of all the disinterested directors (a majority of whom shall for such purpose constitute a quorum) or by a majority of the members of a committee of two or more disinterested directors appointed by such a vote;

(2) By special legal counsel:

(A) Selected in the manner prescribed in paragraph (1) of this subsection; or

(B) If there are fewer than two disinterested directors, selected by the board of directors (in which selection directors who do not qualify as disinterested directors may participate); or

(3) By the shareholders, but shares owned by or voted under the control of a director who at the time does not qualify as a disinterested director may not be voted on the determination.

(c) Authorization of indemnification or an obligation to indemnify and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if there are fewer than two disinterested directors or if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subparagraph (b) (2) (B) of this Code section to select special legal counsel. (Code 1981, § 14-2-855, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1996, p. 1203, § 5.)

**COMMENT**

Source: Model Act, § 8.55. This replaces provisions formerly found in § 14-2-156(d). It preserves the approach of former law.

Section 14-2-855 provides the method for determining whether a corporation should voluntarily indemnify directors under Section 14-2-851. In this section a distinction is made between a "determination" and an "authorization." A "determination" involves a decision whether under the circumstances the person seeking indemnification has met the requisite standard of conduct under Section 14-2-851 and is therefore eligible for indemnification. This decision may be made by the persons or groups described in Section 14-2-855(b). In addition, after a favorable "determination" is made, the corporation must "authorize" indemnification, unless it has previously obligated itself to provide the indemnification; this includes a review of the reasonableness of the



expenses, the financial ability of the corporation to make the payment, and the judgment whether limited financial resources should be devoted to this or some other use by the corporation. Section 14-2-855(c) provides that "authorization" of indemnification may be made only by the board of directors, by a committee of the board, or by the shareholders. While special legal counsel may make the "determination" of eligibility for indemnification, he may not "authorize" the indemnification.

Section 14-2-855(b) establishes a procedure for selecting the person or persons who will make the determination of eligibility for indemnification. Even though directors who are parties to the proceeding may not participate in the decision determining eligibility for indemnification, they may, if necessary to permit valid action by the board of directors, participate in the decision establishing a committee of independent directors or selecting special legal counsel. Directors who are parties may also participate in the decision to "authorize" indemnification on the basis of a favorable "determination" if necessary to permit action by the board of directors. This limited participation of interested directors in the decision is justified by a principle of necessity.

Legal counsel authorized to make the required determination is referred to as "special legal counsel." In former § 14-2-156(d)(2), he was referred to as "independent" legal counsel. The word "special" is felt to be more descriptive of the role to be performed and is not intended to indicate that the counsel selected should not be independent in accordance with governing legal precepts. "Special legal counsel" should normally be counsel having no prior professional relationship with those seeking indemnification, should be retained for the specific occasion, and should not be either inside counsel or regular outside counsel. It is important that the selection process be sufficiently flexible to permit selection of counsel in light of the particular circumstances and so that unnecessary expense may be avoided. Hence the phrase "special legal counsel" is not defined in the statute. The description of the process by which counsel is selected is new to Georgia law.

Determinations by shareholders rather than by directors or special counsel are permitted by Section 14-2-855(b)(4), but shares owned by or voted under the control of directors seeking indemnification may not be voted on the determination of eligibility for indemnification. This does not affect rules governing the determination of a quorum at the meeting. Formerly § 14-2-156(d)(3) merely referred to "affirmative vote of a majority of the shares entitled to vote thereon," without discussion of whether any shareholders were disqualified.

#### **Note to 1996 Amendments**

Changes were made to conform to 1994 changes in the Revised Model Business Corporation Act. See 49 Bus. Law. 741 (Feb. 1994) and 49 Bus. Law. 1823 (Aug. 1994). Readers are referred to the official comments to the Revised Model Business Corporation Act for more extensive discussion of the text of this section. Changes in subsection (a) were stylistic and not substantive. Former subsection (b)(1) and (2) were deleted entirely. New subsection (b)(1) differs primarily in limiting directors' decisions to indemnify to those where there are at least two disinterested directors. Formerly subsection (b)(2) required a committee of the board that made such a decision to consist of at least two disinterested directors, but new subsection (b)(1) extends this requirement to decisions by the board as well. Former subsection (b)(3) is now subsection (b)(2). The amendments allow the disinterested directors to select special legal counsel to make the determination of eligibility for indemnification, but expand this provision to allow interested directors to participate in the selection of counsel where there are not at least two disinterested directors. This is a rule of necessity, to allow indemnification where all or all but one of the directors are named as defendants in a proceeding.

**Cross-References**

Advance for expenses, see § 14-2-853. Committees of the board, see § 14-2-825. "Party" defined, see § 14-2-850. "Proceeding" defined, see § 14-2-850. Quorum of directors, see § 14-2-824. Special meeting of shareholders, see § 14-2-702. Standard for indemnification, see § 14-2-851.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 1909.

**14-2-856. Shareholder approved indemnification.**

(a) If authorized by the articles of incorporation or a bylaw, contract, or resolution approved or ratified by the shareholders by a majority of the votes entitled to be cast, a corporation may indemnify or obligate itself to indemnify a director made a party to a proceeding including a proceeding brought by or in the right of the corporation, without regard to the limitations in other Code sections of this part, but shares owned or voted under the control of a director who at the time does not qualify as a disinterested director with respect to any existing or threatened proceeding that would be covered by the authorization may not be voted on the authorization.

(b) The corporation shall not indemnify a director under this Code section for any liability incurred in a proceeding in which the director is adjudged liable to the corporation or is subjected to injunctive relief in favor of the corporation:

(1) For any appropriation, in violation of the director's duties, of any business opportunity of the corporation;

(2) For acts or omissions which involve intentional misconduct or a knowing violation of law;

(3) For the types of liability set forth in Code Section 14-2-832; or

(4) For any transaction from which he or she received an improper personal benefit.

(c) Where approved or authorized in the manner described in subsection (a) of this Code section, a corporation may advance or reimburse expenses incurred in advance of final disposition of the proceeding only if:

(1) The director furnishes the corporation a written affirmation of his or her good faith belief that his or her conduct does not constitute behavior of the kind described in subsection (b) of this Code section; and

(2) The director furnishes the corporation a written undertaking, executed personally or on his or her behalf, to repay any advances if it is ultimately determined that the director is not entitled to indemnification under this Code section. (Code 1981, § 14-2-856, enacted by Ga. L. 1988,



p. 1070, § 1; Ga. L. 1989, p. 946, § 36; Ga. L. 1996, p. 1203, § 5; Ga. L. 1997, p. 143, § 14.)

#### COMMENT

Source: Former § 14-2-156(f), as amended, Laws 1987, p. 49, § 2, provided generally that the indemnification and advancement of expenses was “not deemed exclusive,” and provided for further indemnification upon shareholder vote, except for the types of liabilities against which an officer or director could not be exculpated by a charter provision authorized by the predecessor of Code Section 14-2-202(b)(4). Section 14-2-856 preserves that approach. There is no counterpart in the Model Act. It also preserves the strict voting rule of former law (majority of all votes entitled to be cast, rather than majority of all shares entitled to vote), but does not contain specific notice requirements. Rather, it relies on the general notice requirements of Code Section 14-2-705, which require notice of purposes for which special meetings are called, but do not require notice of purposes for annual meetings.

Section 14-2-856 is an entirely separate grant of corporate authority to indemnify, without regard to limitations contained in other sections of the Code. This authority may only be exercised by the shareholders, and then only under the types of voting rules generally reserved for decisions such as amending the articles of incorporation and other major corporate actions.

Under Section 14-2-856 the corporation may indemnify directors fully, including the amount of judgments and fines, as well as for expenses. This authority extends to actions by the corporation and derivative actions, as well as to actions brought by third parties or government officials. The justification for this is the parallel power of the shareholders to exculpate directors from liability to the corporation or its shareholders for negligent acts, subject to the public policy limits imposed by Section 14-2-202(b)(4). Where shareholders have not exculpated directors in advance by formally amending their articles, this section grants them power to indemnify directors, either by contract, bylaw or resolution approved in advance or after the fact. The reference to “ratified” is intended to cover the situation where a board of directors has authorized such indemnification, either in a bylaw, resolution or contract with the director, but the shareholders did not approve their action until a later time.

#### Note to 1989 Amendment

Section 14-2-856 was amended to incorporate restrictions on advancement of expenses pursuant to shareholder-approved indemnification arrangements similar to the restrictions imposed by Code Section 14-2-853, but without reference to the standards of Code Section 14-2-851, which are inapplicable to shareholder-approved payments. Subsection (c), which is entirely new, addresses this question. The affirmation that must be provided by a director need not state that he believes he has met the standards of Code Section 14-2-851, but only that he has not behaved in a manner that would make him ineligible for shareholder-approved indemnification would be prohibited.

#### Note to 1996 Amendments

This section was amended to reflect certain of the 1994 changes in sections 2.02(b)(5) and 8.58 of the Revised Model Business Corporation Act. See 49 Bus. Law. 741 (Feb. 1994) and 49 Bus. Law. 1823 (Aug. 1994). Because Georgia's authorization of shareholder approval of indemnification beyond that permitted to the directors antedates the Model Act's addition of this concept, Georgia's numbering system was retained. The first sentence of subsection (a) does not follow the Model Act pattern, which only authorizes shareholders to authorize indemnification in advance of the act or omission giving rise to the claim for advances or indemnification. The first sentence

of subsection (a) is more general than the Model Act, and omits any reference to authorization "in advance." The second sentence of subsection (a) is new, and is intended to avoid the drafting oversight of authorizing indemnification without specifically addressing the question of advance of funds to directors.

### Cross-References

Exculpation of directors, see § 14-2-202(b)(4). Limits on indemnification authorized by directors, see § 14-2-851.

## JUDICIAL DECISIONS

**Advancement of expenses.** — Compliance with O.C.G.A. § 14-2-853 is sufficient to warrant advancement of expenses without the necessity of satisfying any other statutory preconditions. This is consistent with the expense advancement provision in O.C.G.A. § 14-2-856, which enables a corporation,

from its inception by the inclusion of a provision in its articles of incorporation, to preapprove the advancement of expenses upon a director's compliance with the requirements in O.C.G.A. § 14-2-856(c). *Service Corp. Int'l v. H.M. Patterson & Son*, 263 Ga. 412, 434 S.E.2d 455 (1993).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 1899.

**ALR.** — Reimbursement of stockholder or officer of corporation for expenses incurred with transaction conducted in his name but for benefit of corporation, 56 ALR 973.

Attorneys' fees and other expenses incident to controversy respecting internal af-

fairs of corporation as charge against the corporation, 39 ALR2d 580.

Insurance: construction of policy or bond indemnifying directors or officers of corporation for expenses incurred in defending actions brought against them in their capacity as such, 49 ALR3d 1250.

### 14-2-857. Indemnification of officers, employees, and agents.

(a) A corporation may indemnify and advance expenses under this part to an officer of the corporation who is a party to a proceeding because he or she is an officer of the corporation:

(1) To the same extent as a director; and

(2) If he or she is not a director, to such further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors, or contract except for liability arising out of conduct that constitutes:

(A) Appropriation, in violation of his or her duties, of any business opportunity of the corporation;

(B) Acts or omissions which involve intentional misconduct or a knowing violation of law;

(C) The types of liability set forth in Code Section 14-2-832; or

(D) Receipt of an improper personal benefit.

(b) The provisions of paragraph (2) of subsection (a) of this Code section shall apply to an officer who is also a director if the sole basis on



which he or she is made a party to the proceeding is an act or omission solely as an officer.

(c) An officer of a corporation who is not a director is entitled to mandatory indemnification under Code Section 14-2-852, and may apply to a court under Code Section 14-2-854 for indemnification or advances for expenses, in each case to the same extent to which a director may be entitled to indemnification or advances for expenses under those provisions.

(d) A corporation may also indemnify and advance expenses to an employee or agent who is not a director to the extent, consistent with public policy, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract. (Code 1981, § 14-2-857, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 37; Ga. L. 1996, p. 1203, § 5.)

#### COMMENT

Source: Model Act, § 8.56. There was no counterpart in former Georgia law.

Section 14-2-857 correlates the general legal principles relating to the indemnification of officers, employees, and agents of the corporation with the limitations on indemnification in Part 5. This correlation may be summarized in general terms as follows:

(1) Part 5 (except for Section 14-2-857) applies only to, and limits the indemnification of, directors.

(2) An officer, agent or employee of a corporation who is not a director may be indemnified by the corporation on a discretionary basis to the same extent as though he were a director, and, in addition, may have additional indemnification rights apart from Part 5. (Subsection (2).) The public policy limits of subsection (2) leave public policy determinations as to what are permissible limits, in a particular case, to the courts. For example, in *Koster v. Warren*, 297 F.2d 418, 423 (9th Cir. 1961), the court allowed indemnification of an officer and an employee, both of whom pleaded *nolo contendere* to an antitrust indictment at the corporation's request, the court reasoning that they had foregone their personal right to defend for the corporation's benefit. On the other hand, the court indicated in dicta that an agreement in advance by the corporation to indemnify anyone convicted of an antitrust violation would be against public policy. Implicit in these limits is the general public policy of Georgia, which prohibits indemnification or exculpation where fraud or deliberate violations of criminal laws are present. *Sovereign Camp W.O.W. v. Heflin*, 188 Ga. 234, 3 S.E.2d 559, 560 (1939) (dicta that law does not permit contracting against fraud or contravention of public policy); *Jaffe v. Davis*, 134 Ga. App. 651, 215 S.E.2d 533 (1975) (lease cannot exculpate from willful or reckless acts amounting to actual intent); *Restatement Contracts* 2d §§ 195 — 96; *Restatement of Agency*, § 222.1.

(3) A director who is also an officer, employee, or agent of the corporation is limited to his indemnification rights under Part 5 and is therefore treated the same way as other directors. (Subsection (2) by negative inference). Such an officer/director is limited to this rights under Part 5 even though he is sued solely in his capacity as an officer.

(4) An officer of the corporation (but not employees or agents generally) who is not a director has the mandatory right of indemnification granted to directors under

Section 14-2-852 and the right to apply for court-ordered indemnification under Section 14-2-854. (Subsection (1)).

The rights of employees or agents may derive from principles of agency, the doctrine of respondeat superior, or collective bargaining or other contractual agreement, rather than from the statute. Indemnification of employees or agents may appropriately protect the person indemnified from liabilities incurred while serving at the corporation's request as a director, officer, partner, trustee, or agent of another commercial, charitable, or nonprofit enterprise.

The broad grant of indemnification in Section 14-2-857(2) may be limited by appropriate provisions in the articles of incorporation.

#### **Note to 1996 Amendments**

This section was amended to reflect the 1994 changes to section 8.58 of the Revised Model Business Corporation Act. See 49 Bus. Law. 741 (Feb. 1994) and 49 Bus. Law. 1823 (Aug. 1994). Readers are referred to the official comments to the Revised Model Business Corporation Act for more extensive discussion of the text of this section. These amendments repealed former section 14-2-857 in its entirety. Where the former section provided broad (and vague) power to a corporation to indemnify officers within the limits of public policy, the amendments make the limits of public policy clear - relying on the limits imposed on shareholder authorization of indemnification of directors as the limit. New subsection (c) retains the authorization of an officer to apply for indemnification formerly provided in subsection (a).

#### **Cross-References**

Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Bylaws, see § 14-2-206 and Article 10, Part 2. "Employee" defined, see § 14-2-140. "Expenses" defined, see § 14-2-850. Officer standards of conduct, see § 14-2-842.

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1899, 1900.

**ALR.** — Attorneys' fees and other expenses incident to controversy respecting internal affairs of corporation as charge against the corporation, 39 ALR2d 580.

Insurance: construction of policy or bond indemnifying directors or officers of corporation for expenses incurred in defending actions brought against them in their capacity as such, 49 ALR3d 1250.

#### **14-2-858. Insurance.**

A corporation may purchase and maintain insurance on behalf of an individual who is a director, officer, employee, or agent of the corporation or who, while a director, officer, employee, or agent of the corporation, serves at the corporation's request as a director, officer, partner, trustee, employee, or agent of another domestic or foreign corporation, partnership, joint venture, trust, employee benefit plan, or other entity against liability asserted against or incurred by him or her in that capacity or arising from his or her status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify or advance expenses to him or her against the same liability under this part. (Code 1981, § 14-2-858, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1996, p. 1203, § 5.)



**Law reviews.** — For article, "Corporate Governance in the Aftermath of the Insurance Crisis," see 39 Emory L.J. 1155 (1990).

### COMMENT

Source: Model Act, § 8.58.

Section 14-2-858 authorizes a corporation to purchase and maintain insurance on behalf of directors, officers, employees, or agents against liabilities imposed on them by reason of actions in their official capacity or arising from their service to the corporation or another entity at the corporation's request. Insurance is not limited to claims against which corporations are entitled to indemnify under this part. This insurance, usually referred to as "D&O Liability Insurance," provides a useful supplement to the rights of indemnification created by this part, providing a source of reimbursement for corporations who indemnify directors and others for conduct covered by the insurance, and protecting the insureds against the corporation's failure to pay indemnification required or permitted by this part. On the other hand, policies do not cover uninsurable events like self-dealing, bad faith, knowing violations of the securities acts, or other willful misconduct. See generally Johnston, *Corporate Indemnification and Liability Insurance*, 33 Bus. Law. 1993 (1978); Hinsey, *The New Lloyd's Policy Form for Directors' and Officers' Liability Insurance — An Analysis*, 33 Bus. Law. 1961 (1978).

The fact that insurance policies are issued by a partly or wholly owned subsidiary does not convert them into indemnification agreements that are subject to the restrictions on indemnification imposed by this part. The development of alternative insurance companies, owned by groups of policy-holders, has been one response to the liability crisis of the 1980's. Nothing in this section precludes such insurance, as long as the insurer is subject to normal economic constraints in writing liability policies.

### Note to 1996 Amendments

This section was amended to conform to 1994 amendments to section 8.57 of the Revised Model Business Corporation Act. See 49 Bus. Law. 741 (Feb. 1994) and 49 Bus. Law. 1823 (Aug. 1994). The Model Act's official comments should be read in interpreting this section. The changes are primarily stylistic. Provisions authorizing indemnification or advance of funds for expenses of non-officer employees or agents were deleted, and now appear in Section 14-2-859.

### Cross-References

"Director" defined, see § 14-2-850. "Liability" defined, see § 14-2-850. Mandatory indemnification, see § 14-2-852. Standard for indemnification, see § 14-2-851.

### JUDICIAL DECISIONS

**Cited in** *Service Corp. Int'l v. H.M. Patterson & Son*, 263 Ga. 412, 434 S.E.2d 455 (1993).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1912, 1913.

**ALR.** — Insurance: construction of policy or bond indemnifying directors or officers of

corporation for expenses incurred in defending actions brought against them in their capacity as such, 49 ALR3d 1250.

**14-2-859. Application of part.**

(a) A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or shareholders, obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification or advance funds to pay for or reimburse expenses consistent with this part. Any such obligatory provision shall be deemed to satisfy the requirements for authorization referred to in subsection (c) of Code Section 14-2-853 or subsection (c) of Code Section 14-2-855. Any such provision that obligates the corporation to provide indemnification to the fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with Code Section 14-2-853 to the fullest extent permitted by law, unless the provision specifically provides otherwise.

(b) Any provision pursuant to subsection (a) of this Code section shall not obligate the corporation to indemnify or advance expenses to a director of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders, partners, or, in the case of limited liability companies, members or managers of a predecessor of the corporation or other entity in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by paragraph (3) of subsection (a) of Code Section 14-2-1106.

(c) A corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to this part.

(d) This part does not limit a corporation's power to pay or reimburse expenses incurred by a director or an officer in connection with his or her appearance as a witness in a proceeding at a time when he or she is not a party.

(e) Except as expressly provided in Code Section 14-2-857, this part does not limit a corporation's power to indemnify, advance expenses to, or provide or maintain insurance on behalf of an employee or agent. (Code 1981, § 14-2-859, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1996, p. 1203, § 5.)

**COMMENT**

Source: Model Act, § 8.58. This replaces provisions formerly appearing in § 14-2-156(f).

Subsection (a) provides that a provision treating the indemnification of directors by the corporation in articles of incorporation, bylaws, shareholders' or directors' resolution, or contract "is valid only if and to the extent it is consistent with" this part. Formerly § 14-2-156(f) provided that the statutory provisions were not "exclusive" and



made no attempt to limit the nonstatutory creation of rights of indemnification. This kind of language is subject to misconstruction, however, since nonstatutory conceptions of public policy limit the power of a corporation to indemnify or to contract to indemnify directors, officers, employees, or agents.

The language of the first sentence of subsection (a), "to the extent it is consistent with this part," is believed to be a more accurate description of the limited validity of nonstatutory indemnification provisions than the "nonexclusive" provisions of earlier versions of the Model Act. It is important to recognize that "to the extent it is consistent with" is not synonymous with "exclusive." Situations may well develop from time to time in which indemnification is permissible under Section 14-2-859 but would be precluded if all portions of Part 5 were viewed as exclusive. But indemnification provisions protecting against the consequences of willful misconduct are not consistent with this Part and would not be valid. Furthermore, they would violate well-understood principles of public policy and doubtless would be invalidated on that ground even under statutes purporting to make "nonexclusive" the statutory provisions for indemnification. To the extent the consistency language may preclude indemnification in circumstances where it is reasonable and violates no statutory policy, an escape valve is provided in Section 14-2-855(2), which authorizes a court to grant indemnification if a director "is fairly and reasonably entitled to indemnification in view of all the relevant circumstances," even though he may not have fully met the standards of conduct set forth in Section 14-2-851.

Section 14-2-859 does not preclude provisions in articles of incorporation, bylaws, resolutions, or contracts designed to provide procedural machinery different from that provided by Section 14-2-855 or to make mandatory the permissive provisions of Part 5. For example, a corporation may properly obligate the board of directors to consider and act expeditiously on an application for indemnification or advances, or obligate the board of directors to cooperate in the procedural steps required to obtain a judicial determination under Section 14-2-854.

The consistency limitations of Section 14-2-859 of the Code have an impact different from the Model Act, because of the provisions of Section 14-2-856, which permit shareholders to approve indemnification without regard to the limitations of other provisions of Part 5, subject to the exceptions contained in Section 14-2-856.

The first sentence of subsection (a) applies only to directors; it does not apply to officers, employees, or agents who are not directors. See Section 14-2-857 and its Comment. The inherent problems of conflict of interest and the need to encourage persons to serve as directors are not present to the same degree in the case of nondirector officers, employees, or agents. The standard for permissible indemnification of these persons in Section 14-2-857(2) is "consistent with law" without regard to this part.

Subsection (b) is designed to make clear that Part 5 deals only with directors who are actual or prospective defendants or respondents in a proceeding, and that expenses incurred in connection with appearance as a witness may be indemnified without regard to the limitations of Part 5. Indeed, most of the standards described in Sections 14-2-851 and 14-2-854 by their own terms can have no meaningful application to a director whose only connection with a proceeding is that he has been called as a witness.

#### **Note to 1996 Amendments**

Changes were made to conform to 1994 amendments to the Revised Model Business Corporation Act. See 49 Bus. Law. 741 (Feb. 1994). The Model Act's official comments should be read in interpreting this section.

Subsection (a) is new. Where former subsection (a) merely stated that provisions authorizing indemnification were valid and binding only to the extent consistent with

this part, the revised language expressly authorizes such provisions. The second sentence of new subsection (a) adds a default provision not present in the former language, treating authorization of indemnification as including authorization of advance of expenses, unless otherwise provided.

Subsection (b) is new. It clarifies that a corporation's indemnification provisions do not automatically provide blanket protection for directors of corporations that are merged into the corporation. The right of such directors to indemnification will depend on their rights with respect to the constituent corporation of which they were directors. The reference to Code Section 14-2-1106(a)(3) is part of this clarification.

Subsection (c) is also new. Its principal effect is to preclude retroactive limitation or elimination of previously existing rights of indemnification for past actions. Changes in former subsection (b), now subsection (d), are stylistic. Subsection (e) replaces authorization of indemnification of agents and employees formerly found in section 14-2-857(2).

#### Cross-References

Advance for expenses, see § 14-2-853. Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Bylaws, see § 14-2-206 and Article 10, Part 2. "Director" defined, see § 14-2-850. Indemnification generally, see § 14-2-851 et seq. "Party" defined, see § 14-2-850. "Proceeding" defined, see § 14-2-850.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 1899.

## PART 6

### CONFLICTING INTEREST TRANSACTIONS

#### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-716 and former Code Section 14-2-155, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this part.

**Corporate board of directors may ratify act of officer** which it could have authorized

originally. *Horne v. Drachman*, 247 Ga. 802, 280 S.E.2d 338 (1981) (decided under former Code 1933, § 22-716).

**Cited in** *Crowder v. Electro-Kinetics Corp.*, 228 Ga. 610, 187 S.E.2d 249 (1972); *Comolli v. Comolli*, 241 Ga. 471, 246 S.E.2d 278 (1978); *Henson v. American Family Corp.*, 171 Ga. App. 724, 321 S.E.2d 205 (1984).

#### RESEARCH REFERENCES

**ALR.** — Duty of director to disclose existence of lien or claim against property on which corporation or association lends money, 3 ALR 1058.

Motive as affecting personal liability of directors in voting for acts not in themselves illegal, 4 ALR 166.

Laches as affecting right of corporation or its stockholders to relief against directors for

violation of trust, 10 ALR 370.

Assignability of claim against officers or directors of corporation for breach of duty, 80 ALR 875.

Validity, construction, and effect of clause in obligation of corporation that it is issued without recourse against officers or directors, 97 ALR 1157.

Sole actor doctrine where officer or agent



of corporation acting adversely to it is its sole representative in the transaction, 111 ALR 665.

Construction and application of statutes making corporate officers or directors liable in respect of loans or advances to stockholders or officers, 129 ALR 1258.

Transaction between corporate trustee, administrator, executor, or guardian, and affiliated corporation as violation of rule against self-dealing, 151 ALR 905.

Accountability of corporate directors or officers for profit from activities beyond the corporate powers, but involving the use of information and opportunities available to them by reason of their position in the corporation, 153 ALR 663.

Liability of corporate officer or director for commission or compensation received from third person in connection with that

person's transaction with corporation, 47 ALR3d 373.

What business opportunities are in "line of business" of corporation for purposes of determining whether a corporate opportunity was presented, 77 ALR3d 961.

Propriety of attorney who has represented corporation acting for corporation in controversy with officer, director, or stockholder, 1 ALR4th 1124.

Financial inability of corporation to take advantage of business opportunity as affecting determination whether "corporate opportunity" was presented, 16 ALR4th 185.

Purchase of shares of corporation by director or officer as usurpation of "corporate opportunity," 16 ALR4th 784.

Fairness to corporation where "corporate opportunity" is allegedly usurped by director or officer, 17 ALR4th 479.

## 14-2-860. Part definitions.

As used in this part, the term:

(1) "Conflicting interest" with respect to a corporation means the interest a director of the corporation has respecting a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) if:

(A) Whether or not the transaction is brought before the board of directors of the corporation for action, to the knowledge of the director at the time of commitment he or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the director or a related person that it would reasonably be expected to exert an influence on the director's judgment if he were called upon to vote on the transaction; or

(B) The transaction is brought (or is of such character and significance to the corporation that it would in the normal course be brought) before the board of directors of the corporation for action, and to the knowledge of the director at the time of commitment any of the following persons is either a party to the transaction or has a beneficial financial interest so closely linked to the transaction and of such financial significance to that person that it would reasonably be expected to exert an influence on the director's judgment if he were called upon to vote on the transaction: (i) an entity (other than the corporation) of which the director is a director, general partner, agent,

or employee; (ii) a person that controls one or more of the entities specified in division (i) or an entity that is controlled by, or is under common control with, one or more of the entities specified in division (i) of this subparagraph; or (iii) an individual who is a general partner, principal, or employer of the director.

(2) "Director's conflicting interest transaction" with respect to a corporation means a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) respecting which a director of the corporation has a conflicting interest.

(3) "Related person" of a director means:

(A) The spouse (or a parent or sibling thereof) of the director or a child, grandchild, sibling, parent (or spouse of any thereof), or an individual having the same home as the director or a trust or estate of which an individual specified in this subparagraph is a substantial beneficiary; or

(B) A trust, estate, incompetent, conservatee, or minor of which the director is a fiduciary.

(4) "Required disclosure" means disclosure by the director who has a conflicting interest of (A) the existence and nature of his conflicting interest, and (B) all facts known to him respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment as to whether or not to proceed with the transaction.

(5) "Time of commitment" respecting a transaction means the time when the transaction is consummated or, if made pursuant to contract, the time when the corporation (or its subsidiary or the entity in which it has a controlling interest) becomes contractually obligated so that its unilateral withdrawal from the transaction would entail significant loss, liability, or other damage. (Code 1981, § 14-2-860, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 38.)

#### COMMENT

Source: Model Act, proposed § 8.60, as reported by ABA Committee on Corporate Laws, Changes in the Model Business Corporation Act — Amendments Pertaining to Director's Conflicting Interest Transactions, 43 Bus. Law. 691 (1988). The text of proposed Subchapter F of Chapter 8 of the Model Act and the proposed Official Comments, as published in that article, were contained in the proposed Code revision submitted by the Code Revision Committee to the General Assembly at the time of adoption of the Code. The language of Part 6 is identical to Subchapter F, and the Comments to Part 6 are drawn from and summarize the proposed Official Comments to Subchapter F. Reference is made to that article for a fuller discussion of the meaning of the provisions of Part 6.

There were no comparable definitions in former law. Compliance with the safe harbor provisions of Part 6 provides greater certainty and judicial economy than former law.



The definitions set forth in Section 14-2-860 apply to Part 6 only and have no application elsewhere in the Code.

Subsection (1) defines a conflicting interest only with respect to a transaction by a corporation. Thus this part operates only in the context of a transaction. It does not apply to situations not involving transactions, such as corporate inaction, or actions by directors that are taken with respect to third parties, if no corporate transaction is involved. The transaction may be directly between the director and the corporation (or a subsidiary or any other entity in which the corporation has a controlling interest), between the corporation (or a subsidiary or any other entity in which the corporation has a controlling interest) and a party in which the director has an economic interest sufficiently material to influence his decisions as a director, between the corporation (or a subsidiary or any other entity in which the corporation has a controlling interest) and a "related person" of the director (defined in subsection (3)), or between the corporation (or a subsidiary or any other entity in which the corporation has a controlling interest) and an entity described in subsection (1)(B).

The latter group includes entities in which the director is a director, general partner, agent or employee, and other defined persons and entities likely to be owed fiduciary duties by the director, or to be in a position to influence the director. It covers, importantly, those in control of the corporation of which the director is a director, if the controlling person has a beneficial financial interest in the transaction likely to exert an influence on the director's judgment. The likelihood of influence is specified to be an objective standard: "of such financial significance to that person that it would reasonably be expected to exert an influence on the director's judgment."

The definition of conflicting interest requires that the director know of the transaction. More than that, it requires that he know of his interest conflict at the time of the corporation's commitment to the transaction. Absent that knowledge by the director, the risk to the corporation addressed by Part 6 is not present.

The definition of "conflicting interest" is exclusive. An interest of a director is a conflicting interest if and only if it meets the requirements of subsection (1).

Subsection (1)(B) has a differentiated threshold keyed to the significance of the transaction. Thus, although subsection (A) is triggered whether or not the transaction is brought before the board of directors for action, subsection (B) is triggered only if the matter is of such character and significance that it would ordinarily be brought before the board for action.

Two subcategories of "related person" of the director are set out in subsection (3). These subcategories are specific, exclusive and preemptive.

The first subcategory is made up of the closely related family, or near-family, individuals, trusts and estates as specified in clause (i). The clause is exclusive insofar as family relationships are concerned.

The second subcategory is made up of persons specified in clause (ii) to whom or which the director is linked in a fiduciary capacity as, for example, in his status as a trustee or administrator.

Subsection (4) defines "required disclosure." There are two elements that together make up the defined term: (1) the disclosure of the existence of the conflicting interest and (ii) disclosure of the material facts known by the director about the subject of the transaction. While material facts that pertain to the subject of the transaction must be disclosed, a director is not required to reveal personal or subjective information that bears upon his negotiating position (such as, for example, his urgent need for cash, or the lowest price he would be willing to accept), despite the fact that such information

would be relevant to the corporation's decision-making in the sense that, if known to the corporation, it would improve the corporation's negotiating position.

Subsection (5) defines the time of the commitment by the corporation (or its subsidiary or other controlled entity) to the transaction in operational terms geared to change of economic position.

#### **Note to 1989 Amendment**

The 1989 amendment made clarifying changes in subclauses (1)(B) and (3). In subclause (1)(B), new subclause designations were added for clarity, and the phrase "an entity that controls" was replaced with the phrase "a person that controls one or more of the entities specified in clause (i) or an entity that ..."

Clause (3) was amended to expand the group of influential related persons to include certain relatives of a spouse, or the spouse of certain relatives, namely a director's brother, sister, or parent, and the spouse of a director's child, grandchild, brother, or sister.

These changes follow the final revision of the Model Act provisions.

#### **Cross-References**

Action by the board of directors, see §§ 14-2-821 & 14-2-824. Committees of the board of directors, see § 14-2-825. Compensation of directors, see § 14-2-811. "Entity" defined, see § 14-2-140. Exculpation from liability for adoption of bylaws precluding business combination with interested shareholders, see § 14-2-1131 et seq.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1732-1735, 1740. **C.J.S.** — 19 C.J.S., Corporations, §§ 466, 507-509, 511.

#### **14-2-861. Judicial action.**

(a) A transaction effected or proposed to be effected by a corporation (or by a subsidiary of the corporation or by any other entity in which the corporation has a controlling interest) that is not a director's conflicting interest transaction may not be enjoined; set aside, or give rise to an award of damages or other sanctions, in an action by a shareholder or by or in the right of the corporation, on the ground of an interest in the transaction of a director or any person with whom or which he has a personal, economic, or other association.

(b) A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in an action by a shareholder or by or in the right of the corporation, on the ground of an interest in the transaction of the director or any person with whom or which he has a personal, economic, or other association, if:

(1) Directors' action respecting the transaction was at any time taken in compliance with Code Section 14-2-862;

(2) Shareholders' action respecting the transaction was at any time taken in compliance with Code Section 14-2-863; or



(3) The transaction, judged in the circumstances at the time of commitment, is established to have been fair to the corporation. (Code 1981, § 14-2-861, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 39.)

#### COMMENT

Source: Model Act, proposed § 8.61. This replaces former § 14-2-155(a).

Section 14-2-861 is the operational section of Part 6 as it prescribes the judicial consequences of the other sections.

Subsection (a) provides that if a transaction is not a director's conflicting interest transaction as defined in Section 14-2-860, then the transaction may not be enjoined, rescinded or made the basis of other sanction on the ground of a conflict of interest of a director, whether or not it went through the procedures of Part 6. It draws a bright line circle, declaring that the definitions of Section 14-2-860 wholly occupy and preempt the field of directors' conflicting interest transactions. Of course, outside this circle there is a penumbra of director interests, desires, goals, loyalties and prejudices that may in a particular context run at odds with the best interests of the corporation; but Section 14-2-861 (a) forbids a court to ground remedial action on any of them. In that sense, Part 6 is specifically intended to be both comprehensive and exclusive.

It must be emphasized that subsection (a) limits the court only with respect to claims based on interest conflicts on the part of a director or a person having a personal economic or other association with the director. Also, as previously noted, subsection (a) is inapplicable in non-transactional situations, such as a director's usurpation of a corporate opportunity or improper competition with the corporation. Subsection (a) does not apply to a claim that a parent corporation or other controlling shareholder has violated a duty owed to minority shareholders.

Subsection (b) provides that, if the procedure set forth in Section 14-2-862 or in Section 14-2-863 is complied with, or if the transaction is fair to the corporation, the director's conflicting interest transaction is immune from attack on any ground of a personal interest or conflict of interest of the director. The narrow scope of Part 6 must again, however, be strongly emphasized; if the transaction is vulnerable to attack on some other ground, Part 6 does not make it less so for having passed through the procedures of Part 6.

Clause (1) of subsection (b) provides that if a director has a conflicting interest respecting a transaction, neither the transaction nor the director is legally vulnerable if the procedures of Section 14-2-862 have been properly followed. This follows former § 14-2-155(a), which provided that "no contract ... shall be void or voidable" solely because of a conflict of interest, if it met the standards specified.

Subsection (b)(2) provides a similar rule for shareholders' approval obtained pursuant to Section 14-2-863. This, too, follows former § 14-2-155(a).

Clause (3) of subsection (b) follows former § 14-2-155(a)(3), and provides that a director's conflicting interest transaction will be secure against judicial intervention if the interested director can establish that the transaction was fair to the corporation. The term "fair" (and in clause (4) the term "unfair") accord with traditional language in the cases. But it must be understood that, as used in the context of those cases and of Part 6, they have a special flexibility in meaning and a wide embrace. For a transaction to be fair, the price and terms must be fair, and it must also be one that the directors could have believed to be in the best interests of the corporation. This would be particularly true if the transaction related to a loan of the corporation's assets or credit to a director or related person. Loans to assist relocated personnel are obvious examples. The forms of benefit that might be identified are many and varied.

No inference should be drawn that there is a single "fair" price, so all others are "unfair." It has long been settled that a "fair" price is any price in that broad range which a board of directors might have been willing to pay, or willing to accept, as the case may be, for the property, following a normal arm's-length business negotiation, in the light of the knowledge that the board would reasonably have acquired in the course of such negotiations.

The range of this "fair" criterion is only a segment of the full spectrum of the directors' discretion associated with the exercise of business judgment. That is to say, the scope of decisional discretion that a court would have allowed to the board in the absence of a director's conflicting interest is wider than the range of "fairness" contemplated for judicial determination where Section 14-2-861(b) (3) is the governing provision.

In judging the fairness of a transaction, courts have traditionally considered the process by which the decision was reached. It should then compare those components with the process of decision-making the board would have followed and the spectrum of judgments that the board would have made if D had not had a special stake in the outcome. This does not mean that the court should evaluate the merits or wisdom of the decision made by the board, but whether the manner of reaching the decision has been adversely influenced by the director's conflicting interest. "Unfairness" means any substantial variance arising from that comparison.

A few corporate transactions in which directors inherently have a special personal interest are of a unique character and are addressed not by Part 6 but by special provisions of the Code: indemnification arrangements (see Sections 14-2-851 and 852); directors' and officers' liability insurance (see Section 14-2-858); and termination of derivative proceedings by board action (see Section 14-2-744). Any corporate transaction or arrangement affecting directors that is authorized or permitted by those sections of the Code is governed thereby and is not covered by, addressed under, or affected by Part 6. The Model Act created a special statute for loans to directors (Section 8.32) which has been eliminated in the Code, on the theory that the general conflict of interest provisions of this part provide sufficient safeguards.

#### **Note to 1989 Amendment**

The 1989 amendment deleted subsection (b)(4), which insulated from attack on the basis of a conflict of interest a transaction if the "transaction pertained to the compensation, or the reimbursement of expenses, of one or more directors unless the transaction, judged in the circumstances at the time of commitment, is established to have been unfair to the corporation." Elimination of this safe harbor follows the final version of this Model Act provision. The effect is to admit that decisions involving compensation of directors inevitably involve conflicts of interest, and to return to traditional approaches to legitimating these transactions, which is either to seek shareholder approval or to establish the fairness of the transactions.

#### **Cross-References**

Action by the board of directors, see §§ 14-2-821 & 14-2-824. Action by shareholders, see § 14-2-725 et seq. Committees of the board of directors, see § 14-2-825. Compensation of directors, see § 14-2-811. "Entity" defined, see § 14-2-140. Indemnification of directors, see § 14-2-851. Limits on liability of directors, see § 14-2-202(b)(4). Standards of conduct for directors, see § 14-2-830.

### **JUDICIAL DECISIONS**

**Transactions based on undisclosed facts not protected.** — In an action by minority shareholders against the president of a corporation for breach of fiduciary duty, even



though an asset sales agreement had been approved by a majority of the corporation's board of directors, where undisclosed facts were known to defendant at the time defendant proposed approval of the agreement, and any ordinarily prudent person would reasonably believe those undisclosed facts would have been material to the decision, the jury was authorized in rejecting the defense provided in O.C.G.A. §§ 14-2-861(b)(1) and 14-2-862(a). *Dunaway v. Parker*, 215 Ga. App. 841, 453 S.E.2d 43 (1994).

**Advancement of litigation expenses fair.** — Compliance with the requirements of O.C.G.A. § 14-2-853 was sufficient to uphold the advancement of litigation expenses notwithstanding the fact that all the members of the board that approved the advancement were named defendants. *Service Corp. Int'l v. H.M. Patterson & Son*, 263 Ga. 412, 434 S.E.2d 455 (1993).

**Cited in** *Fisher v. State Mut. Ins. Co.*, 290 F.3d 1256 (11th Cir. 2002).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, *Corporations*, §§ 1817, 1822-1824.

### 14-2-862. Directors' action.

(a) Directors' action respecting a transaction is effective for purposes of paragraph (1) of subsection (b) of Code Section 14-2-861 if the transaction received the affirmative vote of a majority (but not less than two) of those qualified directors on the board of directors or on a duly empowered committee thereof who voted on the transaction after either required disclosure to them (to the extent the information was not known by them) or compliance with subsection (b) of this Code section.

(b) If a director has a conflicting interest respecting a transaction, but neither he nor a related person of the director specified in subparagraph (A) of paragraph (3) of Code Section 14-2-860 is a party thereto, and if the director has a duty under law or professional canon, or a duty of confidentiality to another person, respecting information relating to the transaction such that the director cannot, consistent with that duty, make the disclosure contemplated by subparagraph (B) of paragraph (4) of Code Section 14-2-860, then disclosure is sufficient for purposes of subsection (a) of this Code section if the director:

(1) Discloses to the directors voting on the transaction the existence and nature of his conflicting interest and informs them of the character of and limitations imposed by that duty prior to their vote on the transaction; and

(2) Plays no part, directly or indirectly, in their deliberations or vote.

(c) A majority (but not less than two) of all the qualified directors on the board of directors, or on the committee, constitutes a quorum for purposes of action that complies with this Code section. Directors' action that otherwise complies with this Code section is not affected by the presence or vote of a director who is not a qualified director.

(d) For purposes of this Code section, “qualified director” means, with respect to a director’s conflicting interest transaction, any director who does not have either (1) a conflicting interest respecting the transaction or (2) a familial, financial, professional, or employment relationship with a second director who does have a conflicting interest respecting the transaction, which relationship would, in the circumstances, reasonably be expected to exert an influence on the first director’s judgment when voting on the transaction. (Code 1981, § 14-2-862, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, proposed § 8.62. This replaces former § 14-2-155(a)(1).

Section 14-2-862 provides the procedure for action of the board of directors under Part 6. In the normal course, this section, taken together with Section 14-2-861(b), will be the key provision for dealing with directors’ conflicting interest transactions.

Subsection (a) provides the basic rule: a transaction respecting which a director has a conflicting interest is approved under Section 14-2-862 if and only if it is approved by the affirmative vote of a majority (but not less than two) of the qualified directors on the board or on a duly authorized committee of the board. Except to the extent provided in subsection (b), such approval must be preceded by required disclosure. Qualified directors are defined in subsection (d).

Action complying with subsection 14-2-862(a) may be taken by the board of directors at any time — before or after the transaction.

Directors’ actions approving a director’s conflicting interest transaction can only occur after full disclosure of all material facts, covered by the reference to “required disclosure.” Subsection (b) is a new provision designed to deal, in a practical way, with situations in which a director who has a conflicting interest of the type described in Section 14-2-860(1)(B) is not able to comply fully with the disclosure requirement of subsection (a) because of an extrinsic duty of confidentiality. The director may, for example, be prohibited from making full disclosure because of restrictions of law that happen to apply to the transaction (e.g., grand jury seal or national security statute) or professional canon (e.g., lawyers’ or doctors’ client privilege). The most frequent use of subsection (b), however, will undoubtedly be in connection with common directors who find themselves in a position of dual fiduciary obligations that clash. In such circumstances, subsection (b) makes it possible for such a matter to be brought to the board for consideration under subsection (a) and thus enable both the company and the director to secure the protection afforded by Part 6 for the transaction despite the fact that D cannot make the full disclosure usually required.

To comply with subsection (b), D must disclose that he has a conflicting interest, inform the directors who vote on the transaction of the nature of the duty of confidentiality (e.g., inform them that it arises out of an attorney-client privilege or his duty as a director of Y Co. that prevents him from making the disclosure called for by clause (ii) of Section 14-2-860(4)) and then play no personal part in the board’s deliberations.

Subsection (b) is not available to a director if the transaction is directly between the corporation and the director or his related person described in Section 14-2-860(a)(3)(A) — if, that is, the director or such related person is a party to the transaction.

Subsection (c) provides special quorum rules for approval of director’s conflicting interest transactions. A majority of the qualified directors constitutes a quorum for board action, but a quorum may never be less than two directors.



Subsection (d) defines those “qualified” directors who can act to approve a director’s conflicting interest transaction. The definition is broad: it excludes not only any director who has a conflicting interest respecting the matter, but also — going significantly beyond the persons specified in the subcategories of Section 14-2-860(1)(ii) for purposes of the “conflicting interest” definition — any director whose familial or financial relationship with D or whose employment or professional relationship with D would be likely to influence the director’s vote on the transaction. The notion of relationships between directors that disqualify a director are specified: they must arise from “a familial, financial, professional, or employment relationship” with the other director. Further, the subsection imposes an objective standard of influence: the relationship must, “in the circumstances, reasonably be expected to exert an influence on the first director’s judgment.” This rejects the notion of “structural bias”; that by nature of their relationships all directors are disqualified from judging the fairness of their colleagues’ transactions with the corporation. In order for director action to be effective under Section 14-2-862, it must be taken, of course, in compliance with the requirements of Section 14-2-830(a) that a director must discharge his duties “in a manner he believes in good faith to be in the best interests of the corporation,” and “with the care an ordinarily prudent person” would exercise. If, for example, “qualified directors” vote in favor of a transaction, as an accommodation to the director who has a conflicting interest, without complying with the requirements of Section 14-2-830(a), the board action would not be given effect under Section 14-2-861(b).

#### Cross-References

Action by the board of directors, see §§ 14-2-821 & 14-2-824. By-laws governing quorum and voting requirements for directors, see § 14-2-1022. Committees of the board of directors, see § 14-2-825. Compensation of directors, see § 14-2-811. Continuing Directors in business combinations with interested shareholders, see § 14-2-1111. Limits on liability of directors, see § 14-2-202(b)(4). Quorum for directors’ meetings, see § 14-2-824. Standards of conduct for directors, see § 14-2-830.

### JUDICIAL DECISIONS

**Transaction based on undisclosed facts not protected.** — In an action by minority shareholders against the president of a corporation for breach of fiduciary duty, even though an asset sales agreement had been approved by a majority of a corporation’s board of directors, where undisclosed facts were known to defendant at the time the defendant proposed approval of the agreement, and any ordinarily prudent person

would reasonably believe those undisclosed facts would have been material to the decision, the jury was authorized in rejecting the defense provided in O.C.G.A. §§ 14-2-861(b)(1) and 14-2-862(a). *Dunaway v. Parker*, 215 Ga. App. 841, 453 S.E.2d 43 (1994).

Cited in *Fisher v. State Mut. Ins. Co.*, 290 F.3d 1256 (11th Cir. 2002).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 1740.

**C.J.S.** — 19 C.J.S., Corporations, § 466.

#### 14-2-863. Shareholders’ action.

(a) Shareholders’ action respecting a transaction is effective for purposes of paragraph (2) of subsection (b) of Code Section 14-2-861 if a majority of the votes entitled to be cast by the holders of all qualified shares were cast

in favor of the transaction after (1) notice to shareholders describing the director's conflicting interest transaction, (2) provision of the information referred to in subsection (d) of this Code section, and (3) required disclosure to the shareholders who voted on the transaction (to the extent the information was not known by them).

(b) For purposes of this Code section, "qualified shares" means any shares entitled to vote with respect to a director's conflicting interest transaction except shares that, to the knowledge, before the vote, of the secretary (or other officer or agent of the corporation authorized to tabulate votes) are beneficially owned (or the voting of which is controlled) by a director who has a conflicting interest respecting the transaction or by a related person of the director, or both.

(c) A majority of the votes entitled to be cast by the holders of all qualified shares constitutes a quorum for purposes of action that complies with this Code section. Subject to the provisions of subsection (d) of this Code section, shareholders' action that otherwise complies with this Code section is not affected by the presence of holders, or the voting, of shares that are not qualified shares.

(d) For purposes of compliance with subsection (a) of this Code section, a director who has a conflicting interest respecting the transaction shall, before the shareholders' vote, inform the secretary (or other officer or agent of the corporation authorized to tabulate votes) of the number, and the identity of persons holding or controlling the vote, of all shares that to the knowledge of the director are beneficially owned (or the voting of which is controlled) by the director or by a related person of the director, or both.

(e) If a shareholders' vote does not comply with subsection (a) of this Code section solely because of a failure of a director to comply with subsection (d) of this Code section, and if the director establishes that his failure did not determine and was not intended by him to influence the outcome of the vote, the court may, with or without further proceedings respecting paragraph (3) of subsection (b) of Code Section 14-2-861, take such action respecting the transaction and the director, and give such effect, if any, to the shareholders' vote, as it considers appropriate in the circumstances. (Code 1981, § 14-2-863, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, proposed § 8.63. This replaces former § 14-2-155(a)(2).

Section 14-2-863 provides the machinery for shareholder safe harbor of a director's conflicting interest transaction, as Section 14-2-862 provides the machinery for safe harbor by action of directors.

Subsection (a) follows the basic pattern of former law, but specifies in detail the procedure required to establish effective safe harbor protection of a director's conflict-



ing interest transaction through a vote of shareholders. Shareholders must be given notice describing the transaction. The director must notify the secretary as to any shares beneficially owned or voted by the director or his related person, in compliance with subsection (d). Required disclosure must be made, as defined in Section 14-2-860(4). Subsection (a) does not contain the exception for a director under a duty of confidentiality. The remaining members of the board are expected, in submitting the transaction to shareholders, to provide sufficient information to satisfy the standard of required disclosure. If, following proper disclosure, a majority of all qualified shares that are entitled to vote on the matter vote favorably, the safe harbor provision of Section 14-2-861(b)(2) becomes effective.

Action that complies with subsection 14-2-863(a) may be taken at any time — before or after the transaction.

Under subsection (a) only “qualified shares” may be counted in the vote for purposes of safe harbor action pursuant to Section 14-2-861(b) (2). Subsection (b) defines “qualified shares” to exclude all shares that prior to the vote the secretary or other tabulator of the votes knows to be owned or controlled by the director who has the conflicting interest or any related person of that director. It should be stressed that this definition is dependent upon the tabulator’s actual knowledge. If the tabulator does not know that certain shares are owned by the director who has the conflicting interest, he cannot be expected to exclude those shares from the vote count. But see the Comment to subsection (e).

The category of persons whose shares are excluded from the vote count under subsection (b) is not the same as the category of persons specified in Section 14-2-860(1) (ii) for purposes of defining a director’s “conflicting interest” and not the same as the category of persons excluded for purposes of the definition of non-qualified directors under subsection 14-2-862(d). Those distinctions among these categories are deliberate and carefully drawn. While Section 14-2-862 is concerned with a wide range of relationships that might influence a director in his fiduciary capacity, shareholders voting as shareholders are not fiduciaries, and are typically entitled to vote in their own interests. The common ownership of shares is sufficient assurance that shares generally will be voted in the common interests of shareholders. Thus only shares beneficially owned or voted by or under the control of the director or his related person will be disqualified.

Subsection (c) provides a special quorum rule for shareholder approval — a majority of the votes to be cast by holders of all qualified shares, rather than a majority of the votes of all shares, required by Section 14-2-725(a). Like other quorum requirements, this one could be increased by an amendment of articles of incorporation or bylaws under Sections 14-2-1003 or 14-2-1021.

The fact that certain shares are not qualified and are not countable for purposes of subsection (a) is not intended to mean that they are not properly countable for other purposes such as, for example, a statutory requirement that a certain fraction of the total vote or a special majority vote be obtained.

Subsection (d) provides a procedure for assuring that only qualified shares are counted toward shareholder action approving a director’s conflicting interest transaction. It requires the director who has a conflicting interest to notify the corporate secretary of shares beneficially owned or the voting of which is controlled by that director or by related persons of the director. Placing the burden on the director to identify disqualified shares relieves the tabulator of votes of a duty to investigate whether shares are qualified. If the tabulator does not know that shares are owned or controlled by a director with a conflicting interest, or by a related person of his, the shares are “qualified” pursuant to the definition of subsection (b), and the vote cannot be attacked on the ground that nonqualified shares were voted; but see subsection (e).

If a director with a conflicting interest did not provide the information required under subsection (d), the shareholders' action is not in compliance with subsection (a) and the director has no safe harbor under subsection (a), in the absence of which he can be put to the challenge of establishing the fairness of the transaction under Section 14-2-861(b) (3). Subsection (e) provides that if the director's failure did not determine the result of the vote, and is shown to be inadvertent or negligent, rather than deliberate, the court is free to fashion an appropriate alternative remedy, rather than put the director to the proof of the fairness of the transaction.

#### **Cross-References**

Action by shareholders, see § 14-2-725 et seq. Bylaws governing quorums and action by shareholders, see § 14-2-1021. Quorums and voting requirements: generally, for voting groups, see § 14-2-725; greater quorum & voting requirements, see § 14-2-727; for business combinations with interested shareholders, see §§ 14-2-1111 and 14-2-1132. Secretary of the corporation defined, see § 14-2-140.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 1745.

#### **14-2-864. Definitions; officer's conflicting interest transactions.**

(a) As used in this Code section, the term:

(1) "Officer" means a person who is not a director and who is holding an office described in the bylaws of the corporation or appointed by the board of directors in accordance with the bylaws of the corporation.

(2) "Officer's conflicting interest transaction" means any transaction, other than a director's conflicting interest transaction as defined in paragraph (2) of Code Section 14-2-860, between a corporation (or a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) and one or more of its officers or between a corporation and a related person of an officer.

(3) "Related person" of an officer shall have the same meaning with respect to an officer that this term has with respect to a director in paragraph (3) of Code Section 14-2-860.

(4) "Required disclosure" with respect to an officer shall have the same meaning as this term has with respect to a director in paragraph (4) of Code Section 14-2-860.

(5) "Time of commitment" shall have the same meaning as in paragraph (5) of Code Section 14-2-860.

(b) No officer's conflicting interest transaction shall be void or voidable solely because the officer is present at or participates in the meeting of the board of directors or committee thereof which authorizes the contract or transaction.



(c) An officer's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in an action by a shareholder or by or in the right of the corporation, on the ground of an interest in the transaction of the officer or any person with whom or which he has a personal, economic, or other association, if:

(1) The transaction was approved by the board of directors after required disclosure;

(2) The transaction was approved by the shareholders after required disclosure; or

(3) The transaction, judged in the circumstances at the time of commitment, is established to have been fair to the corporation. (Code 1981, § 14-2-864, enacted by Ga. L. 1989, p. 946, § 40.)

#### COMMENT

This section was added by the 1989 amendments, to restore the safe harbor for transactions between the corporation and its officers formerly provided by O.C.G.A. § 14-2-155 (1982), which covered both officers and directors. The Model Act made no separate provision for transactions by officers who are not also directors, on the theory that the general law of agency provides sufficient guidance in this area, that principals can waive conflicts of interest with respect to their agents, and that directors or superior officers, acting in good faith, can waive such conflicts on behalf of the corporation. Because former Georgia law specifically provided a safe harbor for such transactions, it was feared that negative implications might arise were similar protections not provided by the new Code. Absent appropriate authorization, after full disclosure, the officer may defend the transaction on the basis of its fairness.

### ARTICLE 9

#### CLOSE CORPORATIONS

**Law reviews.** — For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988). For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989).

#### RESEARCH REFERENCES

**ALR.** — Duty and liability of closely held corporation, its directors, officers, or majority stockholders, in acquiring stock of minority shareholder, 7 ALR3d 500.

#### PART 1

##### CREATION

#### 14-2-901. Application of Business Corporation Code and Professional Corporation Act.

(a) This chapter applies to statutory close corporations to the extent not inconsistent with the provisions of this article.

(b) This article applies to a professional corporation organized under Chapter 7 of this title, known as the "Georgia Professional Corporation Act," whose articles of incorporation contain the statement required by Code Section 14-7-3, except insofar as the "Georgia Professional Corporation Act" contains inconsistent provisions, if such professional corporation's articles of incorporation also contain the statement required by subsection (a) of Code Section 14-2-902.

(c) This article does not repeal or modify any statute or rule of law that is or would apply to a corporation that is organized under this chapter or Chapter 7 of this title, known as the "Georgia Professional Corporation Act" and that does not elect to become a statutory close corporation under Code Section 14-2-902. (Code 1981, § 14-2-901, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1995, p. 482, § 6.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 2. There was no comparable comprehensive set of provisions in former Georgia law. Previously § 14-2-120(b) expressly validated shareholders' agreements that varied the form of management of the corporation (much as Code § 14-2-731(c) does), and § 14-2-141(a) permitted the board of directors to consist of one or two persons, rather than three, under specified conditions. Former § 14-2-142 permitted the court to appoint provisional directors.

Provisions in the Georgia Business Corporation Code apply to all statutory close corporations except to the extent they are not consistent with the provisions in this article. Whenever this article is silent on an issue, the corresponding provision of the remainder of the Code applies.

One provision of the Code only becomes applicable upon election of statutory close corporation status. Section 14-2-627 provides that corporations formed under the Code do not have preemptive rights unless they elect them in their articles of incorporation. However, under Section 14-2-627(b) election of statutory close corporation status is treated as an election of preemptive rights, unless they are denied in the articles of incorporation.

Under subsection (b) the provisions of this article apply to all professional corporations that elect to be statutory close corporations.

Subsection (c) is derived from section 356 of the Delaware Corporation Law, and makes clear that enactment of this article does not affect the law applicable to corporations, including closely held corporations, that are not statutory close corporations. Election of statutory close corporation status is not intended to provide the exclusive means of varying the corporate form, where authority to do so exists under other provisions of the Code, or has previously been a normal incident of Georgia corporations. This article has independent legal significance, as does each other provision of the Code. See *Zion v. Kurtz*, 50 N.Y.2d 92, 405 N.E.2d 681 (Ct. App. 1980) (applying Delaware law), for a judicial approach consistent with the intent of this article.

The Code departs from the Model Close Corporation Supplement in Sections 14-2-731(c) and 801(a) to make clear that the flexibility provided by election of statutory close corporation status can effectively be obtained by provisions in articles of incorporation, bylaws or shareholder agreements, provided all shareholders approve in writing, and provided the corporation's shares are not regularly traded in public securities markets.



**Cross-References**

Election of statutory close corporation status, see § 14-2-902. Business Corporation Code definitions, see § 14-2-140. Shareholders' agreements to vary management of the corporation, see §§ 14-2-731 and 14-2-801.

**14-2-902. Definition and election of statutory close corporation status.**

(a) A statutory close corporation is a corporation whose articles of incorporation contain a statement that the corporation is a statutory close corporation.

(b) A corporation having 50 or fewer shareholders may become a statutory close corporation by amending its articles of incorporation to include the statement required by subsection (a) of this Code section. The amendment must be approved by the holders of at least two-thirds of the votes of each class or series of shares of the corporation, voting as separate voting groups, whether or not otherwise entitled to vote on amendments. If the amendment is adopted, a shareholder who voted against the amendment is entitled to assert dissenters' rights under Article 13 of this chapter. (Code 1981, § 14-2-902, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Statutory Close Corporation Supplement, § 3. There was no counterpart in former Georgia law. Special provisions validating shareholders' agreements appeared in former § 14-2-120(b), and applied only to corporations with shares not listed on a national securities exchange or generally traded in the markets maintained by securities dealers or brokers. See Section 14-2-731 for comparable provisions for corporations not electing statutory close corporation status.

This article is designed to be entirely elective. Those corporations choosing to be governed by its provisions, in whole or in part, must elect close corporation status in their articles of incorporation. This article has no effect on corporations not electing statutory close corporation status, and its provisions do not limit the authority of such corporations to vary their form by provisions in their articles of incorporation, bylaws, or agreements among shareholders. The provisions of this article are designed to provide a standard set of provisions suitable for most closely held corporations. They, too, are subject to variation by agreement among the contracting parties.

All corporations, except those with more than 50 shareholders at the time of the election, are eligible to elect statutory close corporation status under this article. The election is made by including in the articles of incorporation a statement that the corporation is a statutory close corporation. An electing corporation continues to be governed by this article unless the shareholders revoke the election. A new corporation may elect this status, regardless of the number of subscribers for shares. Thereafter, regardless of the number of shareholders, it may continue to act as a statutory close corporation.

Subsection (b), in addition to limiting election of this status by existing corporations to those with 50 or fewer shareholders, imposes special voting rules for amending the articles of incorporation for this election. The amendment must be approved by holders of at least two thirds of the votes of each class or series, voting as a separate voting group. All classes and series are entitled to vote on this amendment, in contrast to the rules provided in Section 14-2-1004 of the Code for voting on other amendments. Holders of

shares voted against the amendment are expressly granted dissenters' rights under Article 13, provided they comply with the conditions of that article.

#### **Cross-References**

Amendment of articles of incorporation, see Article 10, Part 1. Application to existing corporations, see § 14-2-950. Articles of incorporation, see § 14-2-202. Dissenter's rights, see Article 13. Filing fees, see § 14-2-122. Number of shareholders, see § 14-2-142. Voting by voting groups: amendment of articles of incorporation, see § 14-2-1004; generally, see § 14-2-726. "Voting group" defined, see § 14-2-140.

#### **JUDICIAL DECISIONS**

Cited in *Jamal v. Pirani*, 227 Ga. App. 713, 490 S.E.2d 140 (1997).

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, § 36.

### **PART 2**

### **SHARES**

#### **14-2-910. Notice of statutory close corporation status on issued shares.**

(a) The following statement must appear conspicuously on each share certificate issued by a statutory close corporation:

"The rights of shareholders in a statutory close corporation may differ materially from the rights of shareholders in other corporations. Copies of the articles of incorporation and bylaws, shareholders' agreements, and other documents, any of which may restrict transfers and affect voting and other rights, may be obtained by a shareholder on written request to the corporation."

(b) Within a reasonable time after the issuance or transfer of uncertificated shares, the corporation shall send to the shareholders a written notice containing the information required by subsection (a) of this Code section.

(c) The notice required by this Code section satisfies all requirements of this article and of Code Section 14-2-627 that notice of share transfer restrictions be given.

(d) A person claiming an interest in shares of a statutory close corporation which has complied with the notice requirement of this Code section is bound by the documents referred to in the notice. Any document referred to in subsection (a) of this Code section, whether or not referred to on the share certificate in the manner required by this Code section, is enforceable against a person with knowledge of the document.



(e) A corporation shall provide to any shareholder upon his written request and without charge copies of provisions that restrict transfer or affect voting or other rights of shareholders appearing in articles of incorporation, bylaws, or shareholders' or voting trust agreements filed with the corporation. (Code 1981, § 14-2-910, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 10. There was no counterpart in prior Georgia law.

The purpose of this section is to put shareholders in a statutory close corporation on notice that their shares are subject to transfer restrictions and that their rights and liabilities may be different from those of shareholders in other corporations. The notice is essential to bind third parties who are not signatories to the original agreements establishing the rights of shareholders among themselves.

Subsection (d) has been modified to clarify the binding nature of actual knowledge or notice of restrictions imposed by close corporation status. The approach parallels that of Section 14-2-627(b), relating to restrictions on transfer of shares. The Model Close Corporation Supplement approach made these documents binding upon a shareholder even though not noted on the certificate, and even though he lacked actual knowledge, if his transferor knew of them.

The notice is also drafted to satisfy the notice requirements of Section 14-2-626 where a statutory close corporation has uncertificated shares. In that case the notice required by this section would appear in the transaction statement.

#### Cross-References

Certificateless shares, see § 14-2-626. Compulsory purchase of shares, see § 14-2-914 et seq. "Conspicuous" defined, see § 14-2-140. "Notice" defined, see § 14-2-141. Share transfer restrictions: generally, see § 14-2-627; statutory close corporations, see § 14-2-911 et seq. Shareholders' agreements, see § 14-2-731. Voting trust agreements, see § 14-2-730.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 488.

#### 14-2-911. Share transfer prohibition.

(a) An interest in shares of a statutory close corporation may not be voluntarily or involuntarily transferred, by operation of law or otherwise, except to the extent permitted by the articles of incorporation or under Code Section 14-2-912.

(b) Except to the extent the articles of incorporation provide otherwise, this Code section does not apply to a transfer:

(1) To the corporation or to any other holder of the same class or series of shares;

(2) To members of the shareholder's immediate family (or to a trust, all of whose beneficiaries are members of the shareholder's immediate family), which immediate family consists of his spouse, parents, lineal descendants (including adopted children and stepchildren), and the spouse of any lineal descendant, and brothers and sisters;

(3) That has been approved in writing by all of the holders of the corporation's shares having general voting rights;

(4) To an executor or administrator upon the death of a shareholder or to a trustee or receiver as the result of a bankruptcy, insolvency, dissolution, or similar proceeding brought by or against a shareholder;

(5) By merger or share exchange under Article 11 of this chapter or an exchange of existing shares for other shares of a different class or series of the corporation;

(6) By a pledge as collateral for a loan that does not grant the pledgee any voting rights possessed by the pledgor; or

(7) Made after termination of the corporation's status as a statutory close corporation. (Code 1981, § 14-2-911, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 11. There was no comparable provision in former Georgia law.

This section sets out a standardized transfer prohibition that automatically applies unless the articles of incorporation provide otherwise. The prohibition is designed to accomplish two purposes: first, to provide a prohibition that fits the needs of the "typical" close corporation; and second, to facilitate alteration in order to fit the special needs of shareholders in a particular corporation.

The definition of transfer in subsection (a) is intended to cover every possible type of transaction that might create an interest in corporate shares, including purchase, sale, discount, negotiation, gift, trust, legacy, inheritance, pledge, mortgage lien, creation of a security interest, hypothecation, bankruptcy, or transfer pursuant to court order. It is a blanket definition, from which specific exceptions are carved in subsection (b). Its effect, without more, is to make shares in a statutory close corporation non-transferable, with limited exceptions, much as partnership interests are not transferable.

Subsection (a) also provides that these transfers are permitted only to the extent permitted either by the articles of incorporation or under Section 14-2-912. This is intended to make clear that the statutory prohibition can be limited or modified simply by altering it in the articles of incorporation. For example, if shareholders wanted all pledges to be subject to the prohibition, but found the remainder of the statutory prohibitions acceptable, the articles of incorporation may simply provide that "subsection 14-2-911(b)(6) does not apply."

Subsection (b) describes a number of exemptions to the prohibition of subsection (a). Intrashareholder and intrafamily transfers are exempt on the assumption that most typical close corporation shareholders would want these transfers to be exempt. In addition, transfers that are in effect merely internal recapitalizations and transfers having the approval of all the shareholders are exempt. Pledges that do not carry voting



power are exempted, just as assignments of a partner's interest, which carries no management rights, is permitted under the Uniform Partnership Act.

### Cross-References

Corporation's purchase options, see §§ 14-2-912 & 14-2-913. Information on shares: generally, see § 14-2-627; statutory close corporation shares, see § 14-2-910. Merger and share exchange: generally, see Article 11; statutory close corporation, see § 14-2-930. Sale of assets: generally, see Article 12; statutory close corporation, see § 14-2-930. "Shareholder" defined, see § 14-2-140. Shareholders' purchase options, see § 14-2-912. Termination of statutory close corporation status, see § 14-2-931.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 685, 687, 689.

**C.J.S.** — 18 C.J.S., Corporations, §§ 219-225.

**ALR.** — Validity of restrictions on alienation or transfer of corporate stock, 61 ALR2d 1318.

Validity and construction of provision restricting transfer of corporate stock, which conditions transfer upon consent of one other than shareholder, officer, or director of corporation, 53 ALR3d 1272.

## 14-2-912. Share transfer after first refusal by corporation.

(a) A person desiring to transfer shares of a statutory close corporation subject to the transfer prohibition of Code Section 14-2-911 must first offer them to the corporation by obtaining an offer to purchase the shares for cash from a third person who is eligible to purchase the shares under subsection (b) of this Code section. The offer by the third person must be in writing and state the offeror's name and address, the number and class (or series) of shares offered, the offering price per share, and the other terms of the offer.

(b) A third person is eligible to purchase the shares if:

(1) He is eligible to become a qualified shareholder under any federal or state tax statute the corporation has adopted and he agrees in writing not to terminate his qualification without the approval of the remaining shareholders; and

(2) His purchase of the shares will not impose a personal holding company tax or similar federal or state penalty tax on the corporation.

(c) The person desiring to transfer shares shall deliver the offer to the corporation and by doing so offers to sell the shares to the corporation on the terms of the offer. Within 20 days after the corporation receives the offer, the corporation shall call a special shareholders' meeting, to be held not more than 40 days after the call, to decide whether the corporation should purchase all (but not less than all) of the offered shares. The offer must be approved by the affirmative vote of the holders of a majority of votes entitled to be cast at the meeting, excluding votes in respect of the shares covered by the offer.

(d) The corporation must deliver to the offering shareholder written notice of acceptance within 75 days after receiving the offer or the offer is rejected. If the corporation makes a counteroffer, the shareholder must deliver to the corporation written notice of acceptance within 15 days after receiving the counteroffer or the counteroffer is rejected. If the corporation accepts the original offer or the shareholder accepts the corporation's counteroffer, the shareholder shall deliver to the corporation duly endorsed certificates for the shares, or instruct the corporation in writing to transfer the shares if uncertificated, within 20 days after the effective date of the notice of acceptance. The corporation may specifically enforce the shareholder's delivery or instruction obligation under this subsection.

(e) A corporation accepting an offer to purchase the shares under this Code section may allocate some or all of the shares pro rata to those of its shareholders who desire to purchase the shares unless all of the shareholders who desire to purchase approve a different allocation to the shareholders or to other persons. If the corporation has more than one class (or series) of shares, however, the remaining holders of the class (or series) of shares being purchased are entitled to a first option to purchase the shares not purchased by the corporation in proportion to their shareholdings or in some other proportion agreed to by all the shareholders participating in the purchase.

(f) If an offer to purchase shares under this Code section is rejected, the offering shareholder, for a period of 120 days after the corporation received his offer, is entitled to transfer to the third-person offeror all (but not less than all) of the offered shares in accordance with the terms of his offer to the corporation. (Code 1981, § 14-2-912, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 41.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 12. There was no standardized share transfer restriction in previous law. Former § 14-2-171(b)(1) permitted articles of incorporation to set forth "any provision, not inconsistent with law, for the regulation of the internal affairs of the corporation and for the restriction of the transfer of shares." No further rules were provided, leaving open questions of what restraints on alienation were reasonable and whether amendments to articles can restrict the transferability of previously issued shares.

Subsection (a) provides that if the proposed transfer is not exempt under Section 14-2-911(b) the shareholder may sell his shares only if he obtains an offer from a nonshareholder who meets the requirements of subsection (b)(1) and (2) of this section. The mere offer by a shareholder to sell his shares to the corporation does not trigger the first refusal option and other rights provided by this subsection. These rights are only triggered by an offer meeting the specifications stated — that the offer obtained by the shareholder must be for cash, and must be in writing. It must also be sufficiently specific to satisfy the statute of frauds. Offers made to purchase shares for consideration other than cash are not covered by this subsection.

Subsection (b) provides protection for both the corporation and its shareholders against unfavorable tax consequences, by permitting third persons to purchase shares



only if their acquisition will not destroy favorable tax characteristics, such as Subchapter S status, under subsection (b)(1), and will not create an unfavorable tax status, such as imposition of personal holding company status on the corporation, under subsection (b)(2). These requirements apply to all purchases by third persons, including those made after satisfying the first option provisions of this section.

Subsection (c) encourages the parties to reach an agreement in a reasonably short period of time. Thus, after the selling shareholder has delivered the offer to the corporation, the corporation has 20 days within which to call a special shareholders' meeting. Failure to do so terminates the corporation's right to purchase. The special shareholders' meeting must be held within 40 days after the call to decide whether to purchase. Voting is by simple majority of a quorum, as is generally provided in Section 14-2-725. The holder of the shares covered by the offer is disqualified from voting, as an "interested" shareholder. This follows the approach of Section 14-2-863, which excludes interested directors from voting their shares to approve a director's conflicting interest transaction, and of Section 14-2-1111, which excludes the votes of an interested shareholder in a business combination. The determination of a quorum under this section is based on the total number of remaining shares in the corporation. Any other calculation would be futile, at least where the selling shareholder proposed to sell a majority of the shares of the corporation.

Subsection (d) encourages the parties to reach an agreement in a reasonably short period of time. The 15-day interval between the last day for holding a shareholders' meeting to consider the third-party offer and the cutoff date for the notice of acceptance is designed to allow time for the corporation and the other shareholders to contact potential third-party purchasers or shareholders not present at the meeting at which the decision to purchase was taken and to make any necessary arrangements to finance the purchase. Similarly, subsection (d) encourages negotiation by permitting a counteroffer by the corporation, which the selling shareholder may reject immediately. This is designed to allow the corporation to suggest different terms of payment, for example. Because the selling shareholder can immediately reject the counteroffer, it cannot be a vehicle for delaying a transfer.

Subsection (e) contemplates allocation of repurchased shares either to existing shareholders or to outside buyers. In order to protect allocations of voting power and economic rights that have previously been arranged through issuance of different classes or series of stock, subsection (e) provides that only holders of the same class of shares shall be eligible for such allocations, and only on a pro rata basis, unless those shareholders who elect to participate in the purchase unanimously agree to another allocation. The Model Close Corporation Supplement required unanimous approval of those shareholders who approved the repurchase. Georgia's modification creates a veto power only in those who elect to purchase. Those who elect not to purchase have already waived their right to preserve proportionate holdings, under this rule. The modification adds the words "pro rata," as a clarification of the default rule, to assure that no allocation of repurchased shares to shareholders can disturb existing voting power allocations without the consent of those electing to purchase.

If the corporation does not arrange the purchase of the offered shares, subsection (f) permits their transfer to the third person only if made within 120 days of the date the shareholder notifies the corporation of the third-party offer. Additionally, the transaction must be consummated on the terms set forth in the notice of the offer.

#### **Note to 1989 Amendment**

The 1989 amendment moves the phrase "or to other persons" to the end of the first sentence to correct an error.

**Cross-References**

Acquisition of own shares by statutory close corporation, see § 14-2-631. Effective date of notice, see § 14-2-141. "Notice" defined, see § 14-2-141. Notice includes mail, see § 14-2-140. Notice of shareholders' meeting, see § 14-2-705. Special shareholders' meeting, see § 14-2-702. Voting of shares, see Article 7, Part 2.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 690-697.

**C.J.S.** — 18 C.J.S., Corporations, §§ 219-225.

**ALR.** — Validity of restriction on alienation or transfer of corporate stock, 61 ALR2d 1318.

Validity and construction of provision restricting transfer of corporate stock, which conditions transfer upon consent of one other than shareholder, officer, or director of corporation, 53 ALR3d 1272.

**14-2-913. Attempted share transfer in breach of prohibition.**

(a) An attempt to transfer shares in a statutory close corporation in violation of a prohibition against transfer binding on the transferee is ineffective.

(b) An attempt to transfer shares in a statutory close corporation in violation of a prohibition against transfer that is not binding on the transferee, either because the notice required by Code Section 14-2-910 was not given or because the prohibition is held unenforceable by a court, gives the corporation an option to purchase the shares from the transferee for the same price and on the same terms that he purchased them; provided, however, that in the case of a gift, the purchase shall be at a price and upon terms which are agreed upon by the parties, or if no agreement is reached, then at the fair value of the shares and upon terms as determined by a court in accordance with standards set forth in Code Section 14-2-942. To exercise its option, the corporation must give the transferee written notice within 30 days after they are presented for registration in the transferee's name. The corporation may specifically enforce the transferee's sale obligation upon exercise of its purchase option. (Code 1981, § 14-2-913, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Statutory Close Corporation Supplement, § 13. Subsection (b) is patterned on Del. Code Ann. tit. 8, § 349. There was no counterpart in former Georgia law.

This section provides additional protection for the effectiveness of the transfer restrictions applicable to the shares of a statutory close corporation. If the required notice of the restrictions has not been given (see Section 14-2-910) and the transferee does not have actual notice of the restrictions, the corporation is given a 30-day option to purchase the shares. If the corporation exercises its option, the proposed transferee may pursue a breach of warranty claim or any other appropriate remedy against the proposed transferor.

This section also gives the corporation an option to purchase shares attempted to be transferred in violation of a transfer restriction that has been held unenforceable by a



court. The Model Close Corporation Supplement approach, that required payment of the same price that the transferee paid, was amended to add a "fair value" approach where shares are transferred without consideration. The "fair value" approach is in use in Delaware, Del. Code Ann. tit. 8, § 349, Illinois, Ill. Rev. Stat. ch. 32, § 1210, and Kansas, Kans. Stat. Ann. §§ 17-7207 & 7209.

#### **Cross-References**

Acquisition of shares by a corporation, see §§ 14-2-631 & 14-2-640. Delivery includes mail, see § 14-2-140. Effective date of notice, see § 14-2-141. "Notice" defined, see § 14-2-141. Share transfer restrictions: generally, see § 14-2-627; statutory close corporations, see §§ 14-2-911 & 14-2-912.

#### **14-2-914. Compulsory purchase of shares after death of shareholder.**

(a) This Code section and Code Sections 14-2-915 through 14-2-917 apply to a statutory close corporation only if so provided in its articles of incorporation. If these Code sections apply, the executor or administrator of the estate of a deceased shareholder may require the corporation to purchase or cause to be purchased all (but not less than all) of the decedent's shares or to be dissolved.

(b) The provisions of Code Sections 14-2-915 through 14-2-917 may be modified only if the modification is set forth or referred to in the articles of incorporation.

(c) An amendment to the articles of incorporation to provide for application of Code Sections 14-2-915 through 14-2-917, or to modify or delete the provisions of these Code sections, must be approved by the holders of at least two-thirds of the votes of each class or series of shares of the statutory close corporation, voting as separate voting groups, whether or not otherwise entitled to vote on amendments. If the corporation has no shareholders when the amendment is proposed, it must be approved by at least two-thirds of the subscribers for shares, if any, or, if none, by all of the incorporators.

(d) A shareholder who votes against an amendment to modify or delete the provisions of Code Sections 14-2-915 through 14-2-917 is entitled to dissenters' rights under Article 13 of this chapter if the amendment upon adoption terminates or substantially alters his existing rights under these Code sections to have his shares purchased.

(e) A shareholder may waive his and his estate's rights under Code Sections 14-2-915 through 14-2-917 by a signed writing.

(f) Code Sections 14-2-915 through 14-2-917 do not prohibit any other agreement providing for the purchase of shares upon a shareholder's death, nor do they prevent a shareholder from enforcing any remedy he has independently of these Code sections. (Code 1981, § 14-2-914, enacted by Ga. L. 1988, p. 1070, § 1.)

#### **COMMENT**

Source: Model Statutory Close Corporation Supplement, § 14.

Sections 14-2-914 through 14-2-917, which are operative only if the articles of incorporation specifically so provide, guarantee a buy-out at the death of a shareholder. Thus, it is not enough to comply with Section 14-2-902(a), to state that the corporation is a statutory close corporation, to trigger application of these sections. Subsection (a) requires a specific provision in the articles of incorporation to the effect that "Sections 14-2-914 — 14-2-917 of the Georgia Business Corporation Code apply to this corporation," or words of similar import.

Subsection (b) specifically contemplates modification of the standard form of buyout arrangements provided in Sections 14-2-914 — 14-2-917, but requires that modification to be contained in, or at least referred to in the articles of incorporation. Thus, a lengthy buy-sell agreement need not be set out in the articles of incorporation, if specific reference is made to it in the articles. Thus these buy-sell arrangements can be expanded to cover events other than death, such as disability or retirement, and the terms of payment can be modified. Where immediate payment or dissolution appears too harsh, provision can be made for extended payments to a decedent's estate or a withdrawing shareholder.

Subsection (c) varies the usual voting rules in the case of adoption or modification of these buyout arrangements. Subsection (c) raises the voting requirement of Section 14-2-1003(e) (a majority of the votes entitled to be cast) to two-thirds. It is not intended to modify the rule of Section 14-2-1003(e) that permits the articles of incorporation to require a higher vote. While Section 14-2-1003 only provides for voting by each voting group that has dissenter's rights, subsection (c) provides that all voting groups must separately approve an amendment making these provisions applicable, or modifying them. These voting rules emphasize that the decision to utilize any kind of a buyout arrangement should be made only after careful consideration of the factors involved in the particular consideration.

Because these sections have the effect of making a corporation subject to dissolution upon the death of a shareholder, if the shares are not repurchased, they remove one of the normal characteristics of the corporate form — continuity of life, and make its life more like that of a partnership. Subsection (d) provides dissenters' rights under Article 13 for those shareholders who vote against an amendment to modify or delete these provisions, if the amendment substantially alters previously existing rights to have shares purchased. No dissenters' rights are granted for an original amendment making these sections applicable, even if the amendment at the same time modifies these provisions, since a shareholder is being granted some right, however limited or conditioned, to have shares purchased.

Subsections (e) and (f) make clear that the rights granted by these sections may be waived or added to by other instruments. Thus, a corporation can adopt the buyout provisions of these sections to provide for the death of shareholders, and agree by separate contract to buy shares of retiring employees.

#### **Cross-References**

Acquisition of own shares by corporation, see §§ 14-2-631 & 14-2-640. Amendment of articles of incorporation, see Article 10, Part 1. Court action to compel purchase, see § 14-2-916. Dissenters' rights, see Article 13. Dissolution: generally, see Article 14; statutory close corporations, see § 14-2-943. Procedure for compulsory purchase, see § 14-2-915. Voting by voting groups: amendment of articles of incorporation, see § 14-2-1004; generally, see § 14-2-726. "Voting group" defined, see § 14-2-140.

### **14-2-915. Exercise of compulsory purchase right.**

(a) A person entitled and desiring to exercise the compulsory purchase right described in Code Section 14-2-914 must deliver a written notice to the



corporation, within 120 days after the death of the shareholder, describing the number and class or series of shares beneficially owned by the decedent and requesting that the corporation offer to purchase the shares.

(b) Within 20 days after the effective date of the notice, the corporation shall call a special shareholders' meeting, to be held not more than 40 days after the call, to decide whether the corporation should offer to purchase the shares. A purchase offer must be approved by the affirmative vote of the holders of a majority of votes entitled to be cast at the meeting, excluding votes in respect of the shares covered by the notice.

(c) The corporation must deliver a purchase offer to the person requesting it within 75 days after the effective date of the request notice. A purchase offer must be accompanied by the corporation's balance sheet as of the end of a fiscal year ending not more than 16 months before the effective date of the request notice, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any. The person must accept the purchase offer in writing within 15 days after receiving it or the offer is rejected.

(d) A corporation agreeing to purchase shares under this Code section may allocate some or all of the shares pro rata to those of its shareholders who desire to purchase the shares unless all of the shareholders who desire to purchase approve a different allocation to the shareholders or to other persons. If the corporation has more than one class or series of shares, however, the remaining holders of the class or series of shares being purchased are entitled to a first option to purchase the shares not purchased by the corporation in proportion to their shareholdings or in some other proportion agreed to by all the shareholders participating in the purchase.

(e) If price and other terms of a compulsory purchase of shares are fixed or are to be determined by the articles of incorporation, bylaws, or a written agreement, the price and terms so fixed or determined govern the compulsory purchase unless the purchaser defaults, in which event the seller is entitled to commence a proceeding for dissolution under Code Section 14-2-916. (Code 1981, § 14-2-915, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 42; Ga. L. 1990, p. 257, §§ 6, 7.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 15.

Section 14-2-915 sets out the mechanics of exercising the buyout option. The procedures are similar to those in Section 14-2-912 relating to third-party offers.

Like Section 14-2-912, subsection (a) requires that the selling shareholder offer all of his shares for sale on the premise that a shareholder desiring to cash out his interest in the corporation ought to divest himself of all his equity interest in the business.

Subsection (b) sets out a notice and meeting schedule for approval by the shareholders of a buyout, together with voting rules parallel to those in Section 14-2-912(c).

Subsection (c) requires the corporation to deliver a purchase offer within 75 days of the shareholder request for repurchase. This gives the corporation at least 15 days from the date of approval by the shareholders to seek financing and to negotiate informally with the requesting shareholder. The corporation's offer must be accompanied by financial statements identical to those specified in Section 14-2-1325(b) when a corporation offers a price to dissenters. Further time for negotiations is provided by allowing the requesting shareholder 15 days to accept the offer, which must be in writing. Failure to respond to the corporation's offer is treated as a rejection.

Subsection (d) authorizes the corporation to allocate repurchased shares to the remaining shareholders under the same conditions as Section 14-2-912(e). Modifications of the Model Close Corporation Supplement follow those made to Section 14-2-912(e). See the Comment to that subsection.

#### **Note to 1990 Amendment**

The 1990 amendment to subsection (d) corrects provisions relating to the right to acquire shares being repurchased by a close corporation to clarify that allocation among shareholders of the same class on other than a proportional basis requires only the approval of all shareholders participating in the purchase as opposed to those eligible to participate. This change reflects the language used in the Model Close Corporation Supplement.

The 1990 amendment to subsection (e) corrects a typographical error in the Revised Model Corporation Act. The effect of the amendment is to provide, as the Model Act intended, that after the exercise of compulsory purchase rights the seller, rather than the buyer, may commence a proceeding for dissolution of the corporation if the purchaser of the shares defaults in payment of the purchase rights.

#### **Cross-References**

Court action to compel purchase, see § 14-2-916. Delivery includes mail, see § 14-2-140. Effective date of notice, see § 14-2-141. Financial statements for shareholders, see § 14-2-1620. "Notice" defined, see § 14-2-141. Notice of shareholders' meeting, see § 14-2-705. Special shareholders' meeting, see § 14-2-702. Voting of shares, see Article 7, Part 2.

### **14-2-916. Court action to compel purchase.**

(a) If an offer to purchase shares made under Code Section 14-2-915 is rejected, or if no offer is made, the person exercising the compulsory purchase right may commence a proceeding against the corporation to compel the purchase in the superior court of the county where the corporation's registered office is located. The corporation at its expense shall notify in writing all of its shareholders, and any other person the court directs, of the commencement of the proceeding. The jurisdiction of the court in which the proceeding is commenced under this subsection is plenary and exclusive.

(b) The court shall determine the fair value of the shares subject to compulsory purchase in accordance with standards set forth in Code Section 14-2-942 together with terms for the purchase. Upon making these determinations the court shall order the corporation to purchase or cause the purchase of the shares or empower the person exercising the compulsory purchase right to have the corporation dissolved.



(c) After the purchase order is entered, the corporation may petition the court to modify the terms of purchase and the court may do so if it finds that changes in the financial or legal ability of the corporation or other purchaser to complete the purchase justify a modification.

(d) If the corporation or other purchaser does not make a payment required by the court's order within 30 days of its due date, the seller may petition the court to dissolve the corporation and, absent a showing of good cause for not making the payment, the court shall do so.

(e) A person making a payment to prevent or cure a default by the corporation or other purchaser is entitled to recover the payment from the defaulter. (Code 1981, § 14-2-916, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 16. There was no counterpart in former Georgia law.

Subsection (a) is jurisdictional, and grants the court full power to fashion relief as may be appropriate.

Subsection (b) requires the court to determine the "fair value" of the petitioning shareholder's shares. The standards to be applied are the same as those applied to dissenting shareholders under Article 13. The direction to consider the standards set out in Section 14-2-942 is a direction to consider the evidence uniquely available in close corporations to determine fair value — collateral agreements among shareholders, or between the corporation and shareholders for buyouts, the going concern value of the corporation, and the legal constraints that may be imposed by restrictions on distributions to shareholders, among other matters.

Subsection (b) also permits the court to set the terms on which the corporation shall make the purchase. The court has discretion to include in its order any conditions it feels are justified on the basis of the financial and other needs of the selling shareholder and of the purchaser. The court, for example, may authorize an installment sale. The order may include a provision for interest and may require collateral to secure the unpaid installments.

Subsection (c) permits the corporation to petition the court for a modification in its order if there are changes in the financial or legal ability of the corporation to make the payment. This is not intended to permit the corporation to relitigate the question of fair value if the corporation's business declines, unless the decline in business was based on facts known at the time of the initial determination of value, so that the initial determination would be subject to reopening under traditional standards. Rather, it is intended to permit the court to reschedule payments, alter security for payments, and take similar actions to make enforcement of the original decree possible.

Subsection (d) provides that if the purchase is not consummated or the purchasers default, the shareholder may petition for dissolution of the corporation. The court may deny the petition for good cause shown. The proceeding, however, affords the corporation an opportunity to be heard on the matter and an opportunity to avoid dissolution. Mandatory dissolution in the event the offered shares are not purchased provides a strong incentive for the corporation and the remaining shareholders to purchase the shares or to find another purchaser. Presumably the corporation and the other shareholders would refuse to purchase if the corporation's financial prospects were bleak. If this is the case, then dissolution may be the appropriate solution.

**Cross-References**

Appointment of appraisers, see § 14-2-942. Appraisal, see § 14-2-942. Dissolution: generally, see Article 14; statutory close corporations, see § 14-2-943. "Notice" defined, see § 14-2-141. "Proceeding" defined, see § 14-2-140. Registered Office: designated in annual registration, see § 14-2-1622; required, see § 14-2-501.

**14-2-917. Court costs and other expenses.**

(a) The court in a proceeding commenced under Code Section 14-2-916 shall determine the total costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court and of attorneys and experts employed by the parties. Except as provided in subsection (b) of this Code section, the court shall assess these costs equally against the corporation and the party exercising the compulsory purchase right.

(b) The court may assess all or a portion of the total costs of the proceedings:

(1) Against the person exercising the compulsory purchase right if the court finds that the fair value of the shares does not substantially exceed the corporation's last purchase offer made before commencement of the proceeding and that the person's failure to accept the offer was arbitrary, vexatious, or otherwise not in good faith; or

(2) Against the corporation if the court finds that the fair value of the shares substantially exceeds the corporation's last purchase offer made before commencement of the proceeding and that the offer was arbitrary, vexatious, or otherwise not made in good faith. (Code 1981, § 14-2-917, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 43.)

**COMMENT**

Source: Model Statutory Close Corporation Supplement, § 17. There was no counterpart in former Georgia law.

The power of the court to allocate all costs and attorneys' fees incurred in the suit should provide an adequate incentive for both sides to act in good faith.

**Note to 1989 Amendment**

Subsection (b)(2) was amended by substituting "purchase" for "sale." This was merely a grammatical change to make subsection (b)(2) consistent with (b)(1), which refers to assessing costs against the shareholder demanding repurchase if the court finds the fair value of the shares does not substantially exceed the corporation's last purchase offer. The Model Close Corporation Supplement refers to "last sale offer" in subsection (b)(2), but this was apparently a drafting error.

**Cross-References**

Appraisers, see § 14-2-942. "Proceeding" defined, see § 14-2-140.



## PART 3

## GOVERNANCE

**14-2-920. Shareholder agreements.**

(a) All the shareholders of a statutory close corporation may agree in writing to regulate the exercise of the corporate powers and the management of the business and affairs of the corporation or the relationship among the shareholders of the corporation.

(b) An agreement authorized by this Code section is effective although:

(1) It eliminates a board of directors;

(2) It restricts the discretion or powers of the board or authorizes director proxies or weighted voting rights;

(3) Its effect is to treat the corporation as a partnership; or

(4) It creates a relationship among the shareholders or between the shareholders and the corporation that would otherwise be appropriate only among partners.

(c) If the corporation has a board of directors, an agreement authorized by this Code section restricting the discretion or powers of the board relieves directors of liability imposed by law, and imposes that liability on each person in whom the board's discretion or power is vested, to the extent that the discretion or powers of the board of directors are governed by the agreement.

(d) A provision eliminating a board of directors in an agreement authorized by this Code section is not effective unless the articles of incorporation or bylaws approved by shareholders or an agreement among all the shareholders contains a statement to that effect as required by Code Section 14-2-922.

(e) A provision entitling one or more shareholders to dissolve the corporation under Code Section 14-2-933 is effective only if a statement of this right is contained in the articles of incorporation, a bylaw adopted by the shareholders, or an agreement among all the shareholders.

(f) To amend an agreement authorized by this Code section, all the shareholders must approve the amendment in writing unless the agreement provides otherwise.

(g) Subscribers for shares may act as shareholders with respect to an agreement authorized by this Code section if shares are not issued when the agreement is made.

(h) If the articles of incorporation, a bylaw adopted by the shareholders, or an agreement among all the shareholders provides that directors elected

by the holders of a class or series of shares shall have more or less than one vote per director on any matter, every reference in this chapter to a majority or other proportion of directors shall refer to a majority or other proportion of the votes of such directors.

(i) This Code section does not prohibit any other agreement between or among shareholders in a statutory close corporation. (Code 1981, § 14-2-920, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 8.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 20. Subsection (h) was drawn from Del. Code Ann. tit. 8, § 141(d), as amended, 1987. For previous law see § 14-2-120(b). The provisions of Section 14-2-731 have been modified to reflect subsection (b), to make clear that any arrangements permitted for statutory close corporations are also permitted for other corporations, provided the corporation does not have shares traded regularly in public securities markets.

This section authorizes the shareholders to make any agreement they wish regulating the business of the corporation and their relationship to one another and to the corporation. All the shareholders must enter into the agreement, if it is one covered by this section. This section is not the exclusive means by which shareholders may agree; they retain the right to contact generally under the Code. Section 14-2-801(b) permits limitations on the exercise of corporate powers to be placed in the articles of incorporation, the bylaws approved by the shareholders, and in shareholders' agreements. Section 14-2-920(a) reaffirms that policy for statutory close corporations, and extends it to the relationship among the shareholders. Examples of provisions that may be included in an agreement are:

(1) The management of the business and affairs of the corporation in whole or part may be by or under the direction of all the shareholders of the corporation or by or under the direction of one or more shareholders or third parties selected by the shareholders.

(2) One or more shareholders may be given power to dissolve the corporation at will or upon the occurrence of a specified event or contingency.

(3) The manner of exercising or dividing voting power by the shareholders and directors may be established, and the use of director as well as shareholder proxies may be authorized.

(4) The terms and conditions of employment of any officer or employee of the corporation may be established, regardless of the length of employment.

(5) The identity of the directors and officers of the corporation may be established.

(6) The payment of dividends or division of profits may be established.

(7) Issues as to which the shareholders or directors are deadlocked may be made subject to arbitration, or arbitration may be required for any issue of disagreement between a shareholder in his capacity as a shareholder, director, officer, or employee and the corporation, or the other shareholders.

Subsection (b) preserves the approach of former § 14-2-120(b), and states that a shareholder agreement is valid and enforceable even if it, inter alia, permits the business to be operated essentially as a partnership without a board of directors. This section gives legal sanction to the customary arrangements made by shareholders of close corporations where most or all of the shareholders are employees, and which are sometimes referred to as "incorporated partnerships."



Subsection (c) provides that the liabilities normally imposed on directors shall fall on whatever persons have the power of the board. These persons will, in turn, be entitled to the protections of any exculpatory provisions placed in articles of incorporation under Section 14-2-202(b)(4), and to the rights of indemnification provided in Sections 14-2-851 — 859. If the corporation has a board of directors with limited powers, the directors are responsible for the appropriate exercise of any management powers they retain, and would be liable for their failure to carry out their duties, and subject to such exculpatory provisions and indemnification as may exist.

Subsection (d) of the Model Close Corporation Supplement required any provision eliminating the board of directors entirely to take the form of a provision in the articles of incorporation, approved by the shareholders in the manner provided in Section 14-2-922. Since Section 14-2-801(b) specifically authorizes limitations on the board's powers to appear in either the articles of incorporation, bylaws, or shareholders' agreements, this provision was altered to be consistent with Section 14-2-801(b). The requirement that such provision could only be contained in the articles of incorporation was eliminated as inconsistent with the goal of corporate flexibility. Similar changes have been made in Section 14-2-922. The essential requirement is unanimous shareholder approval. The only reason for requiring placement of such a provision in the articles is to provide notice to third parties of the location of power to manage the corporation. This problem of demonstrating the authority of others to act on behalf of the corporation is one of documentation, not appropriate for this Code.

Subsection (e) permits the corporation to adopt a rule of dissolution at will by shareholders, which implements one of the basic rules of partnership law. Similarly, such dissolution could be made possible upon the occurrence of any specified event or contingency.

Subsection (f) requires unanimous shareholder agreement to amend arrangements made under this section. Only agreements allocating the power of the board are intended to be covered by this subsection; rules relating to other shareholder agreements, such as how to vote shares, or buy-sell agreements among shareholders, are not intended to be made more restrictive than the rules generally applicable to all corporations under the Code, or to statutory close corporations under Section 14-2-914(c), which requires a two-thirds vote to alter a mandatory repurchase agreement.

Subsection (g) permits pre-incorporation agreements among subscribers for shares to have the same effect as if the agreement had been made among shareholders. Implicit in this section is a rule that they shall cast the number of votes attached to the shares for which they have subscribed.

Subsection (h) was drawn from Del. Code Ann. tit. 8, § 141(d), as amended in 1987. It permits the articles of incorporation to provide for weighted voting among directors. Thus, a director can be given weight proportionate to the votes that elected him, or be given extra votes on certain matters, such as employment, dividends or other fundamental changes in the way the business is managed or structured. Weighted voting provides the corporate board with the same flexibility about voting rules as is possessed by partnerships.

Subsection (i) reaffirms what is implicit in subsection (a): that shareholders may continue to contract with each other, and with the corporation, with as much flexibility as they would have had without election of statutory close corporation status. This section is intended to expand, not restrict, their freedom to contract.

#### **Note to 1990 Amendment**

The 1990 amendments ensure that either (1) the right of the shareholder to seek dissolution of the corporation or (2) the creation of weighted voting of directors may be

addressed in any of the articles of incorporation, the bylaws, or a shareholder agreement. These three options are used throughout the close corporation provisions of the Georgia Business Corporation Code. The original version of § 14-2-920 inadvertently omitted the references to bylaws and shareholder agreements.

### Cross-References

Amendment of articles of incorporation, see Article 10, Part 1. Director standards of conduct, see § 14-2-830 et seq. Dissolution at option of shareholder, see § 14-2-933. Elimination of board of directors, see §§ 14-2-801 & 14-2-922. Indemnification, see § 14-2-850 et seq. Proxies for directors, see § 14-2-731. "Shareholder" defined, see § 14-2-140. Special terms for directors, see § 14-2-921. Special voting power of directors, see §§ 14-2-731 & 14-2-921. Subscriptions for shares, see § 14-2-620. Voting agreements, see § 14-2-731. Voting trusts, see § 14-2-730.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 1112-1123. 18B Am. Jur. 2d, Corporations, §§ 1341, 1476, 2003, 2004.

**C.J.S.** — 18 C.J.S., Corporations, §§ 327-329. 19 C.J.S., Corporations, §§ 466, 556.

**ALR.** — Corporations: right to reconsider vote in stockholders' or directors' meeting, 13 ALR 131.

Validity and effect of agreement controlling the vote of corporate stock, 45 ALR2d 799.

### 14-2-921. Special terms and powers of directors.

The articles of incorporation or a bylaw adopted by the shareholders of a statutory close corporation may confer upon holders of any class or series of shares the right to elect one or more directors who shall serve for such term and have such voting powers as shall be stated in the articles of incorporation or a bylaw adopted by the shareholders. The terms of office and voting powers of the directors elected in the manner so provided in the articles of incorporation or a bylaw adopted by the shareholders may be greater than or less than those of any other director or class of directors. (Code 1981, § 14-2-921, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 44; Ga. L. 1990, p. 257, § 9.)

### COMMENT

Subsection (a) incorporates the approach of Del. Code Ann., tit. 8, § 141(d), as amended, S.B. No. 93, 1987. There was no counterpart in former Georgia law, nor in the Model Statutory Close Corporation Supplement. It specifies what is implicit in Section 14-2-801: that contractual alterations in the way a board of directors may operate are without limit. Thus, directors' votes may be weighted, so that a large shareholder entitled to two or more representatives on a board, whether through agreement or class or cumulative voting, may obtain the same voting representation through a single individual. This avoids the need for "dummy" directors who only vote as instructed by another person, in order to obtain voting power on a board.

### Note to 1989 Amendment

The 1989 amendment added the phrase "or a bylaw adopted by the shareholders" after "articles of incorporation" in the first sentence. This made the procedures consistent with those of § 14-2-806(a), which permits staggered boards (and terms of directors) to be established either in articles or bylaws. It is also more consistent with



Article 9, which generally permits alterations of the standard form to be provided either in articles, bylaws, or an agreement among the shareholders (§ 911(b) permits alterations of share transfer restrictions only in the articles; § 914 permits adoption of mandatory buy-back provisions in the articles; § 920 permits alteration of board power in any agreement in writing among the shareholders; § 920(d) permits elimination of the board entirely through articles, bylaws or shareholder agreement, while § 920(e) and § 933 permit a provision for shareholder dissolution only in the articles). On the other hand, the more drastic provisions of § 920(a), which permits elimination of the board of directors, requires unanimous consent, as an agreement among "all the shareholders." Provisions that merely allocate voting power among classes of shares are traditionally permitted to be adopted by the majorities generally required for amendments of articles of incorporation which, under subsection (d), requires approval of the holders of two-thirds of the shares of each class of shares of the corporation.

#### Note to 1990 Amendment

The 1990 amendment provides that the term and voting powers of directors elected by a class may be specified in either the articles of incorporation or a bylaw adopted by the shareholders.

#### Cross-References

Articles of incorporation: amendment, see Article 10, Part 1; generally, see § 14-2-202. Board of directors: action, see § 14-2-801 et seq.; standards of conduct, see § 14-2-830 et seq. Bylaws: amendment, see Article 10, Part 2; generally, see § 14-2-206. Incorporators, see § 14-2-201. Number of directors, see § 14-2-803. Subscriptions for shares, see § 14-2-620. Terms of directors: generally, see § 14-2-805; staggered terms, see § 14-2-806. Voting by voting groups: amendment of articles of incorporation, see § 14-2-1004; generally, see §§ 14-2-725 & 14-2-726. "Voting group" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 206, 1015. 18B Am. Jur. 2d, Corporations, §§ 1375, 1379, 1395, 1397, 1476.

**C.J.S.** — 18 C.J.S., Corporations, §§ 375-377. 19 C.J.S., Corporations, §§ 450, 466.

#### 14-2-922. Elimination of board of directors.

(a) A statutory close corporation may operate without a board of directors if its articles of incorporation, bylaws approved by the shareholders, or agreements between the shareholders that are otherwise lawful contain a statement to that effect.

(b) An amendment to articles of incorporation, bylaws approved by the shareholders, or an agreement between the shareholders eliminating a board of directors must be approved by all the shareholders of the corporation, whether or not otherwise entitled to vote on amendments, or if no shares have been issued, by all the subscribers for shares, if any, or if none, by all the incorporators.

(c) While a corporation is operating without a board of directors as authorized by subsection (a) of this Code section:

(1) All corporate powers shall be exercised by or under the authority

of, and the business and affairs of the corporation managed under the direction of, the shareholders;

(2) Unless the articles of incorporation, bylaws approved by the shareholders, or agreements among the shareholders provide otherwise:

(A) Action requiring director approval or both director and shareholder approval is authorized if approved by the shareholders; and

(B) Action requiring a majority or greater percentage vote of the board of directors is authorized if approved by the majority or greater percentage of the votes of shareholders entitled to vote on the action;

(3) Those shareholders in whom the discretion or the powers of the board are vested are liable for the liability imposed by law upon directors;

(4) A requirement by a state or the United States that a document delivered for filing contain a statement that specified action has been taken by the board of directors is satisfied by a statement that the corporation is a statutory close corporation without a board of directors and that the action was approved by the shareholders;

(5) The shareholders by resolution may appoint one or more shareholders to sign documents as “designated directors”; and

(6) Unless the context clearly requires otherwise, the shareholders of the corporation shall be deemed to be directors for purposes of applying provisions of this chapter.

(d) An amendment to articles of incorporation, bylaws approved by the shareholders, or an agreement between the shareholders deleting the statement eliminating a board of directors must be approved by the holders of at least two-thirds of the votes of each class or series of shares of the corporation, voting as separate voting groups, whether or not otherwise entitled to vote on amendments. The amendment must also specify the number, names, and addresses of the corporation’s directors or describe who will perform the duties of a board under Code Section 14-2-801. (Code 1981, § 14-2-922, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 45; Ga. L. 1993, p. 1231, § 10.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 21. There was no counterpart in former Georgia law. Former § 14-2-150 permitted the articles of incorporation to provide that all officers or that specified officers shall be elected by the shareholders.

Subsection (a) permits a statutory close corporation to dispense with a board of directors if a statement to that effect is included in its articles of incorporation. See the Comment to Section 14-2-902. It was derived from the Maryland close corporation statute.

Subsection (c)(1) provides that the shareholders of a statutory close corporation operating without a board of directors have the usual duties of directors and must either



hold a meeting or join in a written consent to initiate or to approve action required by statute to be taken by directors.

Subsection (c)(2) provides that the shareholder vote on action normally requiring director approval is tallied in the same manner as at any meeting of shareholders, i.e., the vote is tallied by shares rather than per capita by individual shareholders. This rule may be changed by an appropriate provision in the articles of incorporation. A weighted voting plan that gives one or more shareholders either a general veto power or the power to veto in designated cases is also permissible. If a corporation has different classes or series of shares with voting rights or the Code grants voting rights to all classes or series of shares on a particular issue, either together or as separate voting groups, the requisite vote of the various classes or series of shares must be obtained to validate the action. Shareholder action taken under subsection (c)(2) satisfies any requirement for director approval of proposed action. Subsection (c)(4) restates this rule for purposes of certificates that must be filed evidencing director approval with governmental officials.

Subsection (c)(3) of the Model Close Corporation Supplement provided that a shareholder was not liable for his act or omission, although a director would be, "unless the shareholder was entitled to vote on the action." This was replaced with language intended to provide those persons exercising the powers of the board with the liabilities of the board, and under the same circumstances. It follows the general approach of Section 14-2-920(c).

Subsection (c)(5) authorizes "designated directors" to satisfy a party dealing with the corporation who requests that certain documents be signed or approved by the "directors." Some banks and creditors have in the past refused to accept documents that do not meet specified corporate formalities. This subsection creates an admittedly artificial but practical method of satisfying this objection. The designated directors do not expose themselves to additional liability by signing documents as designated directors.

Although unanimous approval is necessary to elect to dispense with a board of directors, the election can be terminated under subsection (d) by a two-thirds vote of all shares. Operating without a board of directors is such a radical departure from traditional corporate law that it should not be undertaken unless all the shareholders agree because additional liabilities may be incurred as a result of the election. Terminating the election, however, reinstates the statutory requirements for a board of directors, and a two-thirds vote, which is the voting standard used in this article for most fundamental structural changes, seems sufficient.

If a corporation without a board of directors terminates its status as a statutory close corporation, it must immediately elect directors unless it has 50 or fewer shareholders and chooses to operate without a board under MBCA § 14-2-801. This election, which refers to Section 14-2-731, will require consent of all shareholders.

#### **Note to 1989 Amendment**

The 1989 amendment changed subsection (c)(2) to permit variance in shareholder governance rules to be placed in any document approved by the shareholders, including shareholder-approved bylaws or separate agreements. This is consistent with the treatment of such matters elsewhere in the Code.

#### **Note to 1993 Amendment**

This amendment was based on Delaware Stat. Ann. tit. 8, §351(2). It is intended to clarify that when the shareholders are functioning as the directors of the corporation, the provisions generally governing directors apply to them, including procedural requirements such as notice of meetings and quorum requirements.

### Cross-References

Articles of incorporation: amendment, see Article 10, Part 1; generally, see § 14-2-202. Board of directors: action, see § 14-2-801 et seq.; standards of conduct, see § 14-2-830 et seq. Bylaws: amendment, see Article 10, Part 2; generally, see § 14-2-206. Incorporators, see § 14-2-201. Number of directors, see § 14-2-803. Subscriptions for shares, see § 14-2-620. Voting by voting groups: amendment of articles of incorporation, see § 14-2-1004; generally, see §§ 14-2-725 & 14-2-726. "Voting group" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Power to sue.** — In a statutory close corporation owned equally by two shareholders, it was a shareholder, and not the corporation, that had the power to sue the other shareholder for alleged breaches of

fiduciary duties to the business. *Glisson Coker, Inc. v. Coker*, 260 Ga. App. 270, S.E.2d , 2003 Ga. App. LEXIS 333 (2003).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 211, 327, 1117, 1119, 1120. 18B Am. Jur. 2d, Corporations, §§ 1341, 2003, 2004.

**C.J.S.** — 18 C.J.S., Corporations, §§ 38, 119, 329. 19 C.J.S., Corporations, § 556.

### 14-2-923. Bylaws.

(a) A statutory close corporation need not adopt bylaws if provisions required by law to be contained in bylaws are contained in either the articles of incorporation or a shareholder agreement authorized by Code Section 14-2-920.

(b) If a corporation does not have bylaws when its statutory close corporation status terminates under Code Section 14-2-931, the corporation shall immediately adopt bylaws under Code Section 14-2-206. (Code 1981, § 14-2-923, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Statutory Close Corporation Supplement, § 22. There were no comparable provisions in former law. Former § 14-2-176(a) required the board of directors to adopt initial bylaws.

The purpose of bylaws is to provide regulations for the management of a corporation. Business corporation statutes universally require that a corporation adopt bylaws. See Section 14-2-206. Very few, however, specify more than a few mandatory provisions that must be included in the bylaws. For example, under the Code, the mandatory requirements are: (1) the time and place of shareholder meetings (Sections 14-2-701 and 702); (2) the number of directors, which may, alternatively, be set in the articles of incorporation (Section 14-2-803); and (3) the identity, method of election, and authority of the officers (Sections 14-2-840 and 841). Moreover, under Section 14-2-206 any provision required or permitted to be in the bylaws may be placed in the articles of incorporation.



This section gives a statutory close corporation the option to dispense with bylaws, if the matters required by statute to be included in bylaws are contained in either a Section 14-2-922 shareholder agreement or in the articles of incorporation.

#### Cross-References

Articles of incorporation: amendment, see § 14-2-1001 et seq.; generally, see § 14-2-202. Bylaws: adoption of initial bylaws, see §§ 14-2-205 & 14-2-206; amendment, see § 14-2-1020 et seq.; contents, see § 14-2-206. Shareholder agreement, see § 14-2-920. Termination of statutory close corporation status, see § 14-2-931.

#### RESEARCH REFERENCES

C.J.S. — 18 C.J.S., Corporations, § 111.

#### 14-2-924. Annual meeting.

(a) The annual meeting date for a statutory close corporation is the first business day after the thirty-first day of May unless its articles of incorporation, bylaws, or a shareholder agreement authorized by Code Section 14-2-920 fixes a different date.

(b) A statutory close corporation need not hold an annual meeting unless one or more shareholders deliver written notice to the corporation requesting a meeting at least 30 days before the meeting date determined under subsection (a) of this Code section. (Code 1981, § 14-2-924, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 23. There was no comparable provision in former law. Formerly § 14-2-112(b) provided that the default date for all annual meetings was the second Tuesday of the fourth month following the end of the fiscal year of the corporation.

This section, which was derived from the Maryland close corporation statute, requires that a statutory close corporation establish a date for an annual shareholders' meeting but provides that the meeting need not be held unless demanded. Under the Code an annual meeting is mandatory. See Section 14-2-701.

#### Cross-References

Annual meetings, see § 14-2-701. Articles of incorporation: amendment, see Article 10, Part 1; generally, see § 14-2-202. Bylaws: adoption, see § 14-2-206; amendment, see Article 10, Part 2. Court-ordered shareholders' meeting, see § 14-2-703. "Deliver" includes mail, see § 14-2-140. Effective date of notice, see § 14-2-141. Meeting notice, see § 14-2-705. "Notice" defined, see § 14-2-141. Shareholder agreement, see §§ 14-2-731 and 14-2-920. "Shareholder" defined, see § 14-2-140.

#### RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 953, 960.

C.J.S. — 18 C.J.S., Corporations, §§ 362-364.

ALR. — Remedies to restrain or compel holding of stockholders' meeting, 48 ALR2d 615.

**14-2-925. Execution of documents in more than one capacity.**

Notwithstanding any law to the contrary, an individual who holds more than one office in a statutory close corporation may execute, acknowledge, or verify in more than one capacity any document required to be executed, acknowledged, or verified by the holders of two or more offices. (Code 1981, § 14-2-925, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Statutory Close Corporation Supplement, § 24. Former § 14-2-150(b) provided that any two or more offices may be held by the same person, except the offices of president and secretary.

This section, which was derived from the Maryland close corporation statute, is designed to facilitate the authentication of documents in a statutory close corporation. Many small corporations have only one shareholder or one officer.

**Cross-References**

Execution of documents by facsimile signature, see § 14-2-150. Filing requirements, see § 14-2-120. Holding two or more offices simultaneously, see § 14-2-840. Secretary of corporation, see § 14-2-140. Signatures on share certificates, see § 14-2-625.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 2005.

**C.J.S.** — 19 C.J.S., Corporations, §§ 591, 655.

**14-2-926. Limited liability.**

The failure of a statutory close corporation to observe the usual corporate formalities or requirements relating to the exercise of its corporate powers or management of its business and affairs is not a ground for imposing personal liability on the shareholders for liabilities of the corporation. (Code 1981, § 14-2-926, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Statutory Close Corporation Supplement, § 25. There was nothing comparable in former Georgia law. The only possible reference to informalities was in former § 14-2-120(b), to the effect that nothing in any agreement “shall be invalid as between the parties thereto on the ground that it is an attempt by the parties thereto to restrict the discretion of the board of directors ... or to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners.” This only operates to make these agreements enforceable among the parties, and does not speak to third parties.

The purpose of this section is to eliminate the possible argument that the shareholders in a statutory close corporation are individually liable for the debts and torts of the business because the corporation did not follow the classical model of a corporation. Pursuant to Sections 14-2-920, 921, and 933, a statutory close corporation may in effect function like a partnership, although legally the business is still a corporation. This section does not prevent a court from “piercing the corporate veil” of a statutory close corporation if the circumstances should justify imposing personal liability on the



shareholders were the corporation not a statutory close corporation. It merely prevents a court from "piercing the corporate veil" because it is a statutory close corporation.

The section was derived from the California close corporation provisions.

#### Cross-References

Dissolution at option of shareholder, see § 14-2-933. Elimination of board of directors, see § 14-2-922. Liability for preincorporation transactions, see § 14-2-204.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 850-852.

**C.J.S.** — 18 C.J.S., Corporations, §§ 414, 417.

**ALR.** — Informality of meeting of stockholders as affecting action taken thereat, 51 ALR 941.

Stockholders' statutory liabilities as affected by alleged defects or irregularities in organization of corporation, 102 ALR 327.

Stockholder's personal conduct of operations or management of assets as factor justifying disregard of corporate entity, 46 ALR3d 428.

### PART 4

#### REORGANIZATION AND TERMINATION

#### 14-2-930. Merger, share exchange, and sale of assets.

(a) A plan of merger or share exchange:

(1) That if effected would terminate statutory close corporation status must be approved by the holders of at least two-thirds of the votes of each class or series of shares of the statutory close corporation, voting as separate voting groups, whether or not the holders are otherwise entitled to vote on the plan; or

(2) That if effected would create the surviving corporation as a statutory close corporation must be approved by the holders of at least two-thirds of the votes of each class or series of shares of the surviving corporation, voting as separate voting groups, whether or not the holders are otherwise entitled to vote on the plan.

(b) A sale, lease, exchange, or other disposition of all or substantially all of the property (with or without the good will) of a statutory close corporation that requires approval of the shareholders pursuant to Code Section 14-2-1202 must be approved by the holders of at least two-thirds of the votes of each class or series of shares of the corporation, voting as separate voting groups, whether or not the holders are otherwise entitled to vote on the transaction. (Code 1981, § 14-2-930, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 30. There were no comparable provisions in former law.

Section 14-2-931 requires a minimum two-thirds vote of every class or series of shares whether or not otherwise entitled to vote to terminate close corporation status. Each class or series is entitled to vote as a separate voting group. Section 14-2-930 imposes the same voting requirement in transactions that have the effect of terminating a corporation's status as a statutory close corporation. Like other amendments to the articles, the voting rules may be set higher by the articles themselves, as provided in Section 14-2-1003(e).

In addition, under subsection (a)(2), the shareholders of a corporation that will become a statutory close corporation in a merger or share exchange must approve the transaction by the same minimum two-thirds vote. This is consistent with Section 14-2-902(b), which requires that an amendment to the articles of incorporation to elect statutory close corporation status must also be approved by a two-thirds vote.

The exceptions to shareholder approval of mergers or share exchanges for subsidiary mergers and some other types of transactions (in Article 11) do not apply to statutory close corporations since a shareholder vote is required in all circumstances where statutory close corporation status is elected or terminated.

Subsection (b) requires that a sale of all or substantially all the assets of a corporation that requires a shareholder vote under Section 14-2-1202 must be approved by a two-thirds vote of all classes or series of shares, voting as separate voting groups, whether or not they are otherwise entitled to vote.

#### Cross-References

Merger or share exchange, see Article 11. Sale of assets, see Article 12. Voting by voting groups: generally, see §§ 14-2-725 & 14-2-726; merger or share exchange, see § 14-2-1103. "Voting group" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2618, 2676. **C.J.S.** — 19 C.J.S., Corporations, § 798.

#### 14-2-931. Termination of statutory close corporation status.

(a) A statutory close corporation may terminate its statutory close corporation status by amending its articles of incorporation to delete the statement that it is a statutory close corporation. If the statutory close corporation has elected to operate without a board of directors under Code Section 14-2-922, the amendment must either comply with Code Section 14-2-801 or delete the statement dispensing with the board of directors from its articles of incorporation.

(b) An amendment terminating statutory close corporation status must be approved by the holders of at least two-thirds of the votes of each class or series of shares of the corporation, voting as separate voting groups, whether or not the holders are otherwise entitled to vote on amendments.



(c) If an amendment to terminate statutory close corporation status is adopted, each shareholder who voted against the amendment is entitled to assert dissenters' rights under Article 13 of this chapter. (Code 1981, § 14-2-931, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 31. There were no comparable provisions in former Georgia law.

Sections 31 and 32 deal with issues that arise when it is decided to terminate a corporation's status as a statutory close corporation.

Termination is accomplished by amendment of the articles of incorporation to eliminate the special designation required by Section 14-2-902. This amendment must be approved by the same vote (two-thirds) that is necessary to elect close corporation status (unless the articles specify a higher vote); and shareholders who vote against the termination have dissenters' rights. This is consistent with the provisions in Section 14-2-902(b) for election by an existing corporation to become a statutory close corporation. As permitted in Section 14-2-1003(e), higher voting requirements may be imposed by the articles of incorporation.

If the status of a statutory close corporation that is operating without a board of directors is to be terminated, in addition to amending the articles of incorporation to delete the reference to the statutory close corporation election, the corporation must either delete the statement that it has no board of directors, or comply with the provisions of Sections 14-2-731 and 801 to eliminate the board through approval of all the shareholders. If the corporation chooses to delete the statement eliminating the board, it must immediately elect a board of directors.

In the absence of agreement upon rights and duties of the shareholders, the corporation upon termination automatically becomes subject to the general requirements of the Code or of the Georgia Professional Corporation Act if the corporation was organized as a professional corporation. Further, except for transfer restrictions under Section 14-2-911, any existing rights of the shareholders established by agreement (cf. UNIFORM COMMERCIAL CODE § 1-201(3)) between the shareholders or with the corporation and any rights granted to the shareholders in the articles of incorporation that are valid under the general business or professional corporation acts remain in effect.

If the shareholders desire to have transfer restrictions applicable under Section 14-2-911 to continue after termination of statutory close corporation status, the restrictions must meet all requirements specified in Section 14-2-627. An alternative method of continuing the Section 14-2-911 transfer restrictions after termination is to include a provision in the articles of incorporation that Section 14-2-911(b)(7) (which exempts transfers made after termination of statutory close corporation status from the statutory transfer restrictions) does not apply. This eliminates the need to draft a complete set of transfer restrictions. To be binding on third parties, however, all new shares issued after the termination is effective must contain a notice meeting the requirements of Section 14-2-627(b) and other applicable law. See UNIFORM COMMERCIAL CODE § 8-204. The notice required as to shares of statutory close corporations by Section 14-2-910 is no longer appropriate, although it may be effective notice with respect to all shares outstanding at the time of termination.

Most of the special control and distribution arrangements among the shareholders and the optional provisions that may be included in the articles of incorporation are not affected by the termination. For example, if Sections 14-2-914 through 917 have been elected, the buy-out purchase option at the death of a shareholder continues to apply,

unless the articles of incorporation are amended to terminate the option. See the Comment to Section 14-2-914. Some provisions, however, may be of doubtful validity after termination such as a provision in the articles of incorporation giving one or more minority shareholders the right to dissolve the corporation as authorized by Section 14-2-933. This article gives some automatic protection by providing in Section 14-2-932(b) that the special control and contractual arrangements automatically continue in effect unless they are invalid under other applicable statutes or case law.

#### Cross-References

Amendment of articles of incorporation, see Article 10, Part 1. Dissenters' rights, see Article 13. Effect of termination, see § 14-2-932. Effective date of amendment of articles of incorporation, see § 14-2-123. Election not to have board of directors, see §§ 14-2-801 & 14-2-922. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Share transfer restrictions: generally, see § 14-2-627; statutory close corporations, see § 14-2-911 et seq. Voting by voting groups: amendment of articles of incorporation, see § 14-2-1004; generally, see §§ 14-2-725 & 14-2-726. "Voting group" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 211.

**C.J.S.** — 18 C.J.S., Corporations, § 38.

**ALR.** — Power of corporation to change obligations to stockholders, 117 ALR 1290.

Change in name, location, composition,

or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

#### 14-2-932. Effect of termination of statutory close corporation status.

(a) A corporation that terminates its status as a statutory close corporation is thereafter subject to all provisions of this chapter or, if incorporated under Chapter 7 of this title, known as the "Georgia Professional Corporation Act," to all provisions of that chapter.

(b) Termination of statutory close corporation status does not affect any right of a shareholder or of the corporation under an agreement, the bylaws, or the articles of incorporation unless this article, this chapter, or another law of this state invalidates the right. (Code 1981, § 14-2-932, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 10.)

#### COMMENT

See the Comment to Section 14-2-931.

#### Note to 1990 Amendment

The 1990 amendment corrects an inadvertent omission by adding the bylaws as a source of shareholder rights that may be unaffected by termination of close corporation status.

#### Cross-References

Dissolution at option of shareholder, see § 14-2-933. Termination of statutory close corporation status, see § 14-2-931.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2747.

**C.J.S.** — 19 C.J.S., Corporations, § 814.

### 14-2-933. Shareholder option to dissolve corporation.

(a) The articles of incorporation, bylaws adopted by the shareholders, or an agreement among all the shareholders of a statutory close corporation may authorize one or more shareholders, or the holders of a specified number or percentage of shares of any class or series, to dissolve the corporation at will or upon the occurrence of a specified event or contingency. The shareholder or shareholders exercising this authority must give written notice of the intent to dissolve to all the other shareholders. Thirty-one days after the effective date of the notice, the corporation shall begin to wind up and liquidate its business and affairs and begin dissolution proceedings under Code Sections 14-2-1403 through 14-2-1408.

(b) Unless the articles of incorporation, bylaws adopted by the shareholders, or any agreement among all the shareholders provides otherwise, an amendment to the articles of incorporation, bylaws adopted by the shareholders, or any agreement among all the shareholders to add, change, or delete the authority to dissolve described in subsection (a) of this Code section must be approved by the holders of all the outstanding shares, whether or not otherwise entitled to vote on amendments, or, if no shares have been issued, by all the subscribers for shares, if any, or, if none, by all the incorporators. (Code 1981, § 14-2-933, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 46; Ga. L. 1990, p. 257, § 11.)

## COMMENT

Source: Model Statutory Close Corporation Supplement, § 33. There was no comparable provision in former law. Former § 14-2-273(3) required the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon to dissolve a corporation. Former § 14-2-273(1) also required board action to dissolve.

The purpose of this section is to give shareholders in a statutory close corporation, if they so elect, basically the same power to dissolve the business as general partners have under the Uniform Partnership Act. The section applies only if it is elected in the corporation's original or amended articles of incorporation. The right may be given to a single shareholder or to any group of shareholders and may be exercisable at will or restricted to certain designated circumstances. Rights under this section are in addition to other rights a shareholder may have under the Code generally or this article to dissolve the corporation.

This section is generally patterned after the Delaware statute.

#### Note to 1989 Amendment

The 1989 amendment changed subsection (a) by changing the last Code reference in the last line from "14-2-1407" to "14-2-1408," to correct a typographical error.

**Note to 1990 Amendment**

The 1990 amendment makes it clear that, unless otherwise provided in an appropriate governing instrument, the right to cause dissolution of a close corporation may not be altered by amendment of the bylaws or an agreement without unanimous approval.

**Cross-References**

Articles of incorporation: amendment, see Article 10, Part 1; amendment before issuance of shares, see § 14-2-1005; generally, see § 14-2-202. Delivery includes mail, see § 14-2-140. Dissolution: generally, see Article 14; incorporators, see § 14-2-1401. Effective date of notice, see § 14-2-141. "Notice" defined, see § 14-2-141. Procedure following notice of dissolution, see § 14-2-140 et seq. Subscription for shares, see § 14-2-620.

**PART 5****JUDICIAL SUPERVISION****RESEARCH REFERENCES**

<p><b>Am. Jur. 2d.</b> — 19 Am. Jur. 2d, Corporations, §§ 2243-2249, 2259-2271, 2467-2469, 2758-2784.</p>	<p><b>C.J.S.</b> — 18 C.J.S., Corporations, §§ 352, 353. 19 C.J.S., Corporations, §§ 817, 844-850.</p>
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**14-2-940. Court action to protect shareholders.**

(a) Subject to satisfying the conditions of subsections (c) and (d) of this Code section, a shareholder of a statutory close corporation may petition the superior court for any of the relief described in Code Section 14-2-941, 14-2-942, or 14-2-943 if:

(1) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner, whether in his capacity as shareholder, director, or officer of the corporation;

(2) The directors or those in control of the corporation are deadlocked in the management of the corporation's affairs, the shareholders are unable to break the deadlock, and the corporation is suffering or will suffer irreparable injury or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally because of the deadlock; or

(3) There exists one or more grounds for judicial dissolution of the corporation under Code Section 14-2-1430.

(b) A shareholder must commence a proceeding under subsection (a) of this Code section in the superior court of the county where the corporation's principal office (or, if none in this state, its registered office) is located. The jurisdiction of the court in which the proceeding is commenced is plenary and exclusive.

(c) If a shareholder has agreed in writing to pursue a nonjudicial remedy to resolve disputed matters, he may not commence a proceeding under this



Code section with respect to the matters until he has exhausted the nonjudicial remedy.

(d) If a shareholder has dissenters' rights under this article or Article 13 of this chapter with respect to proposed corporate action, he must commence a proceeding under this Code section before he is required to give notice of his intent to demand payment under Code Section 14-2-1321 or to demand payment under Code Section 14-2-1323 or the proceeding is barred.

(e) Except as provided in subsections (c) and (d) of this Code section, a shareholder's right to commence a proceeding under this Code section and the remedies available under Code Sections 14-2-941 through 14-2-943 are in addition to any other right or remedy he may have. (Code 1981, § 14-2-940, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "The Development of the Shareholder's Direct Action Damage Remedy," see 28 Ga. St. B.J. 195 (1992).

### COMMENT

Source: Model Statutory Close Corporation Supplement, § 40. Former Section 14-2-142 provided for appointment of a provisional director if directors were deadlocked in management, and shareholders were unable to break the deadlock, and injury to the corporation was being suffered or threatened. The grounds were thus similar to those of Section 14-2-940, except for the requirement of injury to the corporation. An action for relief under former law was not limited to close corporations; the only limit was that the action must be filed either by one-half of the directors, or the holders of not less than one-third of all voting shares. Former Section 14-2-285(a)(1) provided for judicial dissolution in an action by a shareholder on similar grounds, if it is impracticable to appoint a provisional director. Additional grounds specified were fraud, illegality, and misapplication or waste of corporate assets.

### 1. INTRODUCTION

Sections 14-2-940 through 14-2-943 are derived from similar provisions in the California, Michigan, Minnesota, New Jersey, and South Carolina statutes, which in turn are derived from former section 210 of the 1948 English Companies Act (reenacted as section 75 of the 1980 English Companies Act). There are two major differences between these statutes and Sections 14-2-940 through 943: (1) the statutes, either specifically or by implication, provide that a shareholder may obtain relief only if he has statutory grounds for dissolution, whereas Section 14-2-943 does not tie relief either to a suit to compel dissolution or to the establishment of grounds for dissolution; and (2) the range of relief available to the court is spelled out in greater detail.

The primary danger in granting relief for oppression and related conduct by dissolution is that the remedy is drastic and courts have usually refused to order dissolution of a solvent corporation, except in extreme cases of fraudulent conduct. Under this article, dissolution is one form of relief that may be ordered by the court, but it is appropriate only as a last resort after other possibilities of resolving the dispute have failed. If a shareholder is actually seeking liquidation of the corporation, he may bring an action for dissolution under Section 14-2-1430.

Although Sections 14-2-940 through 943 probably will be invoked most frequently by minority shareholders, the ground for relief described in Section 14-2-940(a)(2) may be

used by the holders of the majority of shares to seek relief from deadlocks created by veto rights given minority shareholders which threaten the corporation's continued existence. Moreover, even in suits brought by minority shareholders, the court has power under Section 14-2-942 to order the petitioning shareholders to sell their shares to the corporation or to the remaining shareholders, even if this is not the relief requested.

Relief available under Sections 14-2-940 through 943 is circumscribed to minimize the danger of abuse by shareholders. No relief of any kind may be ordered unless the court affirmatively finds that one or more of the specific conditions listed in Section 14-2-940(a) — fraud, oppression, unfairly prejudicial conduct, deadlock, or grounds for involuntary dissolution exist. The petitioner has the burden of proof on this issue. The court may award expenses and attorneys' fees to either side under Section 14-2-941(b) in order to discourage or punish the bringing of harassment suits. Finally, if the complaining shareholder has agreed to arbitrate the dispute in question or to resolve it in some other nonjudicial manner, these remedies must be exhausted under Section 14-2-940(c) before a suit under this section may be filed.

## 2. GROUNDS FOR RELIEF

Relief may be granted if any of the three categories of circumstances specified exist.

Section 14-2-940(a)(1) provides relief from oppression and related conduct that adversely affects a minority shareholder in any relationship with the corporation. Attempted squeeze-outs in close corporations often involve removing a shareholder from his various offices or diminishing his compensation. The subsection makes clear that relief is not limited to those situations in which the value of the shareholder's share interest has been adversely affected.

No attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These are elastic terms whose meaning varies with the circumstances presented in a particular case and it is felt that existing case law provides sufficient guidelines for courts and litigants. See, e.g., Annot., "What amounts to 'oppressive conduct' under statute authorizing dissolution of corporation at suit of minority stockholders," 56 A.L.R.3d 358 (1974).

Section 14-2-940(a)(2) allows relief when the corporation is dead-locked. Whether a deadlock is created by majority or minority shareholders is immaterial and either majority or minority shareholders may claim relief under this subsection. Relief may be granted even though the corporation's financial condition is not threatened with irreparable injury if the court finds that the interest of all the shareholders is being damaged by the deadlock.

Section 14-2-940(a)(3) permits a shareholder to claim relief under this section if grounds for involuntary dissolution exist (see Section 14-2-1430). By filing an action under this section, a greater range of relief is made available to the shareholder. For example, the petitioning shareholder may not wish the corporation dissolved, even though grounds for dissolution exist.

## 3. PREREQUISITES TO GRANTING RELIEF

Under Section 14-2-940(c), nonjudicial remedies that the petitioning shareholder has agreed to seek must be exhausted before a suit may be brought under this section. Arbitration clauses covering a wide variety of intracorporate disputes are commonly included in shareholder agreements. If a dispute is covered by an arbitration agreement, the shareholder must submit the claim to arbitration before filing suit under this section and the right to file under this section after the arbitration proceeding is commenced depends on the preclusive effect of the arbitration under state law independent of the corporation statutes.



The requirement in Section 14-2-940(d) that a shareholder who has dissenters' rights with respect to a transaction must file suit challenging the transaction under this section before the time he is required to perfect his dissenters' rights is designed to prevent a shareholder who has foregone his dissenters' rights from filing suit under this section to prevent a proposed transaction from being consummated. If the complaining shareholder has not taken timely action to perfect his dissenters' rights, he is relegated to whatever other rights might be available to him under state or federal law. See, e.g., Comment to Section 14-2-1302. If the shareholder does file a timely proceeding under this section, the court must first determine whether relief under this section is warranted. If the court finds that a share purchase is the appropriate remedy, the proceeding should be treated as a valuation proceeding in a dissenters' rights case and consolidated with any other similar dissenters' rights proceedings involving the same transaction.

#### 4. RELIEF IS CUMULATIVE

Section 14-2-940(e) makes clear that the remedies available under this and Sections 14-2-941 through 943 are cumulative and are in addition to any other remedies the petitioner may have, except as otherwise provided in Sections 14-2-940(c) and 940(d).

#### Cross-References

Dissenters' rights, see Article 13. Judicial dissolution, see § 14-2-1430. Principal office: defined, see § 14-2-140; designated in annual report, see § 14-2-1622. "Proceeding" defined, see § 14-2-140. Registered office: designated in annual report, see § 14-2-1622; required, see § 14-2-501. Relief, see § 14-2-941 et seq. Shareholder agreements, see § 14-2-920.

#### RESEARCH REFERENCES

**ALR.** — Inherent power of equity, at instance of a stockholder, to appoint receiver or, or to wind up, a solvent, going corporation, on ground of fraud, mismanagement, or dissensions, 61 ALR 1212; 91 ALR 665.

under statute authorizing dissolution of corporation at suit of minority stockholder, 56 ALR3d 358.

Relief other than dissolution in cases of intracorporate deadlock or dissension, 34 ALR4th 13.

What amounts to "oppressive conduct"

#### 14-2-941. Ordinary relief.

(a) If the court finds that one or more of the grounds for relief described in subsection (a) of Code Section 14-2-940 exist, it may order one or more of the following types of relief:

(1) The performance, prohibition, alteration, or setting aside of any action of the corporation or of its shareholders, directors, or officers or of any other party to the proceeding;

(2) The cancellation or alteration of any provision in the corporation's articles of incorporation, bylaws, or agreement among the shareholders;

(3) The removal from office of any director or officer;

(4) The appointment of any individual as a director or officer;

(5) An accounting with respect to any matter in dispute;

(6) The appointment of a custodian to manage the business and affairs of the corporation;

(7) The appointment of a provisional director (who has all the rights, powers, and duties of a duly elected director) to serve for the term and under the conditions prescribed by the court;

(8) The payment of dividends;

(9) The award of damages to any aggrieved party.

(b) If the court finds that a party to the proceeding acted arbitrarily, vexatiously, or otherwise not in good faith, it may award one or more other parties their reasonable expenses, including attorneys' fees and the expenses of appraisers or other experts, incurred in the proceeding. (Code 1981, § 14-2-941, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 12.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 41. Former Section 14-2-142 provided for appointment of a provisional director under specified conditions. See Comment to Section 14-2-940.

The purpose of listing the types of relief available, in this section and in Sections 14-2-942 and 943, is to overcome the reluctance some courts have shown in the past to ordering anything other than dissolution, or possibly a buy-out. See, e.g., *Gruenberg v. Goldmine Plantation, Inc.*, 360 So.2d 884 (La. Ct. App. 1978); *Harkey v. Mobley*, 552 S.W.2d 79 (Mo. Ct. App. 1977); *White v. Perkins*, 213 Va. 129, 189 S.E.2d 315 (1972). A court should have broad discretion to fashion the most appropriate remedy to resolve the dispute. What works in one case may not work in another. Detailed standards are not provided since they might encourage litigation and also unduly restrict the court's discretion. Existing cases applying principles of equity, are, of course, precedents for the exercise of a judge's discretion under this section.

#### Note to 1990 Amendment

The 1990 amendment specifically authorizes a court to cancel or amend a provision of an agreement among shareholders in addition to a corporation's articles of incorporation or bylaws.

#### Cross-References

Custodianship, see § 14-2-1432. Directors generally, see § 14-2-801 et seq. Dividends, see § 14-2-640. Officers generally, see § 14-2-840 et seq.

#### 14-2-942. Extraordinary relief; share purchase.

(a) If the court finds that the ordinary relief described in subsection (a) of Code Section 14-2-941 is or would be inadequate or inappropriate, it may order the corporation dissolved under Code Section 14-2-943 unless the corporation or one or more of its shareholders purchase all the shares of the shareholder for their fair value and on terms determined under subsection (b) of this Code section.

(b) If the court orders a share purchase, it shall:

(1) Determine the fair value of the shares, considering among other



relevant evidence the going concern value of the corporation, any agreement among some or all of the shareholders fixing the price or specifying a formula for determining share value for any purpose, the recommendations of appraisers (if any) appointed by the court, and the legal constraints on the corporation's ability to purchase the shares;

(2) Specify the terms of the purchase, including, if appropriate, terms for installment payments, subordination of the purchase obligation to the rights of the corporation's creditors, security for a deferred purchase price, and a covenant not to compete or other restriction on the seller;

(3) Require the seller to deliver all his shares to the purchaser upon receipt of the purchase price or the first installment of the purchase price;

(4) Provide that after the seller delivers his shares he has no further claim against the corporation, its directors, officers, or shareholders, other than a claim to any unpaid balance of the purchase price and a claim under any agreement with the corporation or the remaining shareholders that is not terminated by the court; and

(5) Provide that if the purchase is not completed in accordance with the specified terms, the corporation is to be dissolved under Code Section 14-2-943.

(c) After the purchase order is entered, any party may petition the court to modify the terms of the purchase and the court may do so if it finds that changes in the financial or legal ability of the corporation or other purchaser to complete the purchase justify a modification.

(d) If the corporation is dissolved because the share purchase was not completed in accordance with the court's order, the selling shareholder has the same rights and priorities in the corporation's assets as if the sale had not been ordered. (Code 1981, § 14-2-942, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Statutory Close Corporation Supplement, § 42. There was no comparable provision in former Georgia law.

A court-ordered buy-out is a drastic remedy, particularly if the shareholder ordered to sell his shares does not wish to sell. For this reason Section 14-2-942 authorizes a share purchase order only if other relief short of liquidation will not, in the judge's opinion, resolve the dispute. If a buy-out ordered by the court is not consummated, however, an order dissolving the corporation is authorized. This may place pressure on the remaining shareholders to obey the order but also gives them the option of dissolution if they think the order is too onerous.

If the court orders a buy-out, it must also determine the fair value and other terms of the buy-out in accordance with subsection (b). Fair value is to be determined under principles developed in dissenters rights and other valuation cases. The court may require the selling shareholder to enter into a covenant not to compete and also may

order an installment sale in order to protect the business and to minimize the financial strain on the purchasers. See also the Comment to Section 14-2-914.

This section permits the designated purchasers either to consummate the purchase or to permit the corporation to be dissolved. Presumably the remaining shareholders will elect to have the corporation dissolved if its economic prospects are bleak. Leaving the choice to the remaining shareholders is fairer than ordering dissolution without giving the remaining shareholders the opportunity to buy out the complaining shareholder or requiring the remaining shareholders to purchase the shares without giving them the option of voluntary dissolution (which they would not have unless they held sufficient voting shares to approve a dissolution).

If the remaining shareholders agree to comply with the court ordered buy-out, the sale operates as a release of all claims the selling shareholder may have against the corporation, or its directors, officers, or shareholders. The selling shareholder may still pursue any contractual claim he might have against the corporation — for example, a claim for breach of a long term employment contract — to the extent the claim is not dealt with in the court's order. Normally, however, the order should dispose of these contractual claims. The selling shareholder also retains the right to collect any unpaid balance due on the purchase price of his shares, including the right to realize on any collateral given as security for the unpaid balance. Quite frequently the shares being sold have been pledged as security; in these situations, if there is a default, the former shareholder has the choice of foreclosing on the note and again becoming a shareholder or suing to have the corporation dissolved under Section 14-2-943.

Under Section 14-2-942(c) the court has power to modify its final order at any time upon the petition of any party. For example, should financial or legal constraints prevent the purchasers from fulfilling the terms of a mandated buy-out, the court might modify its order. See also the Comment to Section 14-2-914.

Finally, the buy-out and dissolution remedies provided by this section and Section 14-2-943 are cumulative of ordinary remedies available under Section 14-2-941; for example, a court may award damages in addition to compelling a buy-out. See the Comment to Section 14-2-940.

#### **Cross-References**

Dissenters' rights, see § 14-2-1301 et seq. Dissolution, see § 14-2-1401 et seq. Relief cumulative, see § 14-2-941. Share purchase on death of shareholder, see § 14-2-914.

### **14-2-943. Extraordinary relief; dissolution.**

(a) The court may dissolve the corporation if it finds that:

(1) There are one or more grounds for judicial dissolution under Code Section 14-2-1430; or

(2) All other relief ordered by the court under Code Section 14-2-941 or Code Section 14-2-942 has failed to resolve the matters in dispute.

(b) In determining whether to dissolve the corporation, the court shall consider among other relevant evidence the financial condition of the corporation but may not refuse to dissolve solely because the corporation has accumulated earnings or current operating profits. (Code 1981, § 14-2-943, enacted by Ga. L. 1988, p. 1070, § 1.)



## COMMENT

See the Comments to Sections 14-2-940 — 942.

**Cross-References**

Dissolution generally, see Article 14. Judicial dissolution, see § 14-2-1430. Relief cumulative, see § 14-2-941.

## PART 6

## TRANSITION PROVISIONS

**14-2-950. Application to existing corporations.**

This article applies to all corporations electing statutory close corporation status under Code Section 14-2-902 after July 1, 1989. (Code 1981, § 14-2-950, enacted by Ga. L. 1988, p. 1070, § 1.)

## ARTICLE 10

## AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS

**Law reviews.** — For article, "Georgia's Corporate Practice under Georgia's New Business Corporation Code," see 24 Ga. Business Corporation Code," see 40 Mercer St. B.J. 158 (1988). For article, "Changes in L. Rev. 655 (1989).

## PART 1

## AMENDMENT OF ARTICLES OF INCORPORATION

**14-2-1001. Authority to amend.**

(a) A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation or to delete a provision not required in the articles of incorporation. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

(b) A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend entitlement, or purpose or duration of the corporation. (Code 1981, § 14-2-1001, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Model Act, Section 10.01. This replaces former § 14-2-190. It confirms the power of all corporations governed by it to amend their articles in any manner permitted by this Code, regardless of restrictions in past laws.

Subsection (b) restates explicitly the policy embodied in earlier versions of the Model Act and in former § 14-2-190, that a shareholder does not have a "vested property

right" in any provision of the articles of incorporation. It does not contain the long list of permitted amendments contained in prior law, which was intended to expressly validate amendments in all areas where vested rights claims might be made. Corporations and their shareholders are also subject to amendments of the governing statute by the state under Section 14-2-102, subject, of course, to the rights of shareholders in corporations created prior to 1863, when no power to amend was reserved by the state. See the Comment to Section 14-2-102.

### Cross-References

Amendment: before issuance of shares, see § 14-2-1005; by directors, see § 14-2-1002; by directors and shareholders, see § 14-2-1003; pursuant to court reorganization, see § 14-2-1008. Articles of incorporation, see § 14-2-202. Dissenters' rights, see Article 13. Duration of corporate existence, see § 14-2-302. Effective date of amendment, see § 14-2-123. Powers of corporation, see § 14-2-302. Procedure for amendment, see § 14-2-1002 et seq. Purposes of corporation, see § 14-2-301. Restatement of articles, see § 14-2-1007. Share transfer restrictions, see § 14-2-627. Voting by voting groups, see §§ 14-2-725, 14-2-726, & 14-2-1004. "Voting group" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-190, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Cited in** *Goodwyne v. Moore*, 170 Ga. App. 305, 316 S.E.2d 601 (1984); *Jackson v. Southern Pan & Shoring Co.*, 258 Ga. 401, 369 S.E.2d 239 (1988).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 92-94.

**C.J.S.** — 18 C.J.S., Corporations, §§ 59-61.

**ALR.** — Changes in corporate organization as affecting status as trustee, executor, administrator, or guardian, 61 ALR 994; 131 ALR 753.

Power of corporation to amend its charter in respect of character or kind of business, 111 ALR 1525.

Power of corporation to change obliga-

tions to stockholders, 117 ALR 1290.

Provision of statute, charter, or bylaws respecting amendment of corporate bylaws as excluding waiver thereof, 169 ALR 1374.

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

### 14-2-1002. Amendment by board of directors.

Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles of incorporation without shareholder action:

(1) To extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(2) To delete the names and addresses of the initial directors;



(3) To delete the name and address of the initial registered agent or registered office, if an annual registration is on file with the Secretary of State;

(4) To delete the name and address of each incorporator;

(5) To delete the mailing address of the initial principal office of the corporation if an annual registration is on file with the Secretary of State;

(6) To change each issued or each issued and unissued authorized share of an outstanding class into a greater number of whole shares if the corporation has only shares of that class outstanding;

(7) To change or eliminate the par value of each issued and unissued share of an outstanding class if the corporation has only shares of that class outstanding;

(8) To change the corporate name; or

(9) To make any other change expressly permitted by this chapter to be made without shareholder action. (Code 1981, § 14-2-1002, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1996, p. 1203, § 6.)

**Law reviews.** — For article, "The Acquisition Process and the Closely-Held Corporation: Selected Legal Aspects," see 36 Mercer L. Rev. 567 (1985).

#### COMMENT

Source: Model Act, Section 10.02. This section, permitting the board to amend the articles of incorporation without shareholder approval, represents a departure from prior law, § 14-2-191. The only possible case in which board action might have been considered to amend the articles of incorporation under prior law involved the filing of a certificate designating the rights and preferences of a series of "blank" preferred stock under former § 14-2-81(c). That filing is clearly designated as an amendment of the articles under Section 14-2-602(d) of the Code. Code Section 14-2-631(d) provides authority for the board to amend the articles of incorporation to provide that reacquired shares become treasury shares.

The amendments described in clauses (1) through (6) are so routine and "house-keeping" in nature as not to require action by shareholders. None affects substantive rights in any meaningful way. For example, Section 14-2-1002(1) authorizes amendments by the board of directors to extend the duration of a corporation that was formed at a time when limited duration was required by law. The extension normally will be in the form of an amendment to delete all reference to duration of the corporation, which automatically makes the duration perpetual. Similarly, subsection (a)(4) authorizes the board of directors to change each issued and unissued share of an outstanding class of shares into a greater number of whole shares if the corporation has only that class of shares outstanding. All shares of the class being changed must be treated identically under this clause. Subsection (4) permits increases in the authorized shares of a corporation to accommodate a stock split. Thus, if a corporation with 90% of its authorized shares outstanding wishes to engage in a two for one stock split, it may do so through an amendment approved by the board increasing its authorized capital stock. Such a change, under the circumstances described in the subsection, does not change the substantial rights of any investor.

Subsection (5) is a Code addition to the Model Act provisions, designed to permit elimination of par value in corporations that had par value for shares prior to the adoption of the Code. Since substantial rights may be attached to par value where more than one class of stock is outstanding, this power is limited to those cases where only one class is outstanding. If more than one class exists, shareholder approval will be required. In some instances this will trigger voting by voting groups under Section 14-2-1004, and in others may trigger dissenters' rights under Section 14-2-1302.

Subsection (6) varies from the Model Act by giving the board of directors full power to change the corporate name in whole or in part, rather than the narrower power to make minor changes originally granted.

Subsection (a)(7) recognizes that other sections of the Model Act expressly permit other amendments to be made by the board of directors without prior shareholder approval. Examples of these include Section 14-2-602 (creation of series of shares pursuant to authority already granted in the articles) and Section 14-2-631 (cancellation of reacquired shares if the articles provide they are not to be reissued).

Amendments provided for in this section may be included in restated articles of incorporation under Section 14-2-1007 or in articles of merger under Article 11.

#### **Note to 1996 Amendment**

Subsections (4) and (5) were added in 1996. Like the other sections, these amendments are regarded as so routine in nature as to amount to housekeeping, and thus do not justify a requirement of shareholder approval. This restores similar provisions in former law, O.C.G.A. §14-2-196(e) (1981), which permitted such an amendment in restating articles of incorporation.

#### **Cross-References**

Action by board of directors, see § 14-2-820 et seq. Amendment by filing certificate designating rights and preferences of preferred stock, see § 14-2-602. Amendment by board of directors to provide that reacquired shares become treasury shares, see § 14-2-631. Articles of amendment, see § 14-2-1006. Classes and series of shares, see §§ 14-2-601 & 14-2-602. Duration of corporate existence, see § 14-2-302. Effective date of amendment, see § 14-2-123. Initial directors, see §§ 14-2-202 & 14-2-205. Merger, see Articles 11 and 11A. Name of corporation, see Article 4. Reacquisition of shares, see § 14-2-631. Reduction of authorized shares, see § 14-2-631. Registered office and agent, see Article 5. Restatement of articles, see § 14-2-1007.

### **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-191, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Cited in** L.L. Minor Co. v. Perkins, 246 Ga. 6, 268 S.E.2d 637 (1980); Hutcheson v. State, 246 Ga. 13, 268 S.E.2d 643 (1980).

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 93-95.

**C.J.S.** — 18 C.J.S., Corporations, §§ 55-58, 60.



**14-2-1003. Amendment by board of directors and shareholders.**

(a) A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

(b) For the amendment to be adopted:

(1) The board of directors must recommend the amendment to the shareholders unless the board of directors elects, because of a conflict of interest or other special circumstances, to make no recommendation and communicates the basis for its election to the shareholders with the amendment; and

(2) The shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (e) of this Code section.

(c) The board of directors may condition its submission of the proposed amendment on any basis.

(d) The corporation shall notify each shareholder entitled to vote of the proposed shareholders' meeting in accordance with Code Section 14-2-705. The notice of meeting must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) Unless this chapter, the articles of incorporation, or the board of directors (acting pursuant to subsection (c) of this Code section) require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by a majority of the votes entitled to be cast on the amendment by each voting group entitled to vote on the amendment. (Code 1981, § 14-2-1003, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

**COMMENT**

Source: Model Act, Section 10.03. The procedures are substantially similar to those of prior law, in § 14-2-191(b).

Significant amendments to articles of incorporation must be approved by the shareholders after being proposed by the board of directors.

Subsection (b) provides that when proposing an amendment, the board of directors must make a recommendation to the shareholders that the amendment be approved, unless it elects, because of conflict of interest or other special circumstances, to make no recommendation. If the board of directors so elects, it must describe the conflict or circumstance, and communicate the basis for its election, when presenting the proposed amendment to the shareholders.

Subsection (b)(1) of the Model Act has been amended by replacing references to "determination" with "election," to eliminate any negative implications that a board

with a conflict of interest may not recommend action to its shareholders; candid communication remains appropriate, and fair recommendations remain permissible, even for a board with a conflict of interests. It is intended that a board of directors may recommend the amendment to the shareholders in those cases where the directors determine that there is a conflict of interest, or other special circumstances, so long as the board determines that, in light of all the circumstances and the disclosures made to such shareholders, such recommendation should be made. Whether the board has a duty, in a particular case, to make a recommendation is a matter for judicial interpretation.

Subsection (c) permits the board to submit its recommendation on a conditional basis. Amendments could be conditioned upon the receipt of a supermajority vote, or the affirmative vote of the majority of the shares held by persons other than "related shareholders" or "affiliates", or upon no more than a specified percentage of a class filing written dissents.

Subsection (d) departs from the Model Act in that it does not require notice to holders of classes of shares not entitled to vote, whether by the terms of the articles of incorporation or the provisions of a resolution creating a series, or by reason of Section 14-2-1004. Section 14-2-1004 grants voting rights to holders of non-voting shares whenever significant rights are to be affected by a merger, which will entitle holders of non-voting shares to notice if their rights are adversely affected.

Subsection (e) departs from the Model Act by eliminating subparagraph (1), which granted the same voting rights to a voting group with dissenter's rights as the Code grants to all voting groups. By eliminating subparagraph (1), the Code requires approval by a majority of the outstanding shares of all classes entitled to vote on the amendment, rather than of only those classes with dissenter's rights.

Subsection (e) also departs from the Model Act provision by amending subparagraph (2) to require approval of a majority of the shares entitled to be cast on the amendment in each voting group entitled to vote. This restores the practice of existing Georgia law. The Model Act provisions in Section 14-2-725 state that if a quorum of a voting group is present, shareholder action is approved if the votes cast for a proposition exceed those cast against it. Thus the votes of a majority of the shares present at a meeting could be withheld, and an amendment to the articles approved by the remaining votes, though considerably less than a majority of a quorum. On amendments to the basic shareholder contract, such a vote seems too weak to legitimate the contractual justification. Further, such a low voting requirement could open an amendment to equitable challenge by a minority shareholder.

If an amendment to articles of incorporation creates dissenters' rights, the notice of the shareholders' meeting must contain a statement of the rights of shareholders to dissent, under Section 14-2-1320 of the Code. If corporate action is taken without a meeting of shareholders, Section 14-2-1320 requires notice of dissenter's rights to all shareholders.

### Cross-References

Articles of amendment, see § 14-2-1006. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Dissenters' rights, see § 14-2-1302. "Notice" defined, see § 14-2-141. Notice of dissenters' rights, see §§ 14-2-1320 & 14-2-1322. Notice of shareholders' meeting, see § 14-2-705. Quorum at shareholders' meeting, see § 14-2-725. Restatement of articles of incorporation, see § 14-2-1007. Supermajority quorum and voting requirements, see § 14-2-727. Voting by voting group, see §§ 14-2-725, 14-2-726, & 14-2-1004. Voting entitlement of shareholders generally, see § 14-2-721. "Voting group" defined, see § 14-2-140.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 93-95.

**C.J.S.** — 18 C.J.S., Corporations, §§ 55-58, 60.

**14-2-1004. Voting on amendments by voting groups.**

(a) The holders of the outstanding shares of a class are entitled to vote as a separate voting group (unless shareholder voting is not required by virtue of Code Section 14-2-1002) on a proposed amendment if the amendment would:

(1) Increase or decrease the aggregate number of authorized shares of the class; provided, however, that if the articles of incorporation specifically authorize the shares of any class to be increased or decreased without a vote of such class, under such circumstances, the authorized number, terms, conditions, designations, preferences, limitations, and relative rights of those shares may be fixed as provided in the articles of incorporation;

(2) Effect an exchange or reclassification of all or part of the shares of the class into shares of another class;

(3) Effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;

(4) Change the designation, rights, preferences, or limitations of all or part of the shares of the class;

(5) Change the shares of all or part of the class into a different number of shares of the same class;

(6) Create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

(7) Increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

(8) Limit or deny an existing preemptive right of all or part of the shares of the class;

(9) Cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class; or

(10) Cancel, redeem, or repurchase all or part of the shares of the class.

(b) If a proposed amendment would affect a series of a class of shares in one or more of the ways described in subsection (a) of this Code section, the shares of that series are entitled to vote as a separate voting group on the proposed amendment. If a proposed amendment would not affect a series in any manner described in subsection (a) of this Code section, the holders of shares of that series are not entitled to vote as a separate voting group on the proposed amendment unless the articles of incorporation provide otherwise.

(c) If a proposed amendment that entitles two or more series of shares within a class to vote as separate voting groups under this Code section would affect those two or more series in the same or a substantially similar way, the shares of all the series within the class so affected must vote together as a single voting group on the proposed amendment.

(d) A class or series of shares is entitled to the voting rights granted by this Code section although the articles of incorporation provide that the shares are nonvoting shares. The articles of incorporation may provide that a class or series has voting rights in addition to those granted by this Code section. (Code 1981, § 14-2-1004, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 47; Ga. L. 2000, p. 1567, § 8.)

**Law reviews.** — For article, "The Acquisition Process and the Closely-Held Corporation: Selected Legal Aspects," see 36 Mercer L. Rev. 567 (1985).

For note on 2000 amendment of O.C.G.A. § 14-2-1004, see 17 Ga. St. U.L. Rev. 46 (2000).

#### COMMENT

Source: Model Act, Section 10.04. This replaces former § 14-2-192.

A class or series of shares is generally entitled to vote separately as a voting group on any amendment that affects the class or series in the manner described in subdivisions (1) through (10) of subsection (a). Shares are entitled to vote as separate voting groups under this section even though they are designated as nonvoting shares in the articles of incorporation, or the articles of incorporation purport to deny them entirely the right to vote on the proposal in question, or purport to allow other classes or series of shares to vote as part of the same voting group. See subsection (d). All amendments must be approved by each voting group by a majority of all votes entitled to be cast on the amendment.

Subsection (a)(1) provides for class voting to increase or decrease the number of authorized shares of such class. The Model Act provision was amended to preserve the approach of former § 14-2-192(a)(1), which contained a proviso that class voting was not required if the articles specifically authorize an increase or decrease without such vote. This is a Georgia variation added in 1973.

Subsection (a)(10) was added to the Model Act provisions to restore the rights granted by former § 14-2-192(a)(3), which provided for class voting if an amendment would effect a cancellation of a class of shares. This makes it clear that a class of securities may be "cashed out" by an amendment to the articles of incorporation that recapitalizes the corporation. While this was implicit in the prior law, it should be more explicit, since use of this power might otherwise be in doubt. There is no reason why a corporation should not be able to do through recapitalization what it could already do



by merger — cash out a class of investors. On the other hand, voting rights, in addition to dissenter's rights, assure that the class will be protected from unacceptable terms on a cash-out. This provision, which grants separate voting rights to classes subject to being "cashed out" by an amendment, is not applicable to parent-subsidary mergers or for other mergers under Article 11, however. See Section 14-2-1103. Thus a distinction is made between internal readjustments where each class is given voting power to protect itself from others, and transactions with third parties, where it is undesirable to require separate approval of each voting group because this might create veto power in voting groups with relatively small investments, to the general detriment of shareholders in the aggregate.

Subsection (a)(4), which requires class approval to change the designation, rights, preferences, or limitations of a class, achieves the same result as former § 14-2-192(a)(8), which required a class vote to break a class of preferred into series and to determine the rights of the series. The reference to "change" makes it clear that this does not refer to an original designation of rights and preferences of a new series of "blank" preferred under Section 14-2-602 of the Code. The right to vote by voting groups under Section 14-2-1004 is applicable only if "shareholder voting is otherwise required by this Act." An amendment that does not require shareholder approval, such as the creation of a new series of shares pursuant to authority reserved in the original articles of incorporation (see Section 14-2-602), does not trigger the right to vote by voting groups under this section.

Elimination of legal capital concepts throughout the Code has eliminated one basis for class voting. Previously § 14-2-192(a)(2) provided that an increase or decrease in par value of a particular class entitled the class to voting rights. No comparable provision appears in the Code.

The right to vote as a separate voting group provides a major protection for classes or series of shares with preferential rights or classes or series of limited or nonvoting shares against amendments that adversely affect that class. This section, however, does not make the right to vote by separate voting group dependent on an evaluation of whether the amendment is detrimental to the class or series: if the amendment is one of those described in subsection (a), the class or series is automatically entitled to vote as a separate voting group on the amendment.

The ten types of changes that give rise to voting by voting groups are essentially the same as in former Georgia law, though their number has been reduced based on the conclusion that some of the changes listed in earlier versions were subsumed within other listed changes. Subsections (b) and (c) extend the privilege of voting by separate voting group to one or more series of a class of shares if the series has unique financial or voting provisions and is affected in one or more of the ways described in subsection (a). Subsection (b) allows different series of same class to vote as a separate group; this preserves the rule of former § 14-2-192(b). These subsections must necessarily be phrased in general terms; any significant distinguishing feature of a series, which an amendment affects or alters, should trigger the right of voting by separate voting group for that series.

While subsection (c) requires separate voting groups (series) within a class of stock to vote together as a single voting group under the circumstances specified, it does not require separate classes of shares to vote together. Whether such shares must vote together will be determined by the articles of incorporation (Sections 14-2-725(a) and 14-2-726(a)) or this Code (Sections 14-2-1004 and 14-2-1103). As a general rule, voting groups vote separately on amendments to the articles of incorporation (Section 14-2-726(b)), but together on fundamental corporate changes involving third parties, as in mergers (Section 14-2-1103(e)) and sales of assets (Section 14-2-1103(e)). Further, as a general rule, all shares with voting rights must be counted as a single voting group

under Sections 14-2-1003(e) and 14-2-1103(e). Whether shares of two or more but less than all of the classes must be counted as a separate voting group is determined by subsection (c).

Subsection (d) has no counterpart in former Georgia law. Subsection (d) makes clear that the limited right to vote by separate voting groups provided by Section 14-2-1004 may not be narrowed or eliminated by the articles of incorporation. Even if a class or series of shares is described as "nonvoting" and the articles purport to make that class or series nonvoting "for all purposes," that class or series nevertheless has the limited voting rights provided by this section. Subsection (d) was included because of the ambiguity that would normally arise whenever a class or series of nonvoting shares is created; no inference of any kind should be drawn from subsection (d) as to whether other, unrelated sections of the Code may be modified by the provisions in the articles of incorporation. The last sentence of subsection (d) was added to the Model Act's language to clarify that groups may find voting rights in sources other than this act; viz, the articles of incorporation or board resolutions creating series of preferred.

#### **Note to 1989 Amendment**

Subsection (a) was amended by the addition of a cross reference to section 1002, which excuses shareholder voting in specified circumstances. Subsection (b) was amended by the deletion of a cross reference to voting entitlements under subsection (a), and the addition of a final sentence, intended to clarify the Code, that no separate voting rights as a group attach to a series by virtue of this section if the rights of that series are not affected, even though rights of some other series within the same class are so affected, and that series is thus entitled to voting rights.

#### **Note to 2000 Amendment**

The 2000 amendment to subsection (a) deleted the phrase "a shareholder vote" and added the phrase "a vote of such class" following the phrase "increased or decreased without." This amendment was intended to clarify that the vote of a class as a separate voting group is not required if the articles of incorporation authorize an increase or decrease in the number of authorized shares of the class without such class vote.

#### **Cross-References**

Authorized shares, see § 14-2-601. Classes of shares, see §§ 14-2-601 & 14-2-602. Dissenters' rights, see § 14-2-1302. Quorum for shareholders' meeting, see § 14-2-725. Series of shares, see § 14-2-602. Share rights and limitations, see § 14-2-601. Voting by voting groups generally, see §§ 14-2-725 & 14-2-726. "Voting group" defined, see § 14-2-140.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, § 95. 18A Am. Jur. 2d, Corporations, §§ 436, 1004-1006. **C.J.S.** — 18 C.J.S., Corporations, §§ 55-58, 60, 148, 375-377, 383.

#### **14-2-1005. Amendment before issuance of shares.**

(a) If a corporation has not yet issued shares, its incorporators or board of directors may adopt one or more amendments to the corporation's articles of incorporation.

(b) If any amendment before shares are issued makes a material change in the articles of incorporation, nonassenting subscribers for shares shall be



entitled to rescind their subscriptions. (Code 1981, § 14-2-1005, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, Section 10.05. This follows prior law, § 14-2-191. Subsection (b) was added to the Model Act provisions from former § 14-2-191(a).

#### Cross-References

Articles of amendment, see § 14-2-1006. Effective date of amendment, see § 14-2-123. Incorporators, see § 14-2-201. Initial directors, see § 14-2-202. Organization of corporation, see § 14-2-205. Restated articles of incorporation, see § 14-2-1007.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, § 92. 18A Am. Jur. 2d, Corporations, §§ 636, 637. **C.J.S.** — 18 C.J.S., Corporations, §§ 55-58, 208.

#### 14-2-1006. Articles of amendment.

A corporation amending its articles of incorporation shall deliver to the Secretary of State for filing articles of amendment setting forth:

- (1) The name of the corporation;
- (2) The text of each amendment adopted;
- (3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;
- (4) The date of each amendment's adoption;
- (5) If an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and that shareholder action was not required; and
- (6) If approval of the shareholders was required, a statement that the amendment was duly approved by the shareholders in accordance with the provisions of Code Section 14-2-1003. (Code 1981, § 14-2-1006, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, Section 10.06. This replaces former §§ 14-2-193 & 194.

The articles of amendment must set forth both the amendment itself and the manner in which it was adopted.

Subsection (3) requires the articles of amendment to contain a statement of the manner in which an exchange, reclassification, or cancellation of issued shares is to be put into effect if not set forth in the amendment itself. This requirement avoids any possible confusion that may arise as to how the amendment is to be put into effect and also permits the amendment itself to be limited to provisions of permanent applicability,

with transitional provisions having no long-range effect appearing only in the articles of amendment.

The Code simplified the Model Act's required disclosures about the details of shareholder approval of the amendment. This follows the approach of Delaware. Del. Code Ann., tit. 8, § 242. The filing of more detailed information is inconsistent with the ministerial function of the Secretary of State under this Code.

Several provisions of prior law have been eliminated in the Code. Where Section 14-2-1006 requires filing only with the Secretary of State, in a manner similar to § 14-2-194(a) and (b), there are no Code provisions comparable to § 14-2-194(c), (e)(3)-(4), (g) and (h), covering payments to the clerk of the superior court for filing. Limited publication requirements have been preserved in § 14-2-1006.1. Further, former § 14-2-193(a)(6) covered changes in stated capital, which have been eliminated from the Code.

### Cross-References

Amendment by: board of directors, see § 14-2-1002; incorporators or initial directors, see § 14-2-1005; shareholders, see §§ 14-2-1003 & 14-2-1004. "Deliver" includes mail, see § 14-2-140. Effective date of amendment, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Merger, see Articles 11 & 11A. Publication of notice of name change, see § 14-2-1006.1. Share exchange, see Article 11. "Voting group" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-194, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.  
Cited in *Goodwyne v. Moore*, 170 Ga. App. 305, 316 S.E.2d 601 (1984).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, § 95. **C.J.S.** — 18 C.J.S., Corporations, § 60.

### 14-2-1006.1. Publication of notice of change of name.

(a) Together with the articles of amendment which change the name of the corporation, the corporation shall deliver to the Secretary of State an undertaking, which may appear in the articles of amendment or be set forth in a letter or other instrument executed by an incorporator or any person authorized to act on behalf of the corporation, to publish a notice of the filing of the articles of amendment as required by subsection (b) of this Code section.

(b) No later than the next business day following the delivery of the articles of amendment and certificate as provided in subsection (a) of this Code section, the corporation shall mail or deliver to the publisher of a newspaper which is the official organ of the county where the registered office of the corporation is located or which is a newspaper of general circulation published within such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60



percent paid circulation a request to publish a notice in substantially the following form:

**"NOTICE OF CHANGE OF CORPORATE NAME**

Notice is given that articles of amendment which will change the name of \_\_\_\_\_ (present corporate name) to \_\_\_\_\_ (proposed corporate name) have been delivered to the Secretary of State for filing in accordance with the Georgia Business Corporation Code. The registered office of the corporation is located at \_\_\_\_\_ (address of registered office)."

The request for publication of the notice shall be accompanied by a check, draft, or money order in the amount of \$40.00 in payment of the cost of publication. The notice shall be published once a week for two consecutive weeks commencing within ten days after receipt of the notice by the newspaper. Failure on the part of the corporation to mail or deliver the notice or payment therefor or failure on the part of the newspaper to publish the notice in compliance with this subsection shall not invalidate the articles of amendment or the change of the name of the corporation. (Code 1981, § 14-2-1006.1, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 13; Ga. L. 1999, p. 405, § 7.)

**COMMENT**

Source: Former § 14-2-194.

This replaces former § 14-2-194, which required publication of a similar notice for four consecutive weeks at a fee of \$60. It also required filing with the clerk of the superior court in the county where the registered office of the corporation was located. Further, documents to effect the filing and publication were forwarded, together with the required checks, to the Secretary of State for transmittal to the clerks and newspapers. Local filing has been eliminated entirely by the Code, and publication requirements have been reduced and simplified.

**Note to 1990 Amendment**

The 1990 amendment makes it clear that any person acting on behalf of the corporation (such as an attorney or other agent) may execute the requisite certificate of publication.

**Cross-References**

Articles of amendment, see § 14-2-1006. "Deliver" includes mail, see § 14-2-140. Failure to publish as grounds for administrative dissolution, see § 14-2-1420(5). "Mail" defined, see § 14-2-140. Name of corporation, see Article 4. Registered office, see Article 5.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 287.

**C.J.S.** — 18 C.J.S., Corporations, § 103.

**ALR.** — Change in name, location, composition, or structure of obligor commercial

enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

**14-2-1007. Restated articles of incorporation.**

(a) A corporation's board of directors may restate its articles of incorporation at any time with or without shareholder action.

(b) The restatement may include one or more amendments to the articles. If the restatement includes an amendment requiring shareholder approval, it must be adopted as provided in Code Section 14-2-1003.

(c) If the board of directors submits a restatement for shareholder action, the corporation shall notify each shareholder entitled to vote of the proposed shareholders' meeting in accordance with Code Section 14-2-705. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles or contain or be accompanied by a full and complete summary of any such amendment or other change.

(d) A corporation restating its articles of incorporation shall deliver to the Secretary of State for filing articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation including, or accompanied by a certificate setting forth, the following information:

(1) Whether the restatement contains an amendment to the articles requiring shareholder approval, and, if it does not, that the board of directors adopted the restatement; or

(2) If the restatement contains an amendment to the articles requiring shareholder approval, the information required by Code Section 14-2-1006.

(e) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(f) The Secretary of State may certify restated articles of incorporation as the articles of incorporation currently in effect without including any certificate filed pursuant to subsection (d) of this Code section. (Code 1981, § 14-2-1007, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 11; Ga. L. 2003, p. 897, § 5.)

**The 2003 amendment**, effective July 1, 2003, added "or contain or be accompanied by a full and complete summary of any such amendment or other change" at the end of the last sentence of subsection (c).

**Law reviews.** — For article discussing 1976

constitutional amendment transferring authority to grant corporate powers and privileges from the court to the Secretary of State, and subsequent procedural changes, see 13 Ga. St. B.J. 91 (1976).

**COMMENT**

Source: Model Act, Section 10.07. This replaces former § 14-2-196.



Restated articles of incorporation serve the useful purpose of permitting articles of incorporation that have been amended from time to time to be consolidated into a single document. Such a restatement may also eliminate "historical" or obsolete provisions that have no present relevance.

Subsection (a) provides that a restatement of articles of incorporation that does not involve any substantive change in the articles (or that makes only amendments that may be made by the board of directors without shareholder approval) may be approved by the board of directors alone.

Subsection (b) authorizes the restated articles of incorporation to contain substantive amendments if they are submitted to the shareholders for approval in the same manner as amendments to the articles. If substantive amendments are proposed, the same procedure must be followed as for the adoption of amendments under Sections 14-2-1002, 14-2-1003, or 14-2-1005.

Subsection (c) provides that if restated articles are submitted to the shareholders, the notice of meeting should identify changes in the articles that may reasonably be viewed as more than mere changes of form. The phrase "whether or not entitled to vote" was replaced with "entitled to vote," to restore the approach of former Georgia law, §§ 14-2-191(b)(2) and 14-2-196(c).

Subsection (e) makes it clear that the restated articles of incorporation supersede the original articles of incorporation and all amendments to them, and subsection (f) permits the Secretary of State to certify the restatement uncluttered by the information set forth in subsection (d).

The Code eliminates local filing and publication requirements, previously set out in § 14-2-196 (g) and (i)-(l).

#### **Note to 1993 Amendment**

The 1993 amendment allows the filer a choice regarding the document in which the information required in (1) and (2) of subparagraph (d) appears. The statements may be in the text of the filed restated articles of incorporation or may be included in a separate certificate accompanying and filed with the restated articles of incorporation. The new language of subparagraph (f) retains the ability of the Secretary of State to certify the restated articles of incorporation without including the certificate filed pursuant to subparagraph (d).

#### **Note to 2003 Amendment**

The amendment to Code Section 14-2-1007(c) conforms the language of subsection (c) of Code Section 14-2-1007, dealing with amendments to the articles of incorporation made in connection with a restatement, to that of subsection (d) of Code Section 14-2-1003, which addresses amendments to the articles that are not included in a restatement. Subsection (d) of Code Section 14-2-1003 requires the notice of meeting given to the shareholders to include the amendment or a summary of it. The language of subsection (d) of Code Section 14-2-1007 does not expressly state that the notice may contain a summary of the amendment or amendments to be considered. In practice a general summary of the material changes to be considered at a meeting, as contemplated by subsection (d) of Code Section 14-2-1003, should be sufficient for amendments reflected in composite amended and restated articles of incorporation.

#### **Cross-References**

Amendment of articles of incorporation: before issuance of shares, see § 14-2-1005; by board of directors, see § 14-2-1002; by board of directors and by shareholders, see § 14-2-1003. "Deliver" includes mail, see § 14-2-140. Effective date of restatement, see

§ 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. "Notice" defined, see § 14-2-141. Notice of shareholders' meeting, see § 14-2-705.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 92-95.

**C.J.S.** — 18 C.J.S., Corporations, §§ 54-61.

#### 14-2-1008. Amendment pursuant to reorganization.

(a) A corporation's articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by Code Section 14-2-202.

(b) The individual or individuals designated by the court shall deliver to the Secretary of State for filing articles of amendment setting forth:

- (1) The name of the corporation;
- (2) The text of each amendment approved by the court;
- (3) The date of the court's order or decree approving the articles of amendment;
- (4) The title of the reorganization proceeding in which the order or decree was entered; and
- (5) A statement that the court had jurisdiction of the proceeding under federal statute.

(c) Shareholders of a corporation undergoing reorganization do not have dissenters' rights except as and to the extent provided in the reorganization plan.

(d) This Code section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan. (Code 1981, § 14-2-1008, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, Section 10.08. This replaces former § 14-2-197.

Section 14-2-1008 provides a simplified method of conforming corporate documents filed under state law with the federal statutes relating to corporate reorganization. If a federal court confirms a plan of reorganization that requires articles of amendment to be filed, those amendments may be prepared and filed by the persons designated by the court and the approval of neither the shareholders nor the board of directors is required. Further, shareholders do not have dissenters' rights unless the plan specifically provides for them (subsection (c)). There was no counterpart in former Georgia law, § 14-2-197.



This section applies only to amendments in articles of incorporation approved before the entry of a final decree in the reorganization plan.

Subsection (d) states that this section does not apply after entry of a final decree in the reorganization proceeding. There was no counterpart in former Georgia law.

#### Cross-References

"Deliver" includes mail, see § 14-2-140. Dissenters' rights, see Article 13. Effective date of amendment, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. "Proceeding" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2694.

#### 14-2-1009. Effect of amendment.

An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than shareholders of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name. (Code 1981, § 14-2-1009, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, Section 10.09. This replaces former § 14-2-195.

Under Section 14-2-1009, amendments to articles for incorporation do not interrupt the corporate existence and do not abate a proceeding by or against the corporation even though the amendment changes the name of the corporation.

#### Cross-References

Amendment after issuance of shares, see § 14-2-1002 et seq. Amendment before issuance of shares, see § 14-2-1005. Delayed effective date, see § 14-2-123. Effective time and date of filing, see § 14-2-123. "Proceeding" defined, see § 14-2-140.

#### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code 1933, § 22-906 and former Code Section 14-2-195, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Restructure of board of directors.** — Fact that under original articles of incorporation, members of board of directors of nonprofit

corporation could be removed from office, with or without cause, only by two-thirds' vote of entire board, did not preclude majority of board from amending articles of incorporation so as to entirely restructure board of directors and eliminate lifetime directorships. *Morales v. Sevananda, Inc.*, 162 Ga. App. 854, 293 S.E.2d 387 (1982) (decided under former Code 1933, § 22-906).

## RESEARCH REFERENCES

- C.J.S.** — 18 C.J.S., Corporations, § 61.      tion as affecting status as trustee, executor,  
**ALR.** — Changes in corporate organiza-      administrator, or guardian, 131 ALR 753.

## PART 2

## AMENDMENT OF BYLAWS

## RESEARCH REFERENCES

- Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 327-329.      **C.J.S.** — 18 C.J.S., Corporations, § 119.

**14-2-1020. Amendment by board of directors or shareholders.**

(a) A corporation's board of directors may amend or repeal the corporation's bylaws or adopt new bylaws unless:

(1) The articles of incorporation or this chapter reserve this power exclusively to the shareholders in whole or in part; or

(2) The shareholders in amending or repealing a particular bylaw provide expressly that the board of directors may not amend or repeal that bylaw.

(b) A corporation's shareholders may amend or repeal the corporation's bylaws or adopt new bylaws even though the bylaws may also be amended or repealed by its board of directors.

(c) A bylaw establishing staggered terms for directors may only be adopted, amended, or repealed by the shareholders.

(d) A bylaw limiting the authority of the board of directors may only be adopted pursuant to an agreement meeting the requirements of Code Section 14-2-732.

(e) Bylaws adopted by the incorporators or board of directors prior to the issuance of any of the corporation's shares may be amended by the incorporators or the board of directors prior to the issuance of any of the corporation's shares. (Code 1981, § 14-2-1020, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 12; Ga. L. 2000, p. 1567, § 9.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).      For note on 2000 amendment of O.C.G.A. § 14-2-1020, see 17 Ga. St. U.L. Rev. 46 (2000).

## COMMENT

Source: Model Act, Section 10.20.



In the absence of a provision in the articles of incorporation, the power to amend or repeal bylaws is shared by the board of directors and shareholders as set out in subsection (b). This is consistent with former Georgia law, in § 14-2-176. The powers of directors are limited by clauses (1) and (2) of subsection (a) while the plenary powers of shareholders are only subject to limitations contained elsewhere in the act, or in the articles of incorporation.

Subsection (a)(1) provides that the power to amend or repeal bylaws may be reserved exclusively to the shareholders by an appropriate provision in the articles of incorporation, which is consistent with former § 14-2-176(b).

Subsection (a)(2) permits the shareholders to adopt or amend a bylaw and reserve exclusively to themselves the power to amend or repeal it later. This reservation must be expressed in the action by the shareholders adopting or amending the bylaw.

Subsection (c) is new. Section 14-2-801 permits bylaw limitations on the authority of the board and Section 14-2-806 permits a bylaw approved by shareholders to stagger the board. In both cases, the Model Act limited such provisions to the articles of incorporation, which require shareholder approval for amendment. In order to achieve the same protection for such provisions when placed in the bylaws, it was necessary to "lock in" these provisions against board amendment.

One major change from prior law involves the number of shares required to be voted in favor of an amendment of bylaws. The Code relies on the general rules concerning shareholder voting, which require approval by a plurality of those shares voting when a quorum is present, under Section 14-2-725, while former § 14-2-1976(c) required the affirmative vote of a majority of all shares entitled to elect directors.

These limitations of Sections 14-2-1021 and 14-2-1022 are themselves qualified by the special provisions of Parts 2 and 3 of Article 11 of the Code, governing voting rules for business combinations with interested shareholders.

#### **Note to 1993 Amendment**

The 1993 amendment adds a new subparagraph (d) which provides that an amendment of bylaws which otherwise may require shareholder approval may be effected by the incorporators or by the board of directors if made prior to the issuance of any of the corporation's shares.

#### **Note to 2000 Amendment**

Former Code Section 14-2-1020(c) is divided into two subsections (c) and (d). Subsection (d) clarifies that, consistent with new Code Section 14-2-732 and revised Code Section 14-2-801(b), a bylaw limiting the authority of the board of directors must be approved by all shareholders and is not effective once the corporation's shares are publicly traded. Former subsection (d) has been redesignated as subsection (e).

#### **Cross-References**

Action by: board of directors, see § 14-2-820 et seq.; shareholders, see § 14-2-701 et seq. Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Business Combination with interested shareholder, see § 14-2-1110 et seq. and § 14-2-1131 et seq. Bylaws, see §§ 14-2-206 & 14-2-207. Bylaws increasing quorum or voting requirements, see § 14-2-727. Bylaws limiting authority of board, see § 14-2-801. Bylaws providing staggered terms for directors, see § 14-2-806. Close corporations, see Article 9. Shareholders agreement, see § 14-2-732. Supermajority requirements, see §§ 14-2-727, 14-2-824, 14-2-1021 & 14-2-1022.

## RESEARCH REFERENCES

ALR. — Provision of statute, charter, or bylaws as excluding waiver thereof, 169 ALR 1374.  
bylaws respecting amendment of corporate

**14-2-1021. Bylaw increasing quorum or voting requirement for shareholders.**

(a) A bylaw adopted by the shareholders may fix a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is required by this chapter. A bylaw in effect on July 1, 1989, fixing a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is required by this chapter shall remain valid until amended or repealed as provided in subsection (b) of this Code section.

(b) Except as provided in Code Section 14-2-1020, 14-2-1113, or 14-2-1133, a bylaw that fixes a greater quorum or voting requirement for shareholders under subsection (a) of this Code section may not be adopted, amended, or repealed by the board of directors. (Code 1981, § 14-2-1021, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 48; Ga. L. 1990, p. 257, § 14; Ga. L. 1993, p. 1231, § 13.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

## COMMENT

Source: Model Act, Section 10.21. This replaces former §§ 14-2-116 & 14-2-118.

This section permits "supermajority" provisions relating to shareholder meetings to appear in the bylaws if approved by the shareholders. Unlike the Model Act, subsection (a) permits the adoption of such supermajority voting or quorum requirements by the voting and quorum rules in effect at the time of adoption. The Model Act language only allowed supermajority provisions in bylaws if expressly authorized by the articles of incorporation. This was deleted as unduly restrictive. Subsection (a) preserves the approach of former Georgia law, § 14-2-116(a).

The Code rejects the Model Act rule, which requires, as a minimum, that such a bylaw must be approved by the greater of: (1) the plurality vote required by Section 14-2-725; (2) any supermajority voting requirements already in place; or (3) the higher supermajority proposed for the bylaw. Instead, the Code permits adoption of supermajority bylaws by the plurality vote required by Section 14-2-725 or any supermajority vote already in place.

Supermajority voting may also be provided in the articles of incorporation, under Section 14-2-727. Section 14-2-727(b) provides that both bylaw and articles of incorporation provisions setting supermajority quorum and voting requirements may only be altered pursuant to the quorum and voting requirements prescribed in the provision being amended. This preserves the approach of former § 14-2-118(b).

Subsection (b) prohibits board alteration of the Code's rules or shareholder-approved bylaws concerning voting and quorum rules, except that it also provides authorization for director-approved bylaws imposing supermajority require-



ments for shareholder approval of business combinations with interested shareholders under Section 14-2-1113.

#### Note to 1989 Amendment

The 1989 amendment changed subsection (b) to add a reference to Code Section 14-2-1133 to make it consistent with the business combination provisions of Part 3 of Article 11. Section 14-2-1133(a) provides that the provisions of Part 3 of Article 11 shall not apply unless the bylaws of the corporation specifically provide for its application. It further states that "Such a bylaw may be adopted ... in the manner provided in this chapter...." Since this subsection generally provides that bylaws increasing quorum or voting requirements may not be adopted by the board, a special reference is required to eliminate business combination bylaws from this rule.

#### Note to 1990 Amendment

The 1990 amendment provides that bylaws relating to voting requirements which were adopted prior to the new Georgia Business Corporation Code remain valid until amended or repealed. Section 14-2-725(c) of the new Code provides that shareholder action requires only a plurality of affirmative votes over negative votes unless the articles or a bylaw adopted by the shareholders requires a greater vote. In contrast, § 14-2-116(b) of the old Code required a majority of the votes represented at the meeting to effect shareholder action unless the articles or bylaws provided otherwise. Of course, some Georgia corporations have articles or bylaws adopted under the old Code reflecting the previous requirement of a majority of votes represented at the meeting. Amendment of a bylaw requiring action by majority vote may not be accomplished by action of the board of directors, but is subject to amendment only by the requisite vote of the shareholders. The transition provisions of § 14-2-1703(a) arguably preserve the validity of the old bylaws notwithstanding the adoption of the new Code. However, in order to avoid any question as to the effect of the new Code and its transition provision on any such old bylaws, this section was amended to make explicit the continuing validity of the voting requirements of bylaws and articles existing on July 1, 1989, the effective date of the new Code.

#### Note to 1993 Amendment

The 1993 amendment includes a new cross-reference to Section 14-2-1020, which was added to provide for amendments by incorporators or boards of directors before the issuance of shares.

#### Cross-References

Bylaws: amendment, see § 14-2-1020; generally, see § 14-2-206. Director supermajority requirements, see § 14-2-1022. Quorum and voting of shareholders: normal, see §§ 14-2-725 & 14-2-726; supermajority requirements, see § 14-2-727. "Voting group" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**ALR.** — Stockholders required for quorum or vote as determined by number of stockholders or number of shares, 63 ALR 106.

Validity, construction, and effect of provision in charter or bylaw requiring supermajority vote, 80 ALR4th 667.

**14-2-1022. Bylaw increasing quorum or voting requirement for directors.**

(a) Unless provided otherwise in the articles of incorporation or the bylaws, a bylaw that fixes a greater quorum or voting requirement for the board of directors:

(1) May be adopted, amended, or repealed by the shareholders only by the affirmative vote of a majority of the votes entitled to be cast; or

(2) May be adopted, amended, or repealed by the directors only by a majority of the entire board of directors.

(b) A bylaw adopted or amended by the shareholders that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended or repealed only by a specified vote of either the shareholders or the board of directors. (Code 1981, § 14-2-1022, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

**COMMENT**

Source: Model Act, Section 10.22. This replaces former §§ 14-2-146 & 14-2-176.

Supermajority provisions relating to the board of directors may appear in the bylaws of the corporation without specific authorization in the articles of incorporation. See Section 14-2-824(a) and (c). Like other bylaw provisions, they may be adopted either by the board of directors or by the shareholders. See Section 14-2-1020. Such provisions, further, may be amended or repealed by the board of directors or shareholders as provided in this section.

Subsection (a) of the Model Act was amended to provide for higher voting requirements than originally specified. Subsection (a)(1) provides that a bylaw providing for board action may be adopted or amended by the shareholders, but only by affirmative vote of a majority of all votes entitled to be cast, or such higher vote as is required by the articles of incorporation or bylaws. The Model Act did not require such a high vote for shareholder action.

Subsection (a)(2) states that where supermajority voting for the board is approved or altered by the board, it must be by a majority of the entire board, rather than by a simple majority of a quorum, as would otherwise be permitted by Section 14-2-824(c), or by such higher vote as is required by the articles of incorporation or bylaws.

Subsection (b) provides that where shareholders adopt a bylaw concerning quorum and voting requirements for the board of directors, they may prescribe the conditions under which it may be amended.

Subparagraph (c) of the Model Act was deleted as superfluous because of the changes made in subsection (a).

Prior law was not so explicit about the procedures for adopting and amending bylaws governing supermajority requirements, reflecting the lesser interest in voting rules at the time of adoption. Section 14-2-146(a) simply provided for simple majority quorums "unless the articles of incorporation or the bylaws shall provide that a different number



shall constitute a quorum....” Section 14-2-146(b) provided that a majority of a quorum might act, unless a greater vote was required by articles, bylaws or this article. There were no statutory limitations on amendments to the bylaws concerning these provisions. Thus they were governed by Section 14-2-176(c), which required approval of all bylaws by the same vote — a majority of all voting shares, or a majority of all directors in office.

#### Cross-References

Bylaws: amendment, see § 14-2-1020; generally, see § 14-2-206. Quorum and voting of directors, see § 14-2-824. Quorum and voting of shareholders: normal, see §§ 14-2-725 & 14-2-726. Supermajority requirements, see § 14-2-727.

### RESEARCH REFERENCES

**ALR.** — Validity, construction, and effect of provision in charter or bylaw requiring supermajority vote, 80 ALR4th 667.

## ARTICLE 11

### MERGER AND SHARE EXCHANGE

**Cross references.** — Merger of trusts and domestic corporations, § 53-12-59.

**Law reviews.** — For article, “Comparison of Features of Old and New Business Corporation Laws Relating to Domestic Corporations,” see 5 Ga. St. B.J. 13 (1968). For article, “Foreign Corporations in Georgia,” see 10 Ga. St. B.J. 243 (1973). For article,

“Hospital Mergers, Market Concentration and the Herfindahl-Hirschman Index,” see 33 Emory L.J. 869 (1985). For article, “Georgia’s New Business Corporation Code,” see 24 Ga. St. B.J. 158 (1988). For article, “Changes in Corporate Practice under Georgia’s New Business Corporation Code,” see 40 Mercer L. Rev. 655 (1989).

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, a decision under former Code 1933, §§ 22-1001 and 22-1002 and former Article 11A of former Chapter 2, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Constitutionality** — Former Article 11A enjoyed a presumption of validity under the supremacy and interstate commerce clauses, where it could not be established with the required degree of legal certainty that the statute denied hostile tender offers for Georgia corporations a meaningful opportunity

to succeed. *West Point-Pepperell, Inc. v. Farley, Inc.*, 711 F. Supp. 1096 (N.D. Ga. 1989) (decided under former Article 11A).

**Definitions.** — A consolidation is the union of two or more corporations into one corporate body, after which the constituent corporations cease to exist; a merger is the absorption of one corporation into another; and an amalgamation is merely the English term used to designate a consolidation or merger. *Kemos, Inc. v. Bader*, 545 F.2d 913 (5th Cir. 1977) (decided under former Code 1933, §§ 22-1001 and 22-1002).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor’s notes.** — In light of the similarity of the provisions, an opinion under former Code 1933, § 22-1001 and former Article 11A of former Chapter 2, which was repealed by Ga. L. 1988, p. 1070, § 1, effective

July 1, 1989, is included in the annotations for this Code section.

**Disclosure and approval requirements for bank mergers** are generally more difficult than for nonbank corporations. 1981 Op.

Att'y Gen. No. 81-103 (decided under former Code 1933, § 22-1001).

## PART 1

### MERGER AND SHARE EXCHANGE

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2510, 2511, 2608-2612.

**C.J.S.** — 19 C.J.S., Corporations, §§ 792-796.

**ALR.** — Power to require nonassenting creditors or bondholders to accept securities of, or shares in, new or reorganized corporation, 88 ALR 1238.

Construction and effect of provision for payment of dissenting stockholders in statutes relating to merger, consolidation, or reorganization of banks or other corporations, 162 ALR 1237; 174 ALR 960.

Merger or consolidation of corporate lessee as breach of covenant against assignment or sublease, 24 ALR2d 695.

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

Merger or consolidation of corporate lessee as breach of clause in lease prohibiting, conditioning, or restricting assignment or sublease, 39 ALR4th 879.

#### 14-2-1101. Merger.

(a) One or more corporations may merge into another corporation if the board of directors of each corporation adopts and its shareholders (if required by Code Section 14-2-1103) approve a plan of merger.

(b) The plan of merger must set forth:

(1) The name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge;

(2) The terms and conditions of the merger; and

(3) The manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving or any other corporation or into cash or other property in whole or in part.

(c) The plan of merger may set forth:

(1) Amendments to the articles of incorporation of the surviving corporation; and

(2) Other provisions relating to the merger.

(d) Any of the terms of the plan of merger may be made dependent upon facts ascertainable outside of the plan of merger, provided that the manner in which such facts shall operate upon the terms of the merger is clearly and expressly set forth in the plan of merger. As used in this subsection, the term "facts" includes, but is not limited to, the occurrence



of any event, including a determination or action by any person or body, including the corporation. (Code 1981, § 14-2-1101, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2003, p. 897, § 6.)

**The 2003 amendment**, effective July 1, 2003, added subsection (d).

**Law reviews.** — For article, “The Acquisi-

tion Process and the Closely-Held Corporation: Selected Legal Aspects,” see 36 Mercer L. Rev. 567 (1985).

### COMMENT

Source: Model Act, § 11.01. There are no substantial changes from prior law, § 14-2-210, except elimination of the concept of a “consolidation,” which appeared in § 14-2-211. Generally a triangular merger into a merger subsidiary can achieve the same results as a consolidation.

Subsection (a) authorizes a statutory merger, to be accomplished by the adoption of a plan of a merger under subsection (b), approval of the transaction by the shareholders (if required by Section 14-2-1103), and filing articles of merger or a certificate of merger under Section 14-2-1105. Upon the effective date of the merger, the surviving corporation becomes vested with all the assets of the disappearing corporations and becomes subject to their liabilities.

Under the Code there are virtually no restrictions or limitations on the terms of a statutory merger. Subsection (c) permits amendments to the articles of incorporation of the surviving corporation as part of the plan of merger, so the effect may be that the surviving corporation is essentially different from either of the constituents, thereby achieving the effect of a consolidation under prior law. Shareholders of the disappearing corporations may receive securities of the surviving corporation, securities of a third corporation, e.g., shares issued by the parent of the surviving or disappearing corporation (which may be publicly traded and marketable while the shares of the surviving or disappearing corporation are not), or cash or other property (a “cash” or “cash-out” merger). Some of the holders of a single class of shares may be required to accept securities or properties while the remaining holders may be compelled to accept different securities, property, or cash. Shares may also be canceled, pursuant to the express authority of Section 14-2-1004(a)(10). The capitalization of the surviving corporation may be restructured in the merger, or its articles of incorporation may be amended by the articles of merger or a certificate of merger in any way deemed appropriate. Any other provisions considered necessary or desirable with respect to the merger may be included in the plan of merger.

Merger transactions may give rise to voting by the holders of nonvoting shares under Section 14-2-1103(f), and dissenting shareholders may have dissenters’ rights under Section 14-2-1302.

A transaction may have the same economic effect as a statutory merger even though it is cast in the form of a nonstatutory transaction. For example, assets of the disappearing corporations may be sold for consideration in the form of shares of the surviving corporation, followed by the distribution of those shares by the disappearing corporations to their shareholders and their subsequent dissolution. Transactions have sometimes been structured in nonstatutory form for tax reasons or in an effort to avoid some of the consequences of a statutory merger, particularly appraisal rights to dissenting shareholders. These problems should not occur under the Code since the procedural requirements for authorization and consequences of various types of transactions are largely standardized. For example, dissenters’ rights are granted not only in mergers but also in share exchanges, in sales of all or substantially all the corporate assets, and in amendments to articles of incorporation that significantly affect

rights of shareholders. Further, each section of the Code has independent legal significance, so that courts should respect the form of the transaction.

#### Note to 2003 Amendment

Code Section 14-2-1101(d) is added to allow any of the terms of the plan of merger to be made dependent upon "facts" ascertainable outside of the plan of merger, provided that the manner in which such facts shall operate upon the terms of the merger is clearly and expressly set forth in the plan of merger. This added flexibility for a plan of merger follows Section 11.02(d) of the Model Business Corporation Act and Delaware General Corporation Law Section 251. The definition of "facts" is added to be consistent with that found in Code Sections 14-2-601, 14-2-602 and 14-2-624.

#### Cross-References

Abandonment of merger, see § 14-2-1103. Amendment of articles of incorporation, see § 14-2-1106. Approval by shareholders, see § 14-2-1103. Articles of merger or share exchange, see § 14-2-1105. Certificate of merger or share exchange, see § 14-2-1105. Dissenters' rights, see Article 13. Effect of merger, see § 14-2-1106. Merger of subsidiary into parent, see § 14-2-1104. Merger with foreign corporation, see § 14-2-1107. Merger with Secretary of State corporation, see § 14-2-1108. Merger with joint-stock association, see § 14-2-1109. Publication of notice of merger or share exchange, see § 14-2-1105.1. Share exchange, see § 14-2-1102.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code 1933, § 22-1001 and former Code Section 14-2-210, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Merger statutes not to be used for sham purpose.** — Where a corporation is unable to eliminate a minority stockholder by simply adopting a bylaw or voting to purchase the minority's stock, its majority stockhold-

ers cannot accomplish the same purpose by setting up a second corporation wholly owned by them whose sole purpose is to enable it to take advantage of the merger statutes. *Bryan v. Brock & Blevins Co.*, 490 F.2d 563 (5th Cir.), cert. denied, 419 U.S. 844, 95 S. Ct. 77, 42 L. Ed. 2d 72 (1974) (decided under former Code 1933, § 22-1001).

*Cited in* *Magner v. One Secs. Corp.*, 258 Ga. App. 520, 574 S.E.2d 555 (2002).

#### 14-2-1102. Share exchange.

(a) A corporation may acquire all of the outstanding shares of one or more classes or series of another corporation through a share exchange if the board of directors of each corporation adopts and its shareholders (if required by Code Section 14-2-1103) approve the share exchange.

(b) The plan of share exchange must set forth:

(1) The name of the corporation whose shares will be acquired and the name of the acquiring corporation;

(2) The terms and conditions of the share exchange;

(3) The manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring or any other corporation or for cash or other property in whole or in part.



(c) The plan of share exchange may set forth other provisions relating to the share exchange.

(d) Any of the terms of the plan of share exchange may be made dependent upon facts ascertainable outside of the plan of share exchange, provided that the manner in which such facts shall operate upon the terms of the share exchange is clearly and expressly set forth in the plan of share exchange. As used in this subsection, the term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(e) This Code section does not limit the power of a corporation to acquire all or part of the shares of one or more classes or series of another corporation through a voluntary exchange of shares or otherwise. (Code 1981, § 14-2-1102, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2003, p. 897, § 7.)

**The 2003 amendment**, effective July 1, 2003, added subsection (d) and redesignated former subsection (d) as present subsection (e).

#### COMMENT

Source: Model Act, section 11.02. Former Georgia law contained no counterpart to these provisions, which were introduced into the Model Act in 1976 as section 72A.

Section 14-2-1102 establishes a procedure by which a direct exchange of shares for cash or other consideration in corporate combinations may be effected under the same safeguards applicable to statutory mergers or similar transactions. A share exchange under Section 14-2-1102 is binding upon all shareholders of the acquired class or series of shares.

Under Section 14-2-1102, all shares of a particular class or series of shares must be acquired. However, shares of one or more classes or series may be excluded from the plan or may be included on different basis. After the plan is adopted and approved by the shareholders as required by Section 14-2-1103, it is binding on all holders of shares of the class or series to be acquired; members of the class or series, however, have the right to dissent under Article 13.

Subsection (b)(3) provides that it is not necessary that a share exchange under Section 14-2-1102 be on a share-for-share basis. The consideration for the shares being acquired may be "shares, obligation, or other securities of the acquiring or any other corporation or ... cash or other property in whole or part."

The effects of an approved share exchange, like the effects of an approved merger, are set by the terms of the plan and by operation of law, so that in both cases shareholders of an "acquired corporation" (one that is not the surviving corporation nor the acquiring corporation) lose their status as shareholders of the acquired corporation, except to the extent of their dissenter's rights under Article 13.

Subsection (d) makes clear that a plan of share exchange pursuant to this article is not the exclusive means of exchanging shares. Voluntary exchange offers, available on an individual basis, without approval of the holders of the class or series, still remain available under the Code.

**Note to 2003 Amendment**

Code Section 14-2-1102(d) is added to allow any of the terms of a plan of share exchange to be made dependent upon "facts" ascertainable outside of the plan of share exchange, in the same way that may be done with a plan of merger under Code Section 14-2-1101(d). This added flexibility for a plan of share exchange follows Section 11.03(d) of the Model Business Corporation Act. The same definition of "facts" is added to Code Section 14-2-1102(d) as is found in Code Section 14-2-1101(d) and Code Sections 14-2-601, 14-2-602 and 14-2-624.

**Cross-References**

Abandonment of share exchange, see § 14-2-1103. Approval by shareholders, see § 14-2-1103. Articles of share exchange, see § 14-2-1105. Certificate of share exchange, see § 14-2-1105. Classes of shares, see § 14-2-601. Definitions, see § 14-2-140. Dissenters' rights, see Article 13. Effect of share exchange, see § 14-2-1106. Series of shares, see § 14-2-602. Share exchange with foreign corporation, see § 14-2-1107. Share exchange with Secretary of State corporation, see § 14-2-1108. Share exchange with joint-stock association, see § 14-2-1109.

**14-2-1103. Action on plan.**

(a) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger and the board of directors of the corporation whose shares will be acquired in the share exchange shall submit the plan of merger (except as provided in subsection (h) of this Code section) or share exchange for approval by its shareholders.

(b) For a plan of merger or share exchange to be approved:

(1) The board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors elects, because of conflict of interest or other special circumstances, to make no recommendation and communicates the basis for its election to the shareholders with the plan; and

(2) The shareholders entitled to vote must approve the plan as provided in subsections (e), (f), and (g) of this Code section.

(c) The board of directors may condition its submission of the proposed merger or share exchange on any basis.

(d) The corporation shall notify each shareholder entitled to vote of the proposed shareholders' meeting in accordance with Code Section 14-2-705. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(e) Unless this chapter, the articles of incorporation, the bylaws, or the board of directors (acting pursuant to subsection (c) of this Code section) requires a greater vote or a vote by voting groups, the plan of merger or share exchange to be authorized must be approved by:

(1) A majority of all the votes entitled to be cast on the plan by all shares entitled to vote on the plan, voting as a single voting group; and



(2) A majority of all the votes entitled to be cast by holders of the shares of each voting group entitled to vote separately on the plan as a voting group by the articles of incorporation.

(f) Shares of a class or series not otherwise entitled to vote on the merger are entitled to vote on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by that class or series of shares voting as a separate voting group on the proposed amendment under Code Section 14-2-1004 as a part of the voting group described in paragraph (1) of subsection (e) of this Code section.

(g) Shares of a class or series included in a share exchange but not otherwise entitled to vote on the plan of share exchange are entitled to vote, with each class or series constituting a separate voting group.

(h) Action by the shareholders of the surviving corporation on a plan of merger or by the shareholders of the acquiring corporation in a share exchange is not required if:

(1) The articles of incorporation of the surviving or acquiring corporation will not differ (except for amendments enumerated in Code Section 14-2-1002) from its articles before the merger or share exchange;

(2) Each share of stock of the surviving or acquiring corporation outstanding immediately before the effective date of the merger or share exchange is to be an identical outstanding or reacquired share immediately after the merger or share exchange; and

(3) The number and kind of shares outstanding immediately after the merger or share exchange, plus the number and kind of shares issuable as a result of the merger or share exchange and by the conversion of securities issued pursuant to the merger or share exchange or the exercise of rights and warrants issued pursuant to the merger or share exchange, will not exceed the total number and kind of shares of the surviving or acquiring corporation authorized by its articles of incorporation immediately before the merger or share exchange.

(i) After a merger or share exchange is authorized, and at any time before articles of merger or a certificate of merger or share exchange is filed, the planned merger or share exchange may be abandoned (subject to any contractual rights) without further shareholder action, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors. (Code 1981, § 14-2-1103, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 49; Ga. L. 1993, p. 1231, § 14; Ga. L. 1996, p. 1203, § 7; Ga. L. 1997, p. 1165, § 10.)

**Law reviews.** — For article discussing financial statement required under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article, "The Acquisition

Process and the Closely-Held Corporation: Selected Legal Aspects," see 36 Mercer L. Rev. 567 (1985). For article, "Some Distinc-

tive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

#### COMMENT

Source: Model Act, section 11.03. This replaces former § 14-2-212.

Subsection (b) requires the board of directors to propose the plan of merger or share exchange and then submit the proposal to the shareholders. When proposing a plan of merger (other than parent-subsidiary mergers covered by Section 14-2-1104) or share exchange, the board of directors must make a recommendation to the shareholders (in the case of a share exchange, only to the holders of shares to be acquired) that the plan be approved, unless it elects that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so elects, it must describe the conflict or circumstances, and communicate the basis for its election, when presenting the proposed plan of merger or share exchange to the shareholders. See the Comment to Code Section 14-2-1003(b).

Subsection (b)(1) of the Model Act has been amended by replacing the concept of "determination" of a conflict of interest with that of an "election" not to make a recommendation, in order to eliminate any negative implications that a board with a conflict of interest may not communicate with its shareholders; candid communication remains appropriate, and fair recommendations remain permissible, even for a board with a conflict of interests. It is intended that a board of directors may recommend a merger or share exchange to the shareholders in those cases where the directors determine that there is a conflict of interest, or other special circumstances, so long as the board determines that, in light of all the circumstances and the disclosures made to such shareholders, such recommendation should be made. A provision permitting submission of a merger or share exchange to shareholders without recommendation is a departure from judicial decisions in other jurisdictions, which generally hold that a board has a duty to recommend a course of action to shareholders. See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. Supr. 1985) *Jewel Companies, Inc. v. Pay Less Drug Stores Northwest, Inc.*, 741 F.2d 1555 (9th Cir. 1984), and *ConAgra, Inc. v. Cargill, Inc.*, 222 Neb. 136, 382 N.W.2d 576 (1986).

Subsection (c) permits the board of directors to condition its submission of a plan of merger or share exchange on any basis; for example, the board may direct that the plan is approved only if it receives a favorable vote of a specified percentage of the disinterested shareholders voting on the plan, or approval of a voting group, voting separately, that does not otherwise have the right to vote separately, or that shareholders holding no more than a specified number or percentage of shares file notice of intent to demand payment under Article 13. Former Section 14-2-212(d) created an implicit right to impose conditions, since it allowed mergers to be abandoned even after shareholder approval, "pursuant to provisions therefore, if any, set forth in the plan of merger or consolidation."

Subsection (d) requires notice of a shareholders' meeting in accordance with the general provisions of Section 14-2-705, which requires a minimum of 10 days' notice. Former § 14-2-212(b) treated votes on mergers and consolidations as special events, and required written notice of a shareholders' meeting at least 20 days in advance of the meeting, rather than the 10 days required for most other matters by § 14-2-113(a). With large publicly held corporations, it is anticipated that the difficulties of securing sufficient proxies for corporate action would generally mean that corporations will give notice more than 10 days in advance, and that this is not a matter of public policy.

Subsection (d) departs from the Model Act in that it does not require notice to holders of classes of shares not entitled to vote. The phrase "whether or not" was



deleted before the phrase "entitled to vote." No justification for such notice could be found, except to notify potential litigants of an opportunity to enjoin a merger.

Subsection (e) states that a plan of merger, to be approved, must be approved by by a majority of all the votes entitled to be cast on the plan. This includes those shares that obtain their voting rights by reason of subsection (f), as well as those with voting rights provided in the articles of incorporation. This is a greater vote than that required for ordinary matters under Section 14-2-725. Section 14-2-140(28) provides that all shares entitled by either the articles of incorporation or this Code to vote generally on a matter are a single voting group for that purpose. Thus a majority of all votes entitled to be cast will be required for approval of a plan. This departs from the Model Act approach, which required approval by each voting group, voting separately, including a class of non-voting shares entitled to vote on the merger by virtue of subsection (f). This could give a veto power, and excessive leverage, to the holders of a small class of shares, and was eliminated.

The articles of incorporation or bylaws of either corporation, however, may require a separate majority vote by one or more voting groups of that corporation. In that event subsection (e)(2) provides that each such voting group must approve the plan by a separate vote. The reference to greater voting requirements in the bylaws is a Georgia modification of subsection (e) of the Model Act, reflecting changes made in Section 14-2-1021, which allow shareholder adoption of such requirements. Where a merger involves an interested shareholder, higher voting requirements may be provided in the bylaws of the corporation adopted by the board of directors, as provided in Sections 14-2-1110 — 14-2-1113.

Subsection (f) entitles holders of non-voting shares to vote on a plan of merger if the plan contains a provision that "if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment." See Section 14-2-1004. Unlike the Model Act, however, these shares obtain voting rights not as separate voting groups, with veto power over the transaction, but as members of a larger voting group, described in subsection (e)(1), including all shares entitled to vote on the merger or share exchange.

The Code thus makes a distinction between amendments to articles of incorporation and mergers, in determining whether voting groups obtain voting rights as a separate group. Internal recapitalization decisions merit more protection for non-voting shares than transactions with third parties, even with dominant shareholders. Small classes of non-voting shares will be protected from overreaching in recapitalizations in which their shares are canceled or redeemed by voting rights. In mergers such voting rights would give the class the power to veto transactions of value to both corporations, which would have the effect of giving a small class, with only a small stake in the transaction, the power to insist on a disproportionate sharing of the gains as a condition for approving it. In these cases holders of non-voting shares are remitted by the Code to their dissenters' rights under Article 13.

Thus nonvoting shares of a corporation can be "cashed out" through a merger under Article 11 without gaining separate voting rights, although this will not be possible through amendment of the articles of incorporation. The Code thus adopts the approach of Delaware law, that distinct sections of the Code will have "independent legal significance," so that what is prohibited by one section may be accomplished in substance through employment of another form of transaction. *Hariton v. Arco Electronics, Inc.*, 41 Del. Ch. 74, 188 A.2d 123 (1963).

Subsection (g) has no counterpart in the Model Act or in former Georgia law. It requires voting by voting groups in a share exchange, with each class or series of shares that is to be acquired in a share exchange entitled to vote as a separate voting group.

This provision protects all classes of shareholders when more than one class or series of shares are being acquired on different terms.

Subsection (h) describes when approval by the shareholders of the surviving corporation is not required. The theory behind this subsection is that shareholders' votes should be required only if the transaction fundamentally alters the character of the enterprise or substantially reduces the shareholders' participation in voting or profit distribution. It is believed that the transactions for which shareholder approval is not required by subsection (h) do not alter the investors' prospects any more than many other management decisions, and thus should not require a shareholder vote.

Subsection (h)(3) (originally subsections (g)(3) & (4) of the Model Act) has been amended to restore the approach of former Georgia law. Former § 14-2-212(a)(3) provided that the plan need not be submitted to shareholders if no new shares would be issued or any new shares to be issued could be issued by the Board of Directors without shareholder approval. Thus, Model Act language that excused a shareholder vote only if the shares issued and to be issued did not exceed prior issued shares by more than 20% was deleted, and language excusing a shareholder vote if the shares that were to be issued would not exceed the previously authorized shares. Generally stock exchange rules will restrict the ability of corporations with listed securities to merge without a shareholder vote. A corporate charter could impose a similar restriction. Public policy does not require a shareholder vote to acquire another business by merger or share exchange where the board possessed authority to issue the same number of shares for cash to finance the same acquisition. Where the Model Act provided separately for participating shares (shares with unlimited rights to participate in distributions) and voting shares (shares with unconditional rights to vote in elections of directors), the Code consolidates these into one subsection, with a reference to "number and kind." There is no intent to cover shares other than those with such voting and participation rights.

Subsection (i) makes it clear that the corporations may abandon without shareholder approval a merger or share exchange even though it has been previously approved by the shareholders. Abandonment under this section does not affect contract rights of third parties. This subsection addresses corporate power, not contract rights. The plan, however, may require that abandonments be approved by shareholders before they are effective.

#### **Note to 1989 Amendment**

The 1989 amendment added the phrase "or share exchange" to subsection (e) after the first reference to "merger" to correct an omission in the 1988 enactment of the Code.

#### **Note to 1993 Amendment**

The 1993 amendment added the words "votes entitled to be cast by holders of the" to subsection (e)(2). This clarifies that shareholders vote the number of votes entitled to be cast by each share according to the articles of incorporation, which may in some cases not be on the basis of one share, one vote. This change makes subsection (e)(2) consistent with subsection (e)(1).

#### **Note to 1996 Amendment**

Subsection (h)(2) was amended to conform generally to Delaware General Corporation Law §251(f)(2). Former Code Section 14-2-1103(h)(2) required that, in order to avoid submitting a plan of merger for action by the shareholders of the surviving corporation, each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger had to hold the same number of shares, with identical designation, preferences, limitations, and relative rights,



immediately after the merger. The 1996 amendment was added to address the situation where a corporation owns shares of the surviving corporation immediately before the effective date of the merger. Under former section 14-2-1103(h)(2), action by the shareholders of the surviving corporation was arguably required, because (for one thing) the merger caused the shares to lose their voting rights (see Code section 14-2-721). As long as the other conditions of subsections (h)(2) and (h)(3) are met, the 1996 amendment allows a surviving corporation to merge with a corporation owning shares of the surviving corporation immediately before the effective date of the merger without submitting the plan of merger for action by the shareholders of the surviving corporation. It is believed that such a transaction does not alter investors' prospects any more than many other management decisions, and thus should not require a vote of shareholders.

#### Note to 1997 Amendments

Subsection (h) was amended to include references to share exchanges. This makes all of the rules for share exchanges parallel to those for mergers.

#### Cross-References

Director standards of conduct, see §§ 14-2-830 & 14-2-831. Dissenters' rights, see Article 13. Distribution, see §§ 14-2-140 & 14-2-640. "Notice" defined, see § 14-2-141. Notice of shareholder meeting, see § 14-2-705. Shareholder action without meeting, see § 14-2-704. Supermajority quorum and voting requirements, see § 14-2-727, Article 11, Part 2, and Article 11A. Unanimous consent of shareholders, see § 14-2-704. Voluntary share exchange, see §§ 14-2-1102 & 14-2-1107. Voting by voting groups generally, see §§ 14-2-725 & 14-2-726. Voting by voting group on amendment of articles of incorporation, see § 14-2-1004. Voting entitlement of shareholders generally, see § 14-2-721. "Voting group" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-212, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Changes to merger plans not material.** — Where merger plans were changed only by a corrected typographical error and a

non-material change, these changes did not violate O.C.G.A. § 14-2-1103 as they did not materially affect the substance of the mergers or the minority shareholder's dissenters' rights. *Magner v. One Secs. Corp.*, 258 Ga. App. 520, 574 S.E.2d 555 (2002).

**Cited in** *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir. 1982).

### RESEARCH REFERENCES

**C.J.S.** — 19 C.J.S., Corporations, §§ 798-802.

#### 14-2-1104. Merger with subsidiary.

(a) A parent corporation that owns at least 90 percent of the outstanding shares of each class and series of a subsidiary corporation may merge the subsidiary into itself or into another such subsidiary or merge itself into the subsidiary without the approval of the board of directors or shareholders of the subsidiary.

(b) The board of directors of the parent shall adopt a plan of merger that sets forth:

(1) The names of the parent and subsidiary; and

(2) The manner and basis of converting the shares of the parent or subsidiary into shares, obligations, or other securities of the surviving corporation or any other corporation or into cash or other property in whole or in part.

(c) If, as provided under subsection (a) of this Code section, approval of a merger by the subsidiary's shareholders is not required, the surviving corporation shall, within ten days after the effective date of the merger, notify each of the subsidiary's shareholders that the merger has become effective.

(d) Except as provided in subsections (a), (b), and (c) of this Code section, a merger between a parent and a subsidiary shall be governed by the provisions of Article 11 of this chapter applicable to mergers generally.

(e) Any of the terms of the plan of merger may be made dependent upon facts ascertainable outside of the plan of merger, provided that the manner in which such facts shall operate upon the terms of the merger is clearly and expressly set forth in the plan of merger. As used in this subsection, the term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation. (Code 1981, § 14-2-1104, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1999, p. 405, § 8; Ga. L. 2003, p. 897, § 8.)

**The 2003 amendment,** effective July 1, 2003, rewrote this Code section.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2003, "of this Code section" was inserted in subsection (c).

**Law reviews.** — For article, "The Acquisition Process and the Closely-Held Corporation: Selected Legal Aspects," see 36 Mercer L. Rev. 567 (1985).

### COMMENT

Source: Model Act, section 11.04. This replaces former § 14-2-214.

Subsection (a) defines a "parent" corporation as one that owns at least 90 percent of the outstanding shares of each class of another corporation, and a "subsidiary" corporation as one whose shares are so owned. Section 14-2-1104 permits merger of a subsidiary into its parent corporation upon adoption of a plan of merger by the board of directors of the parent alone.

Further, the merger transaction need not be approved by the shareholders of either corporation. Approval by the shareholders of the subsidiary is meaningless because the parent's share ownership is sufficient to ensure the plan will be approved. Approval by the parent's shareholders is also unnecessary because the transaction does not materially change their rights: the ownership of the parent corporation is being changed only from 90 percent indirect ownership to 100 percent direct ownership of the assets, and no significant amendment of the parent's articles of incorporation is being made. For the same reason, shareholders of the parent corporation do not have the right to dissent from the transaction under Article 13.



The provisions governing short form mergers are intended to authorize, subject to the provisions of Section 14-2-1107 of this Code, mergers with foreign corporations that are subsidiaries of Georgia corporations.

Subsection (b) requires the board of directors of the parent to approve a plan of merger. Previously § 14-2-214(a) required both Boards of directors to approve the plan. Separate action by the board of directors of the subsidiary is unnecessary because the share ownership of the parent corporation is normally sufficient to permit it to elect or remove the subsidiary's board of directors.

Subsection (c) requires a copy or summary of the plan of merger to be sent to each shareholder of the subsidiary who does not waive the mailing requirement in writing. Previously § 14-2-214(b) did not provide for such a waiver. Subsection (c) of the Model Act was amended to provide a time requirement for notice of the short form merger to shareholders. The ten day notice preserves the rule of prior law, in O.C.G.A. § 14-2-214(b), and is consistent with the notice of dissenter's rights required under Section 14-2-1322.

Minority shareholders of the subsidiary corporation may receive shares, obligations, or other securities of the parent or any other corporation, or cash or other property in whole or in part in exchange for their shares. Shareholders of the subsidiary corporation have a right to dissent from the merger transaction under Article 13.

Subsection (d) of the Model Act was deleted entirely. The intent is to preserve the approach of former Georgia law, which did not require 30 days advance notice to shareholders of a short form merger. The flexibility of accomplishing a short form merger without a 30 day delay can be important in corporate restructuring. Shareholder rights are adequately protected by the subsequent notice and the availability of dissenter's rights.

Subsection (d) provides that articles of merger or a certificate of merger may not contain amendments to the articles of incorporation of the parent corporation, other than the routine amendments that any board of directors may adopt under Section 14-2-1002. Thus, if the merger requires issuance of more parent corporation shares than are currently authorized, it must be accomplished under Section 14-2-1103, in order to amend the parent's articles to authorize additional shares.

#### **Note to 1999 Amendment**

This section was amended to permit a short form merger of a parent corporation into a subsidiary corporation. The amendment allows a parent corporation owning at least 90% of the outstanding shares of each class of a subsidiary corporation's stock to merge into the subsidiary corporation without the approval of the parent corporation's shareholders if all of the conditions in subsection (b) are met.

#### **Note to 2003 Amendment**

Code Section 14-2-1104 was amended in 1999 to allow the short-form merger of a parent into a subsidiary (a reverse merger) without shareholder approval. The Model Business Corporation Act (the "Model Act") was also amended in 1999 to permit a reverse merger pursuant to the short-form merger statute (MBCA § 1105). As amended, the Model Act short-form merger statute does not dispense with the requirement of approval by the parent's shareholders if the parent is not the surviving corporation. The amendment to Code Section 14-2-1104 follows the approach of the Model Act, in that it only dispenses with board and shareholder approval requirements at the subsidiary level. The revised Code Section 14-2-1104 does not in itself dispense with approval by the shareholders of the parent, but under Code Section 14-2-1103(h), a merger of the subsidiary upstream into the parent would usually not require approval of the parent's shareholders, because in such cases the parent's articles of incorporation are usually not

affected by the merger and the parent usually does not issue stock exceeding the number and kind of shares authorized by its articles of incorporation. If, however, a parent is merged downstream into the subsidiary, approval by the parent's shareholders would be required under this revision of Code Section 14-2-1104 (as is the case under Section 253 of the Delaware General Corporation Law). Because the vote of the parent's shareholders will now be required for a downstream merger of a parent into a subsidiary, the former requirements of Section 14-2-1104(b) (identical articles of incorporation and bylaws, no change in shareholder rights, etc.) are eliminated from Section 14-2-1104. A concurrent amendment to Code Section 14-2-1302 also follows the Delaware approach by eliminating dissenters' rights in a downstream merger of the parent into the subsidiary if shareholders of the parent receive the same number and kind of shares of the surviving corporation and no additional shares are required to be authorized. In addition to conforming to the Model Act, the amendment clarifies any potential ambiguity in the 1999 amendment to Code Section 14-2-1104 as to whether notice had to be given to the shareholders of the parent where a subsidiary was merged into the parent pursuant to Code Section 14-2-1104. The 1999 amendment was not intended to require such notice.

Code Section 14-2-1104(e) is added to allow any of the terms of the plan of merger with a subsidiary at least 90% owned to be made dependent upon "facts" ascertainable outside of the plan of merger, in the same way that may be done with a plan of merger under Code Section 14-2-1101(d). The same definition of "facts" is added to Code Section 14-2-1104(e) as is found in Code Sections 14-2-1101(d), 14-2-1102(d), 14-2-601, 14-2-602 and 14-2-624. This added flexibility for a subsidiary merger follows Delaware General Corporation Law Section 253.

#### **Cross-References**

Amendment of articles of incorporation by directors, see § 14-2-1002. Articles of merger, see § 14-2-1105. Certificate of merger, see § 14-2-1105. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Dissenters' rights, see § 14-2-1302(a) and Article 13. Foreign corporations, mergers with, see § 14-2-1107. "Notice" defined, see § 14-2-141. Notice of short form merger, see § 14-2-1320(b). Notice of corporate action to dissenters, see § 14-2-1322.

### **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-214, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Cited in** Atlantic States Constr., Inc. v. Beavers, 169 Ga. App. 584, 314 S.E.2d 245 (1984).

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2613.

#### **14-2-1105. Articles or certificate of merger or share exchange.**

(a) After a plan of merger or share exchange is approved by the shareholders, or adopted by the board of directors if shareholder approval is not required, the surviving or acquiring corporation shall deliver to the



Secretary of State for filing articles of merger or share exchange setting forth:

- (1) The plan of merger or share exchange;
  - (2) If shareholder approval was not required, a statement to that effect; and
  - (3) If approval of the shareholders of one or more corporations party to the merger or share exchange was required, a statement that the merger or share exchange was duly approved by the shareholders.
- (b) In lieu of filing articles of merger or share exchange that set forth the plan of merger or share exchange, the surviving or acquiring corporation may file a certificate of merger or share exchange which sets forth:
- (1) The name and state of incorporation of each corporation which is merging or engaging in a share exchange and, in the case of a merger, the name of the surviving corporation into which each other corporation is merging;
  - (2) In the case of a merger, any amendments to the articles of incorporation of the surviving corporation;
  - (3) That the executed plan of merger or share exchange is on file at the principal place of business of the surviving or exchanging corporation, stating the address thereof;
  - (4) That a copy of the plan of merger or share exchange will be furnished by the surviving or exchanging corporation, on request and without cost, to any shareholder of any corporation that is a party to the merger or whose shares are involved in the share exchange;
  - (5) If shareholder approval was not required, a statement to that effect; and
  - (6) If approval of the shareholders of one or more corporations party to the merger or share exchange was required, a statement that the merger or share exchange was duly approved by the shareholders.
- (c) Unless a delayed effective date is specified, a merger or share exchange takes effect when the articles or certificate of merger or share exchange is filed. (Code 1981, § 14-2-1105, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 50; Ga. L. 1990, p. 257, § 15.)

#### COMMENT

Source: Model Act, section 11.05. This replaces former §§ 14-2-213 & 14-2-216(a).

The articles of merger or share exchange formally make the terms of the transaction a matter of public record and the effective date of the articles is the effective date of their filing unless a delayed effective date is utilized. See Section 14-2-123.

Subsection (a)(3) of the Model Act has been simplified, to require only a statement that the shareholders duly approved the plan of merger or share exchange, if required, rather than the details of the vote, which are of no concern to the Secretary of State.

Subsection (b) has been added to the Model Act provisions. It is based upon Del. Code Ann. tit. 8, § 251(c). Plans of merger can be lengthy and detailed documents, that contain details of business combinations that are inappropriate for public records in some cases. Consequently, a short statement in lieu of the plan of merger or share exchange is permitted. In order to assure that those shareholders who may need the information contained in such documents have full access, this alternative requires that shareholders of all constituent corporations be furnished copies of the plan upon request at no cost.

The introduction of a certificate procedure represents the only substantive change from prior law. Section 14-2-1105 omits requirements of former § 14-2-231(a)(3) that articles of merger explain why no shareholder vote was required, if none occurred. Section 14-2-1105 omits the elaborate filing and publication requirements contained in § 14-2-213, although modified publication requirements have been restored in Section 14-2-1105.1. The provisions of subsection (b) dealing with the effective date of a merger are substantially similar to those of former § 216(a). Provisions requiring the corporation to obtain a certificate for reservation of a corporate name in former § 14-2-213(b) were also omitted.

#### **Note to 1989 Amendment**

The 1989 amendment added the phrase "or share exchange" to subsection (b) after the first reference to "merger" to correct an omission in the 1988 enactment of the Code.

#### **Note to 1990 Amendment**

The 1990 amendment adds to the contents of a certificate of merger or share exchange either a statement that no shareholder approval was required in connection with the transaction or a statement that such approval has been duly obtained.

#### **Cross-References**

Approval of merger or share exchange, see § 14-2-1101 et seq. "Deliver" includes mail, see § 14-2-140. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Publication of notice of merger or share exchange, see § 14-2-1105.1. Short form merger, see § 14-2-1104. Voting by voting group, see §§ 14-2-725 & 14-2-726. "Voting group" defined, see § 14-2-140.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2620.      **C.J.S.** — 19 C.J.S., Corporations, § 802.

### **14-2-1105.1. Publication of notice of merger or share exchange.**

(a) Together with the articles or certificate of merger or share exchange, the surviving or acquiring corporation shall deliver to the Secretary of State an undertaking (which may appear in the articles or certificate of merger or be set forth in a letter or other instrument executed by an officer or any person authorized to act on behalf of such corporation) that the request for publication of a notice of filing the articles or certificate of merger or share exchange and payment therefor will be made as required by subsection (b) of this Code section.



(b) No later than the next business day after filing the articles or certificate of merger or share exchange, the surviving or acquiring corporation shall mail or deliver to the publisher of a newspaper which is the official organ of the county where the registered office of the surviving or acquiring corporation is to be located, if the surviving corporation will be required to maintain a registered office in Georgia, or where the registered office of the merging or acquired corporation was located prior to the merger or share exchange in any other case, or which is a newspaper of general circulation published within such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation a request to publish a notice in substantially the following form:

**"NOTICE OF (MERGER) (SHARE EXCHANGE)**

Notice is given that articles or a certificate of (merger) (share exchange) which will effect a (merger) (share exchange) by and between \_\_\_\_\_ (name and state of incorporation of each of the constituent corporations) has been delivered to the Secretary of State for filing in accordance with the Georgia Business Corporation Code. The name of the (surviving) (acquiring) corporation in the (merger) (share exchange) is \_\_\_\_\_, a corporation incorporated in the State of \_\_\_\_\_. The registered office of such corporation (is) (will be) located at \_\_\_\_\_ (address of registered office) and its registered (agent) (agents) at such address (is) (are) \_\_\_\_\_ (name or names of agent or agents)."

The request for publication of the notice shall be accompanied by a check, draft, or money order in the amount of \$40.00 in payment of the cost of publication. The notice shall be published once a week for two consecutive weeks commencing within ten days after receipt of the notice by the newspaper. Failure on the part of the surviving or acquiring corporation to mail or deliver the notice or payment therefor or failure on the part of the newspaper to publish the notice in compliance with this subsection shall not invalidate the merger or share exchange. (Code 1981, § 14-2-1105.1, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 16; Ga. L. 1993, p. 1231, § 15.)

**COMMENT**

Source: Former § 14-2-213.

This replaces former § 14-2-213, which required publication of a similar notice for four consecutive weeks at a fee of \$60. It also required filing with the clerk of the superior court in the county where the registered office of the corporation was located. Further, documents to effect the filing and publication were forwarded, together with the required checks, to the Secretary of State for transmittal to the clerks and newspapers. Local filing has been eliminated entirely by the Code, and publication requirements have been reduced and simplified.

References in the form of notice to multiple registered agents are erroneous. The Code does not provide for such agents, as prior law did. See § 14-2-501.

**Note to 1990 Amendment**

The 1990 amendment makes it clear that any person acting on behalf of the corporation (such as an attorney or other agent) may execute the requisite certificate of publication.

**Note to 1993 Amendment**

The 1993 amendment deals with the timing of submitting a request for publication in connection with the merger or share exchange procedures, permitting such a request to be delivered the business day after filing of the certificate of merger or share exchange with the Secretary of State. The amendment also changes the form of notice in recognition that it generally is published after such filing has occurred.

**Cross-References**

Articles of merger or share exchange, see § 14-2-1105. certificate of merger or share exchange, see § 14-2-1105. Failure to publish notice as grounds for administrative dissolution, see § 14-2-1420(5). Merger, see § 14-2-1101. Share exchange, see § 14-2-1102.

**14-2-1106. Effect of merger or share exchange.**

(a) When a merger governed by this article of this chapter takes effect:

(1) Every other corporation or entity party to the merger merges into the surviving corporation or entity and the separate existence of every corporation or entity except the surviving corporation or entity ceases;

(2) The title to all real estate and other property owned by, and every contract right possessed by, each corporation or entity party to the merger is vested in the surviving corporation or entity without reversion or impairment, without further act or deed, and without any conveyance, transfer, or assignment having occurred;

(3) The surviving corporation or entity has all liabilities of each corporation or entity party to the merger;

(4) A proceeding pending against any corporation or entity party to the merger may be continued as if the merger did not occur or the surviving corporation or entity may be substituted in the proceeding for the corporation or entity whose existence ceased;

(5) The articles of incorporation or other governing documents of the surviving corporation or entity are amended to the extent provided in the plan of merger; and

(6) The shares of each corporation party to the merger and the shares of each of the entities party to the merger that are to be converted into shares, obligations, or other securities of the surviving or any other corporation or into cash or other property are converted and the former holders of the shares are entitled only to the rights provided in the plan of merger or to their rights otherwise provided by law.



(b) When a share exchange takes effect, the shares of each acquired corporation are exchanged as provided in the plan, and the former holders of the shares are entitled only to the share exchange rights provided in the plan of share exchange or to their rights under Article 13 of this chapter.

(c) For purposes of this Code section, the definitions contained in Code Section 14-2-1109 shall be applicable. (Code 1981, § 14-2-1106, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 17; Ga. L. 2003, p. 897, § 9.)

**The 2003 amendment**, effective July 1, 2003, in subsection (a), inserted "or entity" throughout, inserted "governed by Article 11 of this chapter" in the introductory paragraph, in paragraph (a)(2), inserted ", and every contract right possessed by," and added ", without further act or deed, and without any conveyance, transfer, or assignment having occurred" at the end, inserted "or other governing documents" in paragraph (a)(5), and, in paragraph (a)(6), inserted "and the shares of each of the entities party to the merger" and substituted "otherwise provided by law" for "under Article 13 of this

chapter" at the end; and added subsection (c).

**Cross references.** — Determination of rate of employer contribution to Unemployment Compensation Fund in cases of merger or consolidation of corporations, § 34-8-122.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2003, "this article" was substituted for "Article 11 of this chapter" in subsection (a).

**Law reviews.** — For survey article on business associations, see 34 Mercer L. Rev. 13 (1982).

### COMMENT

Source: Model Act, section 11.06. There is no substantial change from prior law governing mergers, under former § 14-2-216(b); no comparable provisions existed for share exchanges.

Section 14-2-1106 describes the legal consequences of a merger or share exchange on its effective date.

Subsection (a) describes the effect of a merger. On the effective date every disappearing corporation that is a party to the merger disappears into the surviving corporation and the surviving corporation automatically becomes the owner of all real and personal property and becomes subject to all liabilities, actual or contingent, of each disappearing corporation. A merger is not a conveyance or transfer, and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. See subsection (a)(2). Further, all pending litigation is continued; the name of the surviving corporation may, but need not be, substituted for the name of a disappearing corporation that is a party to litigation.

The articles of incorporation of the surviving corporation are amended as provided in the plan of merger on the effective date of the merger. See subsection (a)(5).

Subsection (a)(6) provides that if any shareholders to any party to the merger are to receive different shares or cash or property under the plan of merger, the rights of those shareholders after the articles of merger or certificate of merger is filed are limited to their rights under the plan of merger or their rights under Article 13 of this Act.

Subsection (b) describes the effect of a share exchange. On the effective date, the shareholders of the acquired class of shares cease to be shareholders of the acquired corporation. On that date they are entitled to receive only the consideration provided in the plan of share exchange, or the rights of dissenting shareholders under Article 13.

**Note to 1990 Amendment**

The 1990 amendment corrects an error in the section by substituting the term "plan of merger" for "articles of merger."

**Note to 2003 Amendment**

The amendments to Code Section 14-2-1106 conform to the Model Business Corporation Act's language, as amended in 1999, with respect to the effect of a merger by adding a specific reference clarifying that the property of the constituent corporation that vests in the surviving corporation includes every contract right. In addition, language has been added to Code Section 14-2-1106(a)(2) explicitly stating that no conveyance, transfer or assignment occurs when property, including contract rights, are acquired by the surviving corporation in a merger. These amendments are intended to clarify, not change, existing law. This Code Section has been further amended by adding references to mergers with other entities to conform to the Model Act and to reflect the 1996 amendment to Code Section 14-2-1109.

**Cross-References**

Dissenters' rights, Article 13. Effective date of merger or share exchange, see § 14-2-123. "Proceeding" defined, see § 14-2-140.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions and the issues dealt with, decisions under former Civil Code 1895, § 1863, former Civil Code 1910, § 2227, former Code 1933, § 22-1007, and former Code Section 14-2-216, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Effect of merger on liabilities.** — The acquiring corporation by reason of a merger becomes liable for the payment of all unpaid debts and unperformed contracts of the acquired corporation, and is bound by the terms of the contract entered into between the latter and another corporation prior to the merger. *Hawkins v. Central of Ga. Ry.*, 119 Ga. 159, 46 S.E. 82 (1903); *Atlanta, B. & A.R.R. v. Atlantic Coast Line R.R.*, 138 Ga. 353, 75 S.E. 468 (1912) (decided under former Civil Code 1895, § 1863 and former Civil Code 1910, § 2227).

**Name of corporate defendant in legal proceeding.** — An action could proceed against a former corporation as if a merger had never taken place, or the surviving corporation could be substituted as a defen-

dant. *Employers' Liab. Assurance Corp. v. Keelin*, 132 Ga. App. 459, 208 S.E.2d 328 (1974) (decided under former Code 1933, § 22-1007).

**Where one corporation conveys its property to another,** this alone does not destroy the corporate existence of the grantor or constitute a merger of the two corporations, or render the grantee subject to an action for damages for a tort previously committed by the grantor. The grantor is still subject to suit; and, if liable, the question of seeking to subject property to such liability on a judgment rendered thereon is different from suing the grantee directly for the tort. *Louisville & N.R.R. v. Hughes*, 134 Ga. 75, 67 S.E. 542 (1910) (decided under former Civil Code 1910, § 2227).

**Cited in** *Lowe v. American Mach. & Foundry Co.*, 132 Ga. App. 572, 208 S.E.2d 585 (1974); *Rosing v. Dwoskin Decorating Co.*, 141 Ga. App. 617, 234 S.E.2d 128 (1977); *Donald v. Luckie Strike Loans, Inc.*, 148 Ga. App. 318, 251 S.E.2d 168 (1978); *Albermarle, Inc. v. Eaton Corp.*, 183 Ga. App. 80, 357 S.E.2d 887 (1987).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2624-2641.

**C.J.S.** — 19 C.J.S., Corporations, §§ 807-810.

**ALR.** — Liability of corporation for debts of predecessor, 15 ALR 1112; 149 ALR 787.

Changes in corporate organization as affecting status as trustee, executor, administrator, or guardian, 131 ALR 753.

Statutory superadded liability of stockholders as affected by reorganization, consolidation, or merger of corporation, 154 ALR 427.

Liability of corporation for torts of subsidiary, 7 ALR3d 1343.

Merger or consolidation of corporation as terminating charitable trust of which corporation is beneficiary, 34 ALR3d 749.

Validity and construction of state statute making successor corporation liable for taxes of predecessor, 65 ALR3d 1181.

Products liability: liability of successor corporation for injury or damage caused by product issued by predecessor, 66 ALR3d 824.

Successor products liability: form of business organization of successor or predecessor as affecting successor liability, 32 ALR4th 196.

Merger or consolidation of corporate leases as breach of clause in lease prohibiting, conditioning, or restricting assignment or sublease, 39 ALR4th 879.

Liability of successor corporation for punitive damages for injury caused by predecessor's product, 55 ALR4th 166.

### 14-2-1107. Merger or share exchange with foreign corporation.

(a) One or more foreign corporations may merge or enter into a share exchange with one or more domestic corporations if:

(1) In a merger, the merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger;

(2) In a share exchange, the corporation whose shares will be acquired is a domestic corporation, whether or not a share exchange is permitted by the law of the state or country under whose law the acquiring corporation is incorporated;

(3) The foreign corporation complies with Code Section 14-2-1105 if it is the surviving corporation of the merger or acquiring corporation of the share exchange; and

(4) Each domestic corporation complies with the applicable provisions of Code Sections 14-2-1101 through 14-2-1104 and, if it is the surviving corporation of the merger or acquiring corporation of the share exchange, with Code Section 14-2-1105.

(b) Upon the merger or share exchange taking effect, the surviving foreign corporation of a merger and the acquiring foreign corporation of a share exchange is deemed:

(1) To appoint the Secretary of State as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders of each domestic corporation party to the merger or share exchange; and

(2) To agree that it will promptly pay to the dissenting shareholders of each domestic corporation party to the merger or share exchange the amount, if any, to which they are entitled under Article 13 of this chapter.

(c) This Code section does not limit the power of a foreign corporation to acquire all or part of the shares of one or more classes or series of a domestic corporation through a voluntary exchange or otherwise. (Code 1981, § 14-2-1107, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, section 11.07. This replaces former § 14-2-217.

Section 14-2-1107 permits mergers or share exchanges between domestic and foreign corporations.

In connection with a plan of merger, the plan must be permitted under the law of the state or country of incorporation of the foreign corporation as well as under the law of Georgia. The surviving corporation, if it is a foreign corporation, must file articles of merger or a certificate of merger to accomplish the disappearance of the domestic corporation or corporations, and thereby irrevocably appoints the Secretary of State as agent for service of process and agrees to pay dissenters in accordance with Article 13.

A plan of share exchange, unlike a plan of merger, need not be authorized by the state or country of incorporation of the acquiring foreign corporation. If the domestic law authorizes a compulsory share exchange to acquire a class or series of shares of a domestic corporation, it makes no difference whether the acquiring corporation is foreign or domestic. This kind of transaction does not affect the separate corporate existence of, or impose the liabilities of the disappearing corporation on, the acquiring foreign corporation.

As observed in the Comments to Section 14-2-1104 the provisions governing so-called short form mergers between a parent and subsidiary corporation are intended to be covered by the provisions of Section 14-2-1107.

Changes from prior law are minor. Subsection (a)(3) requires the foreign corporation to file articles of merger or a certificate of merger if it is the surviving corporation, while former § 14-2-217(b)(2) required the domestic corporation to file such articles of merger. Previously § 14-2-217(c) provided a specific cross reference to short form mergers between a Georgia corporation and a foreign corporation. This language did not appear in the 1969 version of the Model Act, nor in the 1984 edition. Its omission, as indicated previously, is not intended to imply a lack of power to engage in such mergers.

#### Cross-References

Articles of merger or share exchange, see § 14-2-1105. Authority to transact business in this state, see Article 15. Certificate of merger or share exchange, see § 14-2-1105. "Deliver" includes mail, see § 14-2-140. Dissenters' rights, see Article 13. Effective time and date of filing, see § 14-2-123. Fee for service of process on Secretary of State, see § 14-2-122. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Publication of notice of merger or share exchange, see § 14-2-1105.1.

#### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, an opinion under former Code 1933, § 22-1008 and former Code Section 14-2-217, which were repealed by Ga.



L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Implied approval of Commissioner upon merger of insurer.** — Former Code 1933, § 22-1008 (see O.C.G.A. § 14-2-1107), considered along with former Code 1933, § 56-205 (see O.C.G.A. § 33-14-5), compels

the conclusion that the Insurance Commissioner is required to exercise approval authority with respect to the merger of a domestic stock insurer into a foreign stock insurer even when the surviving corporation will be domiciled outside this state. 1972 Op. Att'y Gen. No. 72-152 (decided under former Code 1933, § 22-1008).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2642-2653.

**C.J.S.** — 19 C.J.S., Corporations, § 931.

**ALR.** — Timeliness and sufficiency of

dissenting stockholder's notice of his objection to consolidation or merger and of his demand for payment for his shares, 40 ALR3d 260.

### 14-2-1108. Merger or share exchange with corporations chartered by Secretary of State under other provisions.

(a) Unless prohibited by the laws of this state, banking, insurance, railroad, trust, canal, navigation, express, and telegraph companies, and other corporations whose charters have been granted by the Secretary of State under provisions other than this chapter, may merge or engage in a share exchange with corporations that are subject to this chapter.

(b) Each merging or exchanging corporation shall comply with all the provisions of this chapter relating to mergers or share exchanges, as the case may be, except that, if the laws which govern a merging or exchanging corporation chartered by the Secretary of State under provisions other than the provisions of this chapter contain provisions relating to merger or share exchange which conflict with this chapter, that corporation shall follow the provisions of the laws to which it is subject.

(c) If the surviving corporation in a merger is to be one which could be organized under this chapter, the time and effectiveness and the effect of the merger shall be as provided in this chapter. If the surviving corporation is to be one which could not be organized under this chapter, the time of effectiveness and the effect of the merger shall be as provided in this chapter except insofar as the laws of this state to which the surviving corporation shall be subject otherwise provide. (Code 1981, § 14-2-1108, enacted by Ga. L. 1988, p. 1070, § 1.)

**Cross references.** — Secretary of State corporations generally, § 14-4-1 et seq.

### COMMENT

Source: Former § 14-2-215. There are no comparable provisions in the Model Act.

This section deals with the problem of mergers or share exchanges with corporations chartered by the Secretary of State (under provisions other than the provisions of this Code) with corporations organized under this Code or prior general corporation laws.

It sanctions such combinations to the extent they are not prohibited by other laws (subsection (a)). It indicates the procedures to be followed by the constituent corporations (subsection (b)). It also prescribes the legal effects of these mergers and share exchanges (subsection (c)). Prior law was modified by deleting references to consolidations and replacing them with references to share exchanges.

#### Cross-References

Approval of merger or share exchange, see § 14-2-1101 et seq. Effect of merger or share exchange, see § 14-2-1106. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Secretary of State corporations, see § 14-4-1 et seq.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-215, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Merger with company subsequently adopting corporate law.** — The proposed merger

between a railroad company originally chartered by the General Assembly in 1847, but which amended its charter in 1970 to adopt the provisions of the general corporate laws, and a nonrailroad corporation was not unlawful. *Long v. Atlanta & W.P.R.R.*, 253 Ga. 257, 320 S.E.2d 530 (1984) (decided under former § 14-2-215).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code 1933, § 22-1006 and former Code Section 14-2-215, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Interpretation of 1976 amendment to former § 14-2-215.** — The 1976 amendment to former Code 1933, § 22-1006 (see O.C.G.A. § 14-2-1108) should not be construed to change the legal requirements for mergers and consolidations between banks or trust companies and business corporations as they were established by the enactment of former Code 1933, § 41A-2401 (see O.C.G.A. § 7-1-530(c)) in 1974. 1978 Op. Att'y Gen. No. 78-36 (decided under former Code 1933, § 22-1006).

**Section 7-1-530 modified former subsection (b) pro tanto.** — Former Code 1933, § 41A-2401 (see O.C.G.A. § 7-1-530), concerning merger and consolidation of state banks and trust companies, clearly had the effect of modifying former Code 1933, § 22-1006(b) (see O.C.G.A. § 14-2-1108) pro tanto: in cases of clear conflict between statutes the later repeals the earlier by implication. Moreover, even if the two had been enacted together, former Code 1933, § 41A-2401 (see O.C.G.A. § 7-1-530(c)) would control former Code 1933, § 22-1006 because it was the more specific provision. 1978 Op. Att'y Gen. No. 78-36 (decided under former Code 1933, § 22-1006).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2610.

**C.J.S.** — 19 C.J.S., Corporations, §§ 794-796.

#### 14-2-1109. Merger with other entities.

(a) As used in this Code section, the term:

(1) "Entity" includes any domestic or foreign nonprofit corporation,



domestic or foreign limited liability company, domestic or foreign joint stock association, or domestic or foreign limited partnership.

(2) "Governing agreements" includes the articles of incorporation and bylaws of a corporation or nonprofit corporation, articles of association or trust agreement or indenture and bylaws of a joint stock association, articles of organization and operating agreement of a limited liability company, and the certificate of limited partnership and limited partnership agreement of a limited partnership, and agreements serving comparable purposes under the laws of other states or jurisdictions.

(3) "Joint-stock association" includes any association of the kind commonly known as a joint-stock association or joint-stock company and any unincorporated association, trust, or enterprise having members or having outstanding shares of stock or other evidences of financial and beneficial interest therein, whether formed by agreement or under statutory authority or otherwise, but does not include a corporation, partnership, limited liability partnership, limited liability company, or nonprofit organization. A joint-stock association as defined in this paragraph may be one formed under the laws of this state, including a trust created pursuant to Article 3 of Chapter 12 of Title 53, or one formed under or pursuant to the laws of any other state or jurisdiction.

(4) "Limited liability company" includes limited liability companies formed under the laws of this state or of any other state or territory or the District of Columbia, unless the laws of such other state or jurisdiction forbid the merger of a limited liability company with a corporation.

(5) "Limited partnership" includes limited partnerships formed under the laws of this state or of any other state or territory or the District of Columbia, unless the laws of such other state or jurisdiction forbid the merger of a limited partnership with a corporation.

(6) "Nonprofit corporation" includes corporations which may make no distributions to their members, directors, or officers, except as reasonable compensation for services rendered, and except as otherwise provided by law, formed under the laws of this state or of any other state or territory or the District of Columbia, unless the laws of such other state or jurisdiction forbid the merger of a nonprofit corporation with a corporation formed under a general corporation law.

(7) "Share" includes shares, memberships, financial or beneficial interests, units, or proprietary or partnership interests in a limited liability company, joint-stock association or a limited partnership, but does not include debt obligations of any entity.

(8) "Shareholder" includes every member of a limited liability company or a joint-stock association that is a party to a merger or holder of a share of stock or other evidence of financial or beneficial interest therein.

(b) Any one or more domestic corporations may merge with one or more entities, except an entity formed under the laws of a state or jurisdiction which forbids a merger with a corporation. The corporation or corporations and one or more entities may merge into a single corporation or other entity, which may be any one of the constituent corporations or entities.

(c) The board of directors of each merging corporation and the appropriate body of each entity, in accordance with its governing agreements and the laws of the state or jurisdiction under which it was formed, shall adopt a plan of merger in accordance with each corporation's and entity's governing agreements and the laws of the state or jurisdiction under which it was formed, as the case may be.

(d) The plan of merger:

(1) Must set forth:

(A) The name of each corporation and entity planning to merge and the name of the surviving corporation or entity into which each other corporation and entity plans to merge;

(B) The terms and conditions of the merger; and

(C) The manner and basis of converting the shares of each corporation and the shares, memberships, or financial or beneficial interests or units in each of the entities into shares, obligations, or other securities of the surviving or any other corporation or entity or into cash or other property in whole or in part;

(2) May set forth:

(A) Amendments to the articles of incorporation or governing agreements of the surviving corporation or entity; and

(B) Other provisions relating to the merger.

(e) Any of the terms of the plan of merger may be made dependent upon facts ascertainable outside of the plan of merger, provided that the manner in which such facts shall operate upon the terms of the merger is clearly and expressly set forth in the plan of merger. As used in this subsection, the term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(f) For a plan of merger to be approved, the board of directors of each merging corporation must recommend the plan of merger to the shareholders in the same manner and to the same extent as provided in Code Section 14-2-1103. In the case of any other entity, the plan of merger shall be approved in the manner required by its governing agreements and in compliance with any applicable laws of the state or jurisdiction under which it was formed. In addition, each of the corporations shall comply with all other Code sections of this chapter which relate to the merger of domestic



corporations. Each other entity shall comply with all other provisions of its governing agreements and all provisions of the laws, if any, of the state or jurisdiction in which it was formed which relate to the merger.

(g) Each merging corporation shall comply with the requirements of Code Section 14-2-1105. (Code 1981, § 14-2-1109, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 51; Ga. L. 1991, p. 810, § 6; Ga. L. 1996, p. 1203, § 8; Ga. L. 1997, p. 143, § 14; Ga. L. 2003, p. 897, § 10.)

**The 2003 amendment**, effective July 1, 2003, inserted "or a" in the middle of paragraph (a)(8), added subsection (e), and redesignated former subsections (e) and (f) as present subsections (f) and (g), respectively.

**Law reviews.** — For review of 1996 corporation, partnership, and association legislation, see 13 Ga. St. U. L. Rev. 70.

### COMMENT

Source: Former § 14-2-218. There is no comparable Model Act provision.

This preserve the ability of corporations to engage in business combinations with joint-stock associations, and provides a procedure for both the corporations and joint-stock associations to use to accomplish this.

#### Note to 1989 Amendment

The 1989 amendment added subsections (a)(2) and (i), and added references to limited partnerships throughout. The 1989 amendment expands former law concerning mergers of corporations with unincorporated enterprises by including limited partnerships within its authority. This was drawn from Delaware General Corporation Law, Tit. 8, § 263, as amended, 1988. The Delaware act provides for mergers of limited partnerships and corporations without restriction as to the nature of the surviving entity. Unlike Delaware law, section 1109 does not permit corporations to merge into limited partnerships, but only permits mergers of limited partnerships into corporations. Subsection (i) was drawn from Code Section 14-2-904(a)(4) (Supp. 1988). Parallel authority is granted limited partnerships by Code Section 14-9-206.1.

#### Note to 1996 Amendments

The principal purposes of the 1996 amendments were three-fold. First, they expanded the entities with which corporations could merge to include nonprofit corporations and limited liability companies. Provision was made in the 1991 revisions of Code Section 14-3-1101 for mergers of nonprofit and business corporations. Provision was made in the 1995 amendment of 14-11-901 for mergers of limited liability companies and business corporations. Mergers of limited partnerships with corporations are authorized by Code Section 14-9-206.1. The second change was to allow business corporations to merge into these other entities. Formerly Code section 14-2-1109(b) only permitted corporation to be the surviving entity. Third, the amendments provide that, with the exception of joint stock associations, which are not statutory entities, all other entities participating in the merger will be governed by their respective statutes. Previous provisions that required limited partnerships to comply with the provisions of the Business Corporation Code were eliminated.

#### Note to 2003 Amendment

Code Section 14-2-1109(e) is added to allow any of the terms of the plan of merger to be made dependent upon "facts" ascertainable outside of the plan of merger, in the

same way that may be done with a plan of merger of two corporations under Code Section 14-2-1101(d). The same definition of "facts" is added to Code Section 14-2-1109(e) as is found in Code Sections 14-2-1101(d), 14-2-1102(d), 14-2-1104(e), 14-2-601, 14-2-602 and 14-2-624. This added flexibility for a merger between a corporation and another entity under Code Section 14-2-1109 follows Sections 263 and 264 of the Delaware General Corporation Law.

#### **Cross-References**

Articles of merger, see § 14-2-1105. Certificate of merger, see § 14-2-1105. "Domestic corporation" defined, see "corporation" in § 14-2-140. Effect of merger, see § 14-2-1106. Mergers, see § 14-2-1101. Plan of merger, see § 14-2-1103. Shareholder action on plan of merger, see § 14-2-1103. "Shares" defined, see § 14-2-140.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2608-2610.

**C.J.S.** — 19 C.J.S., Corporations, §§ 794-796.

#### **14-2-1109.1. Election to become limited liability company.**

(a) As used in this Code section, the term "limited liability company" means any limited liability company formed under Chapter 11 of this title.

(b) A corporation may elect to become a limited liability company if the board of directors adopts and its shareholders approve a plan of election.

(c) The plan of election must set forth:

(1) The name of the limited liability company to be formed pursuant to such election;

(2) The manner and basis of converting the shares of such corporation into interests as members of the limited liability company to be formed pursuant to such election or a statement that such information is contained in the operating agreement proposed for such limited liability company;

(3) The effective date and time of such election, if later than the date and time the certificate of election is filed;

(4) The contents of the articles of organization that shall be the articles of organization of the limited liability company to be formed pursuant to such election unless and until modified in accordance with the provisions of Chapter 11 of this title; and

(5) The contents of the operating agreement to be entered into among the persons who will be the members of the limited liability company to be formed pursuant to such election, which shall, if not separately provided in the plan of election, state the manner and basis for the conversion of the shares of such corporation into interests as members of the limited liability company to be formed pursuant to such election and that notification that approval of the election will be deemed to be execution of the operating agreement by such persons.



(d) For a plan of election to become a limited liability company to be approved:

(1) The board of directors must recommend the plan of election to the shareholders in the same manner as provided in subsections (a) through (d) of the Code Section 14-2-1103; and

(2) All of the shareholders must approve the plan of election.

(e) After a plan of election is approved by the shareholders, the corporation shall deliver to the Secretary of State for filing a certificate of election complying with subsection (b) of Code Section 14-11-212. (Code 1981, § 14-2-1109.1, enacted by Ga. L. 1993, p. 123, § 2.)

## PART 2

### FAIR PRICE REQUIREMENTS

**Law reviews.** — For article, "Comparison of Features of Old and New Business Corporation Laws Relating to Domestic Corporations," see 5 Ga. St. B.J. 13 (1968). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

#### 14-2-1110. Definitions.

As used in this part, the term:

(1) "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with a specified person.

(2) "Announcement date" means the date of the first general public announcement of the proposal of the business combination.

(3) "Associate," when used to indicate a relationship with any person, means:

(A) Any corporation or organization, other than the corporation or a subsidiary of the corporation, of which such person is an officer, director, or partner or is the beneficial owner of 10 percent or more of any class of equity securities;

(B) Any trust or other estate in which such person has a beneficial interest of 10 percent or more or as to which such person serves as trustee or in a similar fiduciary capacity; and

(C) Any relative or spouse of such person, or any relative of such spouse, who has the same home as such person.

(4) "Beneficial owner" means a person shall be considered to be the beneficial owner of any equity securities:

(A) Which such person or any of such person's affiliates or associates owns, directly or indirectly;

(B) Which such person or any of such person's affiliates or associates, directly or indirectly, has:

(i) The right to acquire, whether such right is exercisable immediately or only after the passage of time, pursuant to any agreement, arrangement, or understanding or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; or

(ii) The right to vote pursuant to any agreement, arrangement, or understanding; or

(C) Which are owned, directly or indirectly, by any other person with which such person or any of such person's affiliates or associates has any agreement, arrangement, or understanding for the purpose of acquiring, holding, voting, or disposing of equity securities; provided, however, that a person shall not be considered to be a beneficial owner of any equity securities which (i) have been tendered pursuant to a tender or exchange offer made by such person or such person's affiliates or associates until such tendered stock is accepted for purchase or exchange or (ii) such person or such person's affiliates or associates have the right to vote pursuant to any agreement, arrangement, or understanding if the agreement, arrangement, or understanding to vote such stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made to ten or more persons.

(5) "Business combination" means:

(A) Any merger of the corporation or any subsidiary with:

(i) Any interested shareholder; or

(ii) Any other corporation, whether or not itself an interested shareholder, which is, or after the merger would be, an affiliate of an interested shareholder that was an interested shareholder prior to the consummation of the transaction;

(B) Any share exchange with (i) any interested shareholder or (ii) any other corporation, whether or not itself an interested shareholder, which is, or after the share exchange would be, an affiliate of an interested shareholder that was an interested shareholder prior to the consummation of the transaction;

(C) Any sale, lease, transfer, or other disposition, other than in the ordinary course of business, in one transaction or in a series of transactions in any 12 month period, to any interested shareholder or any affiliate of any interested shareholder, other than the corporation or any of its subsidiaries, of any assets of the corporation or any



subsidiary having, measured at the time the transaction or transactions are approved by the board of directors of the corporation, an aggregate book value as of the end of the corporation's most recently ended fiscal quarter of 10 percent or more of the net assets of the corporation as of the end of such fiscal quarter;

(D) The issuance or transfer by the corporation, or any subsidiary, in one transaction or a series of transactions in any 12 month period, of any equity securities of the corporation or any subsidiary which have an aggregate market value of 5 percent or more of the total market value of the outstanding common and preferred shares of the corporation whose shares are being issued to any interested shareholder or any affiliate of any interested shareholder, other than the corporation or any of its subsidiaries, except pursuant to the exercise of warrants or rights to purchase securities offered pro rata to all holders of the corporation's voting shares or any other method affording substantially proportionate treatment to the holders of voting shares;

(E) The adoption of any plan or proposal for the liquidation or dissolution of the corporation in which anything other than cash will be received by an interested shareholder or any affiliate of any interested shareholder; or

(F) Any reclassification of securities, including any reverse stock split, or recapitalization of the corporation, or any merger of the corporation with any of its subsidiaries, or any share exchange with any of its subsidiaries, which has the effect, directly or indirectly, in one transaction or a series of transactions in any 12 month period, of increasing by 5 percent or more the proportionate amount of the outstanding shares of any class or series of equity securities of the corporation or any subsidiary which is directly or indirectly beneficially owned by any interested shareholder or any affiliate of any interested shareholder.

(6) "Continuing director" means any member of the board of directors who is not an affiliate or associate of an interested shareholder or any of its affiliates, other than the corporation or any of its subsidiaries, and who was a director of the corporation prior to the determination date, and any successor to such continuing director who is not an affiliate or an associate of an interested shareholder or any of its affiliates, other than the corporation or its subsidiaries, and is recommended or elected by a majority of all of the continuing directors.

(7) "Control," including the terms "controlling," "controlled by," and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise, and the beneficial ownership of

shares representing 10 percent or more of the votes entitled to be cast by a corporation's voting shares shall create an irrebuttable presumption of control.

(8) "Corporation," in addition to the definition contained in Code Section 14-2-140, shall include any trust merging with a domestic corporation pursuant to Code Section 53-12-59.

(9) "Determination date" means the date on which an interested shareholder first became an interested shareholder.

(10) "Fair market value" means:

(A) In the case of securities, the highest closing sale price, during the period beginning with and including the determination date and for 29 days prior to such date, of such a security on the principal United States securities exchange registered under the Securities Exchange Act of 1934 on which such securities are listed, or, if such securities are not listed on any such exchange, the highest closing sales price or, if none is available, the average of the highest bid and asked prices reported with respect to such a security, in each case during the 30 day period referred to above, on the National Association of Securities Dealers, Inc., Automatic Quotation System, or any system then in use, or, if no such quotations are available, the fair market value on the date in question of such a security as determined in good faith at a duly called meeting of the board of directors by a majority of all of the continuing directors, or, if there are no continuing directors, by the entire board of directors; and

(B) In the case of property other than securities, the fair market value of such property on the date in question as determined in good faith at a duly called meeting of the board of directors by a majority of all of the continuing directors, or, if there are no continuing directors, by the entire board of directors of the corporation.

(11) "Interested shareholder" means any person, other than the corporation or its subsidiaries, that:

(A) Is the beneficial owner of 10 percent or more of the voting power of the outstanding voting shares of the corporation; or

(B) Is an affiliate of the corporation and, at any time within the two-year period immediately prior to the date in question, was the beneficial owner of 10 percent or more of the voting power of the then outstanding voting shares of the corporation.

For the purpose of determining whether a person is an interested shareholder, the number of voting shares deemed to be outstanding shall not include any unissued voting shares which may be issuable pursuant to any agreement, arrangement, or understanding, or upon exercise of conversion rights, warrants, or options, or otherwise.



(12) "Net assets" means the amount by which the total assets of a corporation exceed the total debts of the corporation.

(13) "Voting shares" means shares entitled to vote generally in the election of directors. (Code 1981, § 14-2-1110, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 52; Ga. L. 1999, p. 405, § 9.)

#### COMMENT

Source: Former Section 14-2-232.

This part preserves the voting rules and fair price requirements concerning business combinations with interested shareholders. These provisions were adopted by Ga. L. 1985, p. 527, § 1. While they have no counterpart in the Model Act, they were modeled after legislation adopted in the States of Connecticut (Conn. Gen. Stat. § 33-366 (1984)), Kentucky (Ky. Rev. Stat. §§ 271A.396 et seq. (1984)), Louisiana (La. Rev. Stat. Ann. §§ 12:132 et seq. (1984)), Maryland (Md. Corps. & Assns. § 3-601 et seq. (1983)), Michigan (Mich. Stat. Ann. §§ 21.200 (775) et seq. (1984)) and Wisconsin (Wis. Stat. § 180.725 (1983)).

Part 2 is designed to protect shareholders of Georgia corporations against the inequities of certain tactics which have been utilized in hostile takeover attempts. In so-called two-tier transactions, the acquiring party usually tenders in cash at a substantial premium for a major stock interest in the target corporation. After acquiring this initial interest in the corporation, the acquiring party may acquire total ownership of the corporation by effecting a so-called freezeout merger which forces minority shareholders to receive cash or other consideration for their common stock in the acquired corporation. The result is that minority shareholders who do not participate in the initial tender may receive a lower price or less desirable form of consideration than was received by shareholders who tendered. These sections are designed to discourage transactions of this type and to encourage negotiated acquisitions in which all shareholders will be more likely to receive equal treatment.

In order to assure that shareholders who do not tender in the initial offer are treated fairly, these sections impose certain requirements (in addition to those contained in this Code) on "business combinations" (e.g., mergers, share exchanges, sales of assets, liquidations, issuance of securities) of a Georgia corporation with any person who is an "interested shareholder" of that corporation (generally, the beneficial owner of 10% or more of the corporation's voting shares).

Under Sections 14-2-1111 and 14-2-1112, business combinations with interested shareholders must meet one of three criteria designed to protect the minority shareholders: (a) the transaction must be unanimously approved by the "continuing directors" of the corporation (generally, directors who served prior to the time the interested shareholder acquired 10% ownership and who are unaffiliated with the interested shareholder (Section 14-2-1111(a)(1))); OR (b) the transaction must be approved by two-thirds of the continuing directors and a majority of shares held by shareholders other than the interested shareholder (Section 14-2-1111(a)(2)) OR (c) the terms of the transaction must meet specified fair pricing criteria and certain other tests which are intended to assure that all shareholders receive a fair price and equivalent consideration for their shares regardless at what point in time they sell to the acquiring party (Section 14-2-1112).

The most significant variance of Part 2 from similar legislation in other states is that the applicability of these sections is optional; they do not apply to any Georgia corporation unless the corporation amends its bylaws to make these sections applicable to it (Section 14-2-1113).

The definitions set forth in Section 14-2-1110 apply only to this part. For example, the definition of "beneficial owner" in this part differs from that found in § 14-2-723, which provides for recognition of beneficial owners if the corporation provides a procedure for recognizing them. There is no definition of "beneficial owner" in either § 14-2-723 or in the general definition section, § 14-2-140.

Subparagraphs (1), (3) and (4), which define "affiliate," "associate," and "beneficial owner," respectively, result in an extremely broad scope for the term "interested shareholder," and assure that an interested shareholder is not able to circumvent the applicability of this part by use of various corporate structures. Persons with the relationships described in subparagraph (3) with the corporation which is a party to a business combination with an interested shareholder are covered, while those with "the corporation" are not covered. "The corporation," as used in subparagraphs (3)(A), (5)(D), (6) and Section 14-2-1111 refers to the corporation which is engaged in a business combination with an interested shareholder.

Subparagraph (5) defines "business combination" and is intended to include any type of corporate transaction in which minority shareholders might be required to surrender their common or preferred stock in the corporation in exchange for some other type of consideration. Subparagraph (5)(A) was amended to delete references in § 14-2-232(5)(A) to "consolidations," since this concept has been removed from the Code. Subparagraph (5)(B) was added to reflect the introduction of the concept of share exchanges by corporate action. Similar conforming changes were made elsewhere.

Because of the elimination of legal capital concepts, the reference to "net assets" in subparagraph (5)(C) required the addition of a definition, which was drawn from former § 14-2-2.

Subparagraph (6) defines "continuing director." This definition is adopted from Ky. Rev. Stat. § 271A.396(6); the concept of the continuing director is not included in the statutes adopted by Connecticut, Louisiana, Maryland, Michigan or Wisconsin.

#### **Note to 1999 Amendment**

The 1999 amendment eliminates an inconsistency in the Business Corporations Code regarding the definition of "beneficial owner" to exclude from the definition a person who holds shares tendered in a tender or exchange offer which have not been accepted for purchase or exchange, and to exclude a person who holds shares that are the subject of a revocable proxy given in response to a proxy or consent solicitation to ten or more persons. This makes the definition in § 14-2-1110 consistent with the definition of "beneficial owner" previously contained in § 14-2-1131(1).

#### **Cross-References**

Business combinations, see Article 11A. Definitions generally, see § 14-2-140. Issuance of shares, see § 14-2-620 et seq. Liquidation, see § 14-2-1401 et seq. Mergers, see Article 11. Recapitalization, see § 14-2-1004. Reclassification, see § 14-2-1004. Sales of assets, see Article 12. Share exchanges, see Article 11. Voting shares, see § 14-2-721.

### **JUDICIAL DECISIONS**

**Cited in** *Shoffner v. Woodward*, 195 Ga. App. 778, 394 S.E.2d 921 (1990).



**14-2-1111. Additional business combination approval.**

In addition to any vote otherwise required by law or the articles of incorporation of the corporation, a business combination shall be:

(1) Unanimously approved by the continuing directors, provided that the continuing directors constitute at least three members of the board of directors at the time of such approval; or

(2) Recommended by at least two-thirds of the continuing directors and approved by a majority of the votes entitled to be cast by holders of voting shares, other than voting shares beneficially owned by the interested shareholder who is, or whose affiliate is, a party to the business combination. (Code 1981, § 14-2-1111, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Former Section 14-2-233.

See the general comment regarding Part 2 which follows Section 14-2-1110.

This section sets forth the director and shareholder voting requirements which must be met in order for a business combination to avoid the necessity of compliance with the fair pricing and procedural requirements contained in Section 14-2-1112. The concept of the "continuing director" is adopted from Ky. Rev. Stat. § 271A.396(6). The requisite approval of the continuing directors is designed to assure that business transactions between the corporation and major shareholders are approved by directors who have no affiliation with the major shareholder.

The voting requirements contained in this section are in addition to any vote required by Georgia law or the articles of incorporation or bylaws of a corporation. For example, if a corporation's articles of incorporation require the approval of the holders of two-thirds of the shares for a merger, such vote would still be required before the merger could proceed. Such two-thirds vote, however, would not allow the proposed purchaser to avoid the fair pricing and procedural requirements of Section 14-2-1112 absent the approval of the continuing directors and/or the shareholders other than the interested shareholder as required by this section.

The last phrase of this section makes clear that the group of shareholders to be considered in determining whether the two-thirds approval has been received shall include any interested shareholders other than the interested shareholder(s) who is party to the proposed business combination.

Further restrictions on business combinations may be imposed by corporations electing to be governed by Article 11A of this Code.

**Cross-References**

Approval of asset sales by shareholders, see § 14-2-1202. Approval of mergers and share exchanges by shareholders, see § 14-2-1103. Business combinations involving resident domestic corporations, see Article 11A. Bylaws increasing quorum or voting requirements for directors, see § 14-2-1022. Bylaws increasing quorum or voting requirements for shareholders generally, see § 14-2-1021. Greater quorum or voting requirements for voting by shareholders, see § 14-2-727. Mergers, see Article 11. Mergers, action on plan, see § 14-2-1103. Quorum and voting requirements for directors, see § 14-2-824. Quorum and voting requirements for voting groups, see

§ 14-2-725. Recapitalization, voting rights of groups, see § 14-2-1004. Reclassification, voting rights of groups, see § 14-2-1004. Sales of assets, see Article 12. Sales of assets, action on plan, see § 14-2-1202. Share exchanges, see Article 11. Share exchanges, action on plan, see § 14-2-1103. Voting shares, see § 14-2-721.

**14-2-1112. “Interested shareholder” defined; exception to vote requirement of Code Section 14-2-1111.**

(a) As used in this Code section, the term “interested shareholder” refers to the interested shareholder which is party to, or an affiliate of which is party to, the business combination in question.

(b) The vote required by Code Section 14-2-1111 does not apply to a business combination if each of the following conditions is met:

(1) The aggregate amount of the cash, and the fair market value as of five days before the consummation of the business combination of consideration other than cash, to be received per share by holders of any class of common shares or any class or series of preferred shares in such business combination is at least equal to the highest of the following:

(A) The highest per share price, including any brokerage commissions, transfer taxes, and soliciting dealers’ fees, paid by the interested shareholder for any shares of the same class or series acquired by it:

(i) Within the two-year period immediately prior to the announcement date; or

(ii) In the transaction in which it became an interested shareholder, whichever is higher;

(B) The fair market value per share of such class or series as determined on the announcement date or as determined on the determination date, whichever is higher; or

(C) In the case of shares other than common shares, the highest preferential amount per share to which the holders of shares of such class or series are entitled in the event of any voluntary or involuntary liquidation, dissolution, or winding up of the corporation, provided that this subparagraph shall only apply if the interested shareholder has acquired shares of such class or series within the two-year period immediately prior to the announcement date;

(2) The consideration to be received by holders of any class or series of outstanding shares is to be in cash or in the same form as the interested shareholder has previously paid for shares of the same class or series. If the interested shareholder has paid for shares of any class or series of shares with varying forms of consideration, the form of consideration for such class or series of shares shall be either cash or the form used to acquire the largest number of shares of such class or series previously acquired by it;



(3) After the interested shareholder has become an interested shareholder and prior to the consummation of such business combination:

(A) Unless approved by a majority of the continuing directors, there shall have been:

(i) No failure to declare and pay at the regular date therefor any full periodic dividends, whether or not cumulative, on any outstanding preferred shares of the corporation;

(ii) No reduction in the annual rate of dividends paid on any class of common shares, except as necessary to reflect any subdivision of the shares;

(iii) An increase in such annual rate of dividends as is necessary to reflect any reclassification, including any reverse share split, recapitalization, reorganization, or any similar transaction which has the effect of reducing the number of outstanding shares; and

(iv) No increase in the interested shareholder's percentage ownership of any class or series of shares of the corporation by more than 1 percent in any 12 month period;

(B) The provisions of divisions (i) and (ii) of subparagraph (A) of this paragraph shall not apply if the interested shareholder or an affiliate or associate of the interested shareholder did not vote as a director of the corporation in a manner inconsistent with divisions (i) and (ii) of subparagraph (A) of this paragraph and the interested shareholder, within ten days after any act or failure to act inconsistent with divisions (i) and (ii) of subparagraph (A) of this paragraph, notified the board of directors of the corporation in writing that the interested shareholder disapproved thereof and requested in good faith that the board of directors rectify the act or failure to act; and

(4) After the interested shareholder has become an interested shareholder, the interested shareholder has not received the benefit, directly or indirectly, except proportionately as a shareholder, of any loans, advances, guarantees, pledges, or other financial assistance or any tax credits or other tax advantages provided by the corporation or any of its subsidiaries, whether in anticipation of or in connection with such business combination or otherwise. (Code 1981, § 14-2-1112, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Former Section 14-2-234.

See the general comment regarding Part 2 which follows Section 14-2-1110.

Subsection (a) makes clear that the term "interested shareholder" as used in this section refers only to the interested shareholder(s) who is party to (or whose affiliate is party to) the proposed business combination, and does not include other interested shareholders of the corporation.

Unless a proposed merger or other type of business combination involving a major shareholder and a corporation which has elected to be subject to Part 2 receives the approval of the continuing directors or of the continuing directors and non-interested shareholders of the corporation as contemplated by Section 14-2-1111, then the price per share paid to the minority shareholders in the proposed transaction must satisfy the pricing requirements of subparagraphs (b)(1) and (b)(2) of this section. In addition, the conduct of the internal affairs of the corporation following the date the interested shareholder acquires 10% ownership must have complied with the requirements of subparagraph (b)(3). Failure of the proposed transaction or the conduct of the corporation's affairs to comply with any of the provisions of subsection (b) means that the proposed transaction may be consummated only upon receiving the aforesaid approvals under Section 14-2-1111.

Subparagraph (b)(1) sets out a formula to determine the minimum consideration which a minority shareholder must receive in a "freeze-out" transaction in order for the interested shareholder to consummate the transaction. This paragraph ensures that a minority shareholder will not receive a price per share lower than the price per share paid in the interested shareholder's initial acquisitions. This paragraph eliminates the incentive for an interested shareholder to undertake a two-tiered transaction (and encourages negotiated acquisitions), since the interested shareholder is no longer able to eliminate minority shareholders for a lower price than was paid to other shareholders.

Subparagraph (b)(2) requires that minority shareholders receive either cash in exchange for their shares or the same form of consideration which was received by shareholders who have previously sold to the interested shareholder. This paragraph prevents the interested shareholder from acquiring a minority of the corporation's shares with cash and then forcing the remaining shareholders to accept "junk bonds" or other types of consideration which may be dependent upon significant future liquidity of the surviving corporation for their value.

Subparagraph (b)(3)(A) discourages the interested shareholder from using his voting power to cause the corporation to take certain actions (e.g., a decrease in dividends) which might result in a decline in the value of the stock held by the minority shareholders. It accomplishes this result by making compliance with the pricing and procedural requirements of this section unavailable as a means of consummating a business combination in the event the interested shareholder fails to comply with subparagraph (b)(3)(A).

#### Cross-References

Approval of asset sales by shareholders, see § 14-2-1202. Approval of mergers and share exchanges by shareholders, see § 14-2-1103. Bylaws increasing quorum or voting requirements for directors, see § 14-2-1022. Bylaws increasing quorum or voting requirements for shareholders generally, see § 14-2-1021. Definitions, see § 14-2-1110. Greater quorum or voting requirements for voting by shareholders, see § 14-2-727. Interested directors, see § 14-2-831. Mergers, see Article 11. Mergers, action on plan, see § 14-2-1103. Quorum and voting requirements for directors, see § 14-2-824. Quorum and voting requirements for voting groups, see § 14-2-725. Recapitalization, voting rights of groups, see § 14-2-1004. Reclassification, voting rights of groups, see § 14-2-1004. Sales of assets, see Article 12. Sales of assets, action on plan, see § 14-2-1202. Share exchanges, see Article 11. Share exchanges, action on plan, see § 14-2-1103. Voting shares, see § 14-2-721.



## JUDICIAL DECISIONS

Cited in *Shoffner v. Woodward*, 195 Ga. App. 778, 394 S.E.2d 921 (1990).

**14-2-1113. Requirements inapplicable unless specifically in corporate bylaw; repeal of bylaw; applicability of Code Section 14-2-1111.**

(a) The requirements of this part shall not apply to business combinations of a corporation unless the bylaws of the corporation specifically provide that all of such requirements are applicable to the corporation. Such a bylaw may be adopted at any time in the manner provided in this chapter and shall apply to any business combination approved or recommended by the board of directors after the date of the bylaw's adoption. Such a bylaw shall be irrevocable except as provided in subsection (b) of this Code section. Neither the adoption nor the failure to adopt such a bylaw shall constitute grounds for any cause of action against any of the directors of the corporation.

(b) Any bylaw adopted as provided in subsection (a) of this Code section may only be repealed by the affirmative vote of at least two-thirds of the continuing directors and a majority of the votes entitled to be cast by voting shares of the corporation, other than shares beneficially owned by any interested shareholder and affiliates and associates of any interested shareholder, in addition to any other vote required by the articles of incorporation or bylaws to amend the bylaws. Once the bylaw has been repealed in accordance with this subsection, the corporation shall not thereafter be entitled to adopt the bylaw in accordance with subsection (a) of this Code section.

(c) The requirement of Code Section 14-2-1111 shall never apply to business combinations with an interested shareholder or its affiliates if, during the three-year period immediately preceding the consummation of the business combination, the interested shareholder has not at any time during such period:

(1) Ceased to be an interested shareholder; or

(2) Increased its percentage ownership of any class or series of common or preferred shares of the corporation by more than 1 percent in any 12 month period.

(d) Nothing contained in this part shall be deemed to limit in any manner a corporation's right to include in its articles of incorporation or bylaws any provision regarding the approval of business combinations which would not otherwise be prohibited by this article. (Code 1981, § 14-2-1113, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Former § 14-2-235, See the general comment which follows Section 14-2-1110. Bylaws adopted pursuant to this act at any time prior to adoption of this Code

are not affected in any way, but remain valid and in force unless and until repealed or amended as provided in this article.

This section contains two significant departures from prior statutes (see Comment following Section 14-2-1110). First, subsection (a) provides that the application of these sections to a particular corporation is optional at the election of the corporation as provided in subsections (a) and (b). Second, under subsection (c), the provisions of this part are never applicable to an interested shareholder who has continuously remained an interested shareholder for a three-year period and has not increased his stock ownership during such period beyond minimal purchases.

Subsection (a) provides that this part shall only be applicable to business combinations of corporations which have adopted a bylaw provision stating that such provisions are applicable to it. Such a bylaw may be adopted by the same procedure as any other bylaw of the corporation, but may only be revoked in accordance with subsection (b) of this section.

Subsection (b) imposes a supermajority voting requirement in order for a corporation to repeal its bylaw election subject to this part. This voting requirement is identical to the minimum vote required by Section 14-2-1111(2) in order to approve a business combination; therefore, an interested shareholder may not obtain the necessary votes to repeal the bylaw when he would not otherwise have the votes required to approve the proposed business combination under Section 14-2-1111. The last sentence of subsection (b) prevents a corporation from using this part for purely defensive purposes by continually adopting, repealing and readopting a bylaw providing for the applicability of these sections whenever a takeover is threatened.

Subsection (c) reflects the intent of this part to protect minority shareholders from the inequities of two-tiered transactions instigated by recent purchasers of large blocks of the corporation's stock. These sections are not intended to interfere with proposed transactions involving significant shareholders whose ownership position in the corporation has remained relatively stable over an extended period of time. Therefore, any person can acquire a 10% or higher stake in a corporation, wait three years during which period he does not significantly increase his ownership of the corporation, and then proceed with any transaction without regard for this part.

Subsection (d) provides that nothing in this part precludes any other corporate action regarding approval of business combinations. Thus, articles of incorporation or a bylaw adopted pursuant to Code Section 14-2-1021 may provide similar protections, whether or not a bylaw has been adopted pursuant to this section. And adoption of a bylaw electing the coverage of the fair price provisions should not be interpreted as repeal of any provisions of articles or bylaws setting higher voting or quorum requirements for business combinations. Further, a corporation may adopt a bylaw electing coverage under Article 11A of this Code.

#### Cross-References

Articles of incorporation, amendment, see § 14-2-1001 et et seq. Bylaws, amendment by board of directors or shareholders, see § 14-2-1020. Bylaws increasing quorum or voting requirements for directors, see § 14-2-1022. Bylaws increasing quorum or voting requirements for shareholders generally, see § 14-2-1021. Greater quorum and voting requirements for shareholders, see § 14-2-727. Quorum and voting requirements for voting groups, see § 14-2-725.



## PART 3

## BUSINESS COMBINATIONS WITH INTERESTED STOCKHOLDERS

**Editor's notes.** — Ga. L. 1989, p. 946, § 53 redesignated former Article 11A of Chapter 2 as Part 3 of Article 11 of Chapter 2.

**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

**14-2-1131. Definitions.**

For purposes of this part, the definitions contained in Code Section 14-2-1110 shall be applicable with the following exceptions:

(1) For purposes of this part, "business combination" means:

(A) Any merger or consolidation of the resident domestic corporation or any subsidiary with: (i) any interested shareholder; or (ii) any other corporation, whether or not itself an interested shareholder, which is, or after the merger or consolidation would be, an affiliate of an interested shareholder that was an interested shareholder prior to the consummation of the transaction other than as a result of the interested shareholder's ownership of the resident domestic corporation's voting stock;

(B) Any sale, lease, transfer, or other disposition, other than in the ordinary course of business, in one transaction or in a series of transactions, to any interested shareholder or any affiliate or associate of any interested shareholder, other than the resident domestic corporation or any of its subsidiaries, of any assets of the resident domestic corporation or any subsidiary having, measured at the time the transaction or transactions are approved by the board of directors of the resident domestic corporation, an aggregate book value as of the end of the resident domestic corporation's most recently ended fiscal quarter of 10 percent or more of the net assets of the resident domestic corporation as of the end of such fiscal quarter;

(C) The issuance or transfer by the resident domestic corporation, or any subsidiary, in one transaction or a series of transactions, of any equity securities of the resident domestic corporation or any subsidiary which have an aggregate market value of 5 percent or more of the total market value of the outstanding common and preferred shares of the resident domestic corporation whose shares are being issued to any interested shareholder or any affiliate or associate of any interested shareholder, other than the resident domestic corporation or any of its subsidiaries, except pursuant to the exercise of warrants or rights to purchase securities offered pro rata to all holders of the resident domestic corporation's voting shares or any other method affording substantially proportionate treatment to the holders of voting shares, and except pursuant to the exercise or conversion of securities

exercisable for or convertible into shares of the resident domestic corporation, or any subsidiary, which securities were outstanding prior to the time that any interested shareholder became such;

(D) The adoption of any plan or proposal for the liquidation or dissolution of the resident domestic corporation;

(E) Any reclassification of securities, including any reverse stock split, or recapitalization of the resident domestic corporation, or any merger or consolidation of the resident domestic corporation with any of its subsidiaries, which has the effect, directly or indirectly, of increasing by 5 percent or more the proportionate amount of the outstanding shares of any class or series of equity securities of the resident domestic corporation or any subsidiary which is directly or indirectly beneficially owned by any interested shareholder or any affiliate of any interested shareholder;

(F) Any receipt by the interested shareholder, or any affiliate or associate of the interested shareholder, other than in the ordinary course of business, of the benefit, directly or indirectly (except proportionately as a shareholder of the corporation), of any loans, advances, guarantees, pledges, or other financial benefits or assistance or any tax credits or other tax advantages provided by or through the resident domestic corporation or any of its subsidiaries; or

(G) Any share exchange with (i) any interested shareholder or (ii) any other corporation, whether or not itself an interested shareholder, which is, or after the share exchange would be, an affiliate of an interested shareholder that was an interested shareholder prior to the consummation of the transaction;

(2) For purposes of this part and Part 2 of this article, the presumption of "control" created by paragraph (7) of Code Section 14-2-1110 shall not apply where such person holds voting stock, in good faith and not for the purpose of circumventing this part or Part 2 of this article, as an agent, bank, broker, nominee, custodian, or trustee for one or more owners who do not individually or as a group have control of the corporation; and

(3) For purposes of this part, a "resident domestic corporation" means:

(A) An issuer of voting stock which is organized under the laws of this state and which has at least 100 beneficial owners in this state and either:

(i) Has its principal office located in this state;

(ii) Has at least 10 percent of its outstanding voting shares beneficially owned by residents of this state;



(iii) Has at least 10 percent of the holders of its outstanding voting shares beneficially owned by residents of this state; or

(iv) Owns or controls assets located in this state which represent the lesser of (I) substantially all of its assets or (II) assets having a market value of at least \$25 million. For purposes of this Code section, "substantially all of the corporate assets" means either one-half of the value of the assets of the corporation or the assets of the corporation located in this state which generate more than one-half of the total revenues of the corporation, all on a consolidated basis; and

(B) For purposes of divisions (ii) and (iii) of subparagraph (A) of this paragraph, a holder of voting shares that is a corporation shall be deemed to be located in this state if such corporation is organized under the laws of this state. (Code 1981, § 14-2-1131, enacted by Ga. L. 1988, p. 158, § 2; Ga. L. 1989, p. 946, § 54; Ga. L. 1990, p. 257, § 18; Ga. L. 1999, p. 405, § 10.)

#### COMMENT

Source: Del. Code Ann. tit. 8, § 203, as added by Del. Laws 1988, Ch. 204. This succeeds the identical provisions of the former Code, O.C.G.A. § 14-2-236 (Supp. 1988).

The definitions used in this part build upon those in § 14-2-1110.

The definition of "business combination" in this section parallels that of § 1110, but does not include share exchanges. Similarly, differences exist in the coverage of asset transfers by the corporation to interested shareholders in a series of transaction aggregating 10% of total assets. Section 1131(2)(B) defines a series of transactions as a business combination regardless of the duration of the series, while § 1110(C) limits the series to those transactions occurring within 12 months of each other. The same distinction occurs with respect to a series of new stock issued by the corporation to an interested shareholder, and to reclassifications of securities. Where § 14-2-1110 defines dissolutions and liquidations as business combinations only where an interested shareholder receives consideration other than cash, § 1131 covers all such transactions, regardless of the type of consideration received. Subparagraph (2)(F) goes beyond the basic definition of § 1110, to cover any self-dealing transaction in which the interested shareholder receives a significant benefit in a disproportionate manner.

The definition of "business combination" does not apply to proxy solicitations, or to business combinations between a resident domestic corporation and its subsidiaries (unless they meet the definition of a business combination provided in the act).

#### Note to 1989 Amendment

The 1989 amendment to subsection (2)(F) deleted an erroneous reference to "resident domestic" preceding "shareholder", while the amendment to subsection (4)(A)(iv) added the phrase "located in this state" to the first sentence, after "Owns or controls assets ...." This corrects an oversight in the 1988 drafting process. References throughout the section to "article" have been replaced with "part".

#### Note to 1990 Amendment

The 1990 amendment expands the definition of "business combination" to include share exchanges. The definition now conforms to the definition of business combina-

tion in the fair price statute at § 14-2-1110(5)(B). Share exchanges were first expressly recognized as a new form of business combination in the 1989 Code and the conforming change was inadvertently omitted.

#### **Note to 1999 Amendment**

The amendment to § 14-2-1131 conforms the definition of “beneficial owner” to that contained in § 14-2-1110, as amended by the 1999 amendment, which is consistent with the definition in this section in effect prior to this amendment.

#### **Cross-References**

“Affiliate” defined, see § 14-2-1110. “Associate” defined, see § 14-2-1110. “Beneficial owner” defined, see § 14-2-1110. Definitions generally, see § 14-2-140. Definitions for purposes of business combinations, see § 14-2-1110. “Interested shareholder” defined, see § 14-2-1110. Issuance of shares, see § 14-2-620 et seq. “Principal office” defined, see § 14-2-140. Share exchanges, see Article 11. Voting shares, see § 14-2-721.

### **14-2-1132. Business combinations with interested stockholders.**

(a) Notwithstanding any other provision of this chapter (except for the provisions of subsection (b) of this Code section and Code Section 14-2-1133), a resident domestic corporation shall not engage in any business combination with any interested shareholder for a period of five years following the time that such shareholder became an interested shareholder, unless:

(1) Prior to such time the resident domestic corporation’s board of directors approved either the business combination or the transaction which resulted in the shareholder becoming an interested shareholder;

(2) In the transaction which resulted in the shareholder becoming an interested shareholder, the interested shareholder became the beneficial owner of at least 90 percent of the voting stock of the resident domestic corporation outstanding at the time the transaction commenced, excluding for purposes of determining the number of shares outstanding those shares owned by: (A) persons who are directors or officers, their affiliates, or associates; (B) subsidiaries of the resident domestic corporation; and (C) any employee stock plan under which participants do not have the right (as determined exclusively by reference to the terms of such plan and any trust which is part of such plan) to determine confidentially the extent to which shares held under such plan will be tendered in a tender or exchange offer; or

(3) Subsequent to becoming an interested shareholder, such shareholder acquired additional shares resulting in the interested shareholder being the beneficial owner of at least 90 percent of the outstanding voting stock of the resident domestic corporation, excluding for purposes of determining the number of shares outstanding those shares owned by (A) persons who are directors or officers of the resident domestic corporation, their affiliates, or associates; (B) subsidiaries of the resident domestic corporation; and (C) any employee stock plan under which



participants do not have the right (as determined exclusively by reference to the terms of such plan and any trust which is part of such plan) to determine confidentially the extent to which shares held under such plan will be tendered in a tender or exchange offer, and the business combination was approved at an annual or special meeting of shareholders by the holders of a majority of the voting stock entitled to vote thereon, excluding from said vote, for the purpose of this paragraph only, the voting stock beneficially owned by the interested shareholder or by (A) persons who are directors or officers of the resident domestic corporation, their affiliates, or associates; (B) subsidiaries of the resident domestic corporation; and (C) any employee stock plan under which participants do not have the right (as determined exclusively by reference to the terms of such plan and any trust which is part of such plan) to determine confidentially the extent to which shares held under such plan will be tendered in a tender or exchange offer.

(b) The restrictions contained in this Code section shall not apply if a shareholder: (1) becomes an interested shareholder inadvertently; (2) as soon as practicable divests sufficient shares so that the shareholder ceases to be an interested shareholder; and (3) would not, at any time within the five-year period immediately prior to a business combination between the resident domestic corporation and such shareholder, have been an interested shareholder but for the inadvertent acquisition. (Code 1981, § 14-2-1132, enacted by Ga. L. 1988, p. 158, § 2; Ga. L. 1989, p. 946, § 55; Ga. L. 1990, p. 257, § 19.)

#### COMMENT

Source: Del. Code Ann. tit. 8, § 203, as added by Del. Laws 1988, Ch. 204. This succeeds the identical provisions of the former Code, O.C.G.A. § 14-2-237 (Supp. 1988).

This provision is designed to encourage any person, before acquiring 10% of the outstanding voting stock of a resident domestic corporation, to seek approval of its board of directors for the terms of any contemplated business combination. By prohibiting a business combination with an interested shareholder for five years (subject to the exceptions described below) the statute attempts to preserve the board's independence and ability to negotiate freely on behalf of the resident domestic corporation.

Subsection (a) prohibits any person who acquires 10% or more of the voting stock (an "interested shareholder") of a resident domestic corporation that has elected coverage under this article from thereafter engaging in any business combination with the corporation for a period of five years from the date that person became an interested shareholder, unless that person obtains approval of the transaction in one of three ways:

(i) Prior to becoming an interested shareholder, the person obtains the consent of the board of directors;

(ii) Becomes the owner of at least 90% of the outstanding shares in the same transaction in which the 10% interest was acquired, excluding certain "insider" shares defined in the subsection; or

(iii) Subsequent to the 10% acquisition, acquires additional shares resulting in ownership of at least 90% of all the outstanding shares (including defined "insider"

shares) and obtains the approval of the holders of a majority of the remaining shares, excluding the "insider" shares.

Subsection (b) provides an exception for holders of 10% of the stock who "inadvertently" become such, and who immediately divest themselves of sufficient shares to drop below the 10% ownership level. Those who do may then seek approval of a business combination under subparagraphs (i) and (ii) above. Inadvertent ownership could occur because the issuer has engaged in share repurchases that result in an increase in the percentage ownership represented by a fixed number of shares, or because a shareholder purchased shares in reliance on the issuer's public filings disclosing the number of outstanding shares, which did not reflect recent repurchases.

#### **Note to 1989 Amendment**

The 1989 amendment to subsection (a)(3) added the phrase "excluding for purposes of determining the number of shares outstanding those shares owned by (A) persons who are directors or officers, their affiliates or associates; (B) subsidiaries of the resident domestic corporation; and (C) employee stock plans in which employee participants do not have the right to determine confidently whether shares held subject to the plan will be tendered in a tender or exchange offer" after the first comma. The effect was to reduce the proportion of shares that must be acquired before approval of the remaining shareholders could be sought.

#### **Note to 1990 Amendment**

Prior to the 1990 amendment, paragraph (a)(1) provided for an exception to the application of the Business Combinations Act when, prior to the "date" that a shareholder became an interested shareholder, the resident domestic corporation's board of directors approved either the business combination or the transaction that resulted in the shareholder becoming an interested shareholder. The Georgia Business Combinations Act was modeled on Section 203 of the Delaware General Corporation Law. A recent Delaware Chancery Court decision, *Siegmán v. Columbia Pictures Entertainment, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,796 (Del. Ch. Oct. 31, 1989), held that "date" means "time" for purposes of the same exception under the Delaware statute. Thus, if a target resident domestic corporation's board approved an acquisition before the exact time at which an agreement is reached on a subsequent business combination, the three-year waiting period of the Act does not apply. The amendment's substitution of the word "time" for "date" is intended to eliminate any ambiguity and to assure that the result of the Delaware case is explicitly required by the Georgia statute.

The 1990 amendment also changed paragraphs (a)(2) and (a)(3) as such provisions relate to shares held under employee stock plans. The statute provides that shares held under such plans which do not meet certain confidential tender or exchange election features are excluded from the ninety percent threshold that an interested shareholder must acquire to exempt a transaction from the Business Combinations Act. The amendment clarifies that the determination as to whether such a plan provides participants with the requisite rights is to be made exclusively by reference to the plan's governing instruments.

#### **Cross-References**

Additional approval of business combination, see § 14-2-1111. Bylaws increasing quorum or voting requirements for shareholders, see § 14-2-1021. Greater quorum or voting requirements for voting by shareholders, see § 14-2-727. Mergers, action on plan, see § 14-2-1103. Recapitalization, voting rights of groups, see § 14-2-1004. Reclassification, voting rights of groups, see § 14-2-1004. Sales of assets, action on plan, see § 14-2-1202. Share exchanges, action on plan, see § 14-2-1103.



**14-2-1133. Inapplicability of requirements of this article unless specifically provided by corporate bylaw; repeal of bylaw; adoption of other provisions.**

(a) The requirements of this part shall not apply to business combinations with interested shareholders unless the bylaws of the resident domestic corporation specifically provide that all of such requirements are applicable to the resident domestic corporation. Such a bylaw may be adopted at any time in the manner provided in this chapter and shall apply to any business combination with an interested shareholder after the date of the bylaw's adoption, provided that such bylaw shall not apply to restrict a business combination between the corporation and an interested shareholder of the resident domestic corporation if the interested shareholder became such prior to the effective date of the bylaw. Such a bylaw shall be irrevocable except as provided in subsection (b) of this Code section. Neither the adoption nor the failure to adopt such a bylaw shall constitute grounds for any cause of action against any of the directors of the resident domestic corporation.

(b) Any bylaw adopted as provided in subsection (a) of this Code section may only be repealed by the affirmative vote of at least two-thirds of the continuing directors and a majority of the votes entitled to be cast by voting shares of the resident domestic corporation, other than shares beneficially owned by an interested shareholder, in addition to any other vote required by the articles of incorporation or bylaws to amend the bylaws. Any action to repeal any bylaw in accordance with this subsection shall not be effective until 18 months after the shareholder vote to effect such repeal and shall not apply to any business combination between such resident domestic corporation and any person who became an interested shareholder of such resident domestic corporation on or prior to such repeal. Once the bylaw has been repealed in accordance with this subsection, the resident domestic corporation shall not thereafter be entitled to adopt the bylaw in accordance with subsection (a) of this Code section.

(c) Nothing contained in this part shall be deemed to limit in any manner a resident domestic corporation's right to include in its articles of incorporation or bylaws any provision regarding the approval of business combinations which would not otherwise be prohibited by this chapter.

(d) Nothing contained in this part shall be construed to alter in any manner the rights of a resident domestic corporation to adopt a bylaw pursuant to Code Section 14-2-1113. The requirements of any bylaw adopted under this part will be in addition to the requirements of any bylaw adopted pursuant to Part 2 of this article.

(e) Nothing contained in Part 2 of this article shall be construed to alter in any manner the rights of a resident domestic corporation to adopt a bylaw pursuant to this Code section. The requirements of any bylaw

adopted under Part 2 of this article will be in addition to the requirements of any bylaw adopted pursuant to this part. (Code 1981, § 14-2-1133, enacted by Ga. L. 1988, p. 158, § 2; Ga. L. 1989, p. 946, § 56.)

#### COMMENT

Source: Del. Code Ann. tit. 8, § 203, as added by Del. Laws 1988, Ch. 204. This succeeds the identical provisions of the former Code, O.C.G.A. § 14-2-238 (Supp. 1988).

One major difference between the Code provisions and those of Delaware is that Delaware's provisions apply automatically to all covered Delaware corporations unless they elected not to be covered by a specified date, while the Code requires affirmative action to elect coverage, under subsection (a). A bylaw electing coverage will not restrict business combinations with interested shareholders who became such prior to the effective date of the bylaw.

Subsection (a) contains its own exculpatory provision for director action adopting or failing to adopt such a bylaw. This resolves any doubts about whether the exculpatory language permitted in articles of incorporation under § 14-2-202(b)(4) would preclude director liability.

Once adopted as a bylaw, subsection (b) provides that it may only be repealed by a vote of the holder of a majority of the shares other than shares owned by an interested shareholder. Any repeal shall not be effective for 18 months and the repeal shall not apply to any business combination with any person who became an interested shareholder prior to such repeal.

Subsection (c) provides that nothing in this article precludes other corporate action regarding approval of business combinations. Thus, articles of incorporation or a bylaw adopted pursuant to Code Section 14-2-1021 may provide similar protections, whether or not a bylaw has been adopted pursuant to this section. And adoption of a bylaw electing the coverage of the fair price provisions should not be interpreted as repeal of any provisions of articles or bylaws setting higher voting or quorum requirements for business combinations.

Subsection (d) provides that adoption of a bylaw electing coverage under this article is not exclusive. The article complements the Fair Price statute, found in Article 11, Part 2. These provisions have independent legal significance. Stock acquisitions by an interested shareholder, for instance, are not prohibited by this article. Such acquisitions may be subject to the provisions of the fair price statute, however. Additionally, after the expiration of the five-year period, an interested shareholder could engage in a business combination with a resident domestic corporation, but only if all other requirements are met, including, if applicable, the requirements of the fair price statute.

Subsection (e) preserves the right of the corporation to adopt a bylaw electing to be covered by this article. Thus, the provisions of § 14-2-1021(b), prohibiting directors from adopting bylaws fixing greater quorum or voting requirements for shareholders do not limit the authority of the board to adopt a bylaw under this article.

#### Note to 1989 Amendment

References throughout the section to "article" were replaced with references to "part".

#### Cross-References

Articles of incorporation, amendment, see § 14-2-1001 et seq. Approval of business combinations, see §§ 14-2-1111 & 14-2-1112. Bylaws, amendment by board of directors



or shareholders, see § 14-2-1020. Bylaws governing approval of business combinations, see § 14-2-1113. Directors' duties generally, see § 14-2-830. "Continuing Directors" defined, see § 14-2-1110.

## ARTICLE 12

### SALE OF ASSETS

**Law reviews.** — For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer

L. Rev. 655 (1989). For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 2097, 2098. 19 Am. Jur. 2d, Corporations, §§ 2654-2679.

**C.J.S.** — 19 C.J.S., Corporations, §§ 672, 673.

**ALR.** — Liability of corporation for debts of predecessor, 15 ALR 1112; 149 ALR 787.

Changes in corporate organization as affecting status as trustee, executor, administrator, or guardian, 131 ALR 753.

Statutory superadded liability of stockholders as affected by reorganization, consolidation, or merger of corporation, 154 ALR 427.

Pledge or sale by private corporation of its own bonds as security for, or in payment of, antecedent indebtedness, as violation of constitutional or statutory restrictions against

issuance of bonds except for money or property actually received, or for labor done, etc., 142 ALR 1157.

Applicability of statutes regulating sale of assets or property of corporation as affected by purpose or character of corporation, 9 ALR2d 1306.

Authority of president to subordinate corporation's claim, assignment, lien, or the like, 53 ALR2d 1421.

Authority of corporate officers to mortgage or pledge corporate personal property, 62 ALR2d 712.

Validity, construction, and effect of bequest of property owned by corporation in which testator has majority interest, 78 ALR3d 963.

### 14-2-1201. Sale and mortgage of assets not requiring shareholder approval.

(a) As used in this Code section, the term "insolvent" means:

(1) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) The corporation's total assets would be less than the sum of its total liabilities.

(b) A corporation may, on the terms and conditions and for the consideration determined by the board of directors:

(1) Sell, lease, exchange, or otherwise dispose of all or substantially all of its property if:

(A) The corporation is insolvent and a sale for cash or its equivalent is deemed advisable by the board to meet the liabilities of the corporation; or

(B) The corporation was incorporated for the purpose of liquidating such property and assets;

(2) Mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of its property whether or not in the usual and regular course of business;

(3) Transfer any or all of its property to a corporation all the shares of which are owned by the corporation; or

(4) Sell, lease, exchange, or otherwise dispose of less than all or substantially all of its property. Assets shall be deemed to be less than substantially all of a corporation's property if the fair value of the assets as of the date of the most recent available financial information does not exceed two-thirds of the fair value of all of the assets of the corporation, and the annual revenues of the corporation for the most recent fiscal year for which such financial information is available represented or produced by such assets do not exceed two-thirds of the total revenues of the corporation for that period. This subsection is intended merely to create an irrebuttable presumption with respect to transactions described in this subsection and shall not create any inference that the sale of assets exceeding the amounts described in this subsection is the sale of substantially all of the property of the corporation.

(c) Unless the articles of incorporation require it, approval by the shareholders of a transaction described in subsection (b) of this Code section is not required. (Code 1981, § 14-2-1201, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 57.)

**Law reviews.** — For article discussing issuance of debt securities under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article, "The Acquisition

Process and the Closely-Held Corporation: Selected Legal Aspects," see 36 Mercer L. Rev. 567 (1985).

#### COMMENT

Source: Model Act, § 12.01; former § 14-2-230.

The Model Act provisions were amended to delete the reference to sales in the usual and regular course of business. Georgia rejected the "ordinary course of business" distinction as not helpful in 1968, and focused on a more detailed description of transactions where no shareholder vote was required. The Code generally follows the approach of prior law, § 14-2-230.

Subsection (a)(1) was added to the Model Act from former Georgia law, § 14-2-230(a)(3), and preserves the approach of providing a specific list of transactions where no shareholder vote is required.

Subsection (a)(2), permitting mortgage or pledge of all corporate property to secure debt repayment or for other purposes, without shareholder approval, is substantially the same as former § 14-2-230(a)(1).

Subsection (a)(3) allows transfer of any or all a corporation's property to a wholly owned corporation. There was no counterpart in former Georgia law. This provision, however, may not be used as a device to avoid a vote of shareholders by a multiple-step transaction.



Subsection (a)(4) is new, having no counterpart in either prior law or the Model Act. Where the Model Act, in § 12.01(a)(1), permitted sales approved by the board of all or substantially all its property, if in the usual and regular course of business, Georgia has historically rejected the “usual and regular course of business” test as subjective difficult to apply. Instead, Georgia has selected a quantitative approach, permitting the sale of less than all or substantially all assets, regardless of the circumstances, without shareholder approval.

The phrase “all or substantially all” is intended to mean what it literally says. The phrase “substantially all” is synonymous with “nearly all” and was added merely to make it clear that the statutory requirements could not be avoided by retention of some minimal or nominal residue of the original assets. A sale of all the corporate assets other than cash or cash equivalents is normally the sale of “all or substantially all” of the corporation’s property. A sale of several distinct manufacturing lines while retaining one or more lines is normally not a sale of “all or substantially all” even though the lines being sold are substantial and include a significant fraction of the corporation’s former business. If the lines retained are viewed only as a temporary operation or as a pretext to avoid the “all or substantially all” requirements, however, the statutory requirements of Part 12 must be complied with. Similarly, a sale of a plant but retention of operating assets (e.g., machinery and equipment), accounts receivable, good will, and the like with a view toward continuing the operation at another location, or leasing back the plant, is not a sale of “all or substantially all” the corporation’s property.

While the Code rejects “ordinary course of business” formulations as too vague to be useful, it provides a “safe harbor” for asset sales involving no more than two-thirds of the corporation’s assets, measured in two ways, at the time of the decision to sell. Thus, if the corporation has a separate division, with separate accounting records, it may be able to determine that a transaction meets the specific requirements of the safe harbor contained in subsection (a)(4), and does not require shareholder approval. Directors, in making such a decision, should be able to rely on the same kinds of records they are entitled to use in determining the legality of distributions, under Section 14-2-640. The subsection expressly states that failure to meet the safe harbor standards shall not create any inference that the sale involves substantially all the property of the corporation.

Under subsection (b) shareholder approval for transactions described in Section 14-2-1201 is not needed unless the articles of incorporation provide otherwise. Former § 14-2-230(a) had the same requirement, but also provided that the bylaws could require shareholder approval.

#### **Note to 1989 Amendment**

The 1989 amendment strengthens and clarifies the safe harbor introduced in 1988. The percentage of assets that may be sold without a shareholder vote was raised from 50% to 66 2/3%, and the measures of the value of assets have been clarified, by specifying the accounting periods for which revenues are to be measured, and by introducing the notion of “fair value,” which also appears in Code Section 14-2-1302(a). References to “fair valuation” also appear in the comments to Code Section 4-2-640, where a balance sheet test limits distributions to shareholders. It also changed subsection (a)(4) to delete the words “all or” before “substantially all” in the second sentence, both before and after the proviso. The reference to “all” the assets was surplusage, since the safe harbor is clearly designed to apply to sales of less than all the assets. Finally, the safe harbor language was strengthened, by noting that the purpose of the safe harbor was merely to create an irrebuttable presumption about what transactions did not involve the sale of substantially all assets. The safe harbor is not intended to mean that all transactions involving slightly more than two-thirds of the corporation’s assets require a shareholder vote.

The 1989 amendments added subsection (c), to provide a definition of “insolvent” for purposes of this Article. The definition of “insolvent” contained in section 14-2-640

is inappropriate for purposes of this section, since it protects preferred shares, rather than just creditors. No general definition of "insolvent" appears in Code Section 14-2-140.

#### Cross-References

Articles of incorporation, see § 14-2-202 and Article 10, Part 1. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Sale requiring shareholder approval, see § 14-2-1202.

### JUDICIAL DECISIONS

**Date corporation deemed insolvent.** — The trial court erred in ruling that a subcontractor's claim against a county accrued on the day the subcontractor received notification about the contractor's cash flow problems where, for three months after the letter was written, the contractor continued to work on the project even though the county had only paid it 40 percent of the contract price, and there was also evidence that if the

county had paid the contractor pursuant to the contract, the contractor would have paid its materialmen. *Kelly Energy Sys. v. Board of Comm'rs*, 196 Ga. App. 519, 396 S.E.2d 498 (1990).

Cited in *Stewart v. Richardson*, 201 Ga. App. 312, 411 S.E.2d 309 (1991); *Augusta Surgical Ctr., Inc. v. Walton & Heard Office Venture*, 235 Ga. App. 283, 508 S.E.2d 666 (1998).

### RESEARCH REFERENCES

**ALR.** — Power of directors to sell property of corporation without consent of stockholders, 5 ALR 930; 60 ALR 1210.

Trademark or tradename as asset in case of bankruptcy, insolvency, or assignment for benefit of creditors, 44 ALR 706.

Validity, construction, and application of express restrictions on right of action by individual holder of one or more of a series of corporate bonds or other obligations, 108 ALR 88; 174 ALR 435.

Instrument issued by a corporation as certificate of preferred stock or as evidence of indebtedness, 123 ALR 856.

Conditions accompanying or following dissolution of lessee corporation, as breach of covenant against assignment or sublease, 12 ALR2d 179.

Liability of director or dominant shareholder for enforcing debt legally owed him by corporation, 56 ALR3d 212.

#### 14-2-1202. Sale of assets requiring shareholder approval.

(a) A corporation may sell, lease, exchange, or otherwise dispose of all or substantially all of its property (with or without the good will), otherwise than pursuant to Code Section 14-2-1201, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approve the proposed transaction.

(b) For a transaction to be authorized:

(1) The board of directors must recommend the proposed transaction to the shareholders unless the board of directors elects, because of conflict of interest or other special circumstances, to make no recommendation and communicates the basis for its election to the shareholders with the submission of the proposed transaction; and



(2) The shareholders entitled to vote must approve the transaction.

(c) The board of directors may condition its submission of the proposed transaction on any basis.

(d) The corporation shall notify each shareholder entitled to vote of the proposed shareholders' meeting in accordance with Code Section 14-2-705. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all or substantially all of the property of the corporation and contain or be accompanied by a description of the transaction.

(e) Unless the articles of incorporation, the bylaws, or the board of directors (acting pursuant to subsection (c) of this Code section) require a greater vote or a vote by voting groups, the transaction to be authorized must be approved by a majority of all the votes entitled to be cast on the transaction.

(f) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned (subject to any contractual rights) without further shareholder action.

(g) A transaction that constitutes a distribution is governed by Code Section 14-2-640 and not by this Code section. (Code 1981, § 14-2-1202, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1997, p. 1165, § 11.)

**Law reviews.** — For article on the definition of a security in light of the 1973 Georgia Securities Act and the need for maximizing investor protection, see 30 Emory L.J. 73

(1981). For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

#### COMMENT

Source: Model Act, § 12.02.

Section 14-2-1202 requires the board of directors to propose the sale and then submit the proposal to the shareholders. The original Model Act reference in subsection (a) to sales otherwise than in the usual and regular course of business has been replaced with a reference to Section 14-2-1201, since the "ordinary course of business" exception has been deleted and replaced with a specific list of exceptions to the requirement of a shareholder vote.

Former § 14-2-231(3) provided that the shareholders may authorize the sale, and "may approve or fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof..." This language suggested that the shareholders retained the power to alter the terms of the plan proposed by the board, and thus to approve an ultimate form of agreement that varied substantially from that approved by the board. In contrast, subsection (a) makes it clear that a corporation may sell only on the terms and conditions determined by the corporation's board of directors. Under the Code the role of the shareholders is only to vote to approve (or disapprove) the proposed transaction, as formulated by the board.

Subsection (b) provides that when proposing an asset sale, the board of directors must make a recommendation to the shareholders that the transaction be approved, unless it elects, because of conflict of interest or other special circumstances, to make no

recommendation. If the board of directors so elects, it must describe the conflict or circumstance, and communicate the basis for its election, when presenting the proposed amendment to the shareholders. This parallels Section 14-2-1103(b), including changes to the Model Act language. See the Comment to Section 14-2-1103.

The board of directors may condition its submission of a proposal to the shareholders under subsection (c) on any basis -- for example, on its receiving a certain percentage of shareholders' affirmative votes or that specified classes or series of shares, voting by separate voting groups, must approve the transaction or on some other basis; see the discussion of conditional submissions in the Comment to Section 14-2-1003. The disclosure of these conditions, as in disclosure of other matters submitted for shareholder approval, is governed by fiduciary principles of candor.

In subsection (d), the phrase in the Model Act, "whether or not" has been deleted before the words "entitled to vote," consistent with changes in Sections 14-2-1003, 14-2-1103, and elsewhere. See the Comments to Section 14-2-1003 and 14-2-1103.

Subsection (e) requires that the proposed sale, to be approved, must receive the vote of a majority of the outstanding votes entitled by the articles of incorporation to be cast on the proposal. Unlike former § 14-2-231(3), this contemplates that some shares may have more or less than one vote. This is a greater vote than that required for ordinary matters under Section 14-2-725.

Former § 14-2-231(3) provided for class voting on asset sales if the resolution contained any provisions that would, if contained in a proposed amendment to the articles, require class voting. Nonvoting classes of shares are not given a statutory right to vote on proposed sales (either as separate voting groups or together with voting shares) by the Code on the theory that classes or series of shares that are made nonvoting by the articles of incorporation generally did not retain a voice in the areas of business the corporation may engage in the future. The articles of incorporation, however, may stipulate that specified classes or series of shares are entitled to vote by separate voting groups. Thus, in the absence of special provision in the articles of incorporation, only the shares of the corporation entitled to vote generally by the articles of incorporation are entitled to vote on sales of substantially all the assets of the corporation. The articles of incorporation may also specify that a greater percentage of votes is required to approve the proposal than specified in Section 14-2-1202. If the asset sale involves a "business combination" with an "interested shareholder" within the meaning of Section 14-2-1110, it will be subject to the requirements of Sections 14-2-1111 — 14-2-1113 for electing corporations. Further, if the company is a "resident domestic corporation," it will be subject to the requirements of Sections 14-2-1131 — 14-2-1133 for electing corporations.

Subsection (f) authorizes a board of directors to abandon a proposed sale without shareholder approval after it has been previously approved by the shareholders. An abandonment does not affect contractual rights that third persons may have against the corporation.

Certain corporate divisions, often called "spin offs," "split offs," or "split ups," sometimes involve transactions that may be formally characterized as sales of "all or substantially all" the corporate assets when in fact they are only a step in a corporate division that does not give rise to the problem of a major change in corporate direction and therefore does not need shareholder approval. Subsection (g) is designed to make clear that transactions like this, which actually constitute a distribution, are not subject to Section 14-2-1202. See Siegal, "When Corporations Divide: A Statutory and Financial Analysis," 79 Harv. L. Rev. 534 (1966).

The approval of most sales of the corporation's assets under this section gives rise to dissenters' rights under Article 13 to shareholders if a shareholder vote is required on



the transaction and if they avail themselves of the procedures described in that article. Sales subject to Section 14-2-1202 that do not give rise to dissenters' rights even for voting shares include (1) sales pursuant to a court order and (2) sales that require all or substantially all of the net proceeds to be distributed to the shareholders in accordance with their respective interests within one year after the date of sale. See Section 14-2-1302.

#### Note to 1997 Amendment

Subsection (e) was amended by the addition of the words "or bylaws" following "articles of incorporation."

#### Cross-References

Asset sale as "Business Combination," see § 14-2-1011. Director standards of conduct, see §§ 14-2-830 & 14-2-831. Dissenters' rights, see Article 13. "Distribution" defined, see § 14-2-140. "Notice" defined, see § 14-2-141. Limits on business combination with interested shareholder of resident domestic corporation, see § 14-2-1131 et seq. Notice of shareholders' meeting, see § 14-2-705. Quorum at shareholders' meeting, see § 14-2-725. Supermajority quorum and voting requirements, see § 14-2-727. Voting by voting group, see §§ 14-2-725 & 14-2-726. Voting for business combination with interested shareholder, see § 14-2-1111. Voting entitlement of shareholders generally, see § 14-2-721. "Voting group" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-231, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Cited in** *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir. 1982); *Quinn v. Cardiovascular Physicians*, 254 Ga. 216, 326 S.E.2d 460 (1985); *Augusta Surgical Ctr., Inc. v. Walton & Heard Office Venture*, 235 Ga. App. 283, 508 S.E.2d 666 (1998).

### RESEARCH REFERENCES

**ALR.** — Who may assert invalidity of sale, mortgage, or other disposition of corporate property without approval of stockholders, 58 ALR2d 784.

Sale of business or of real estate upon which business is conducted as transferring

good will by implication, in absence of covenant not to compete, 65 ALR2d 502.

Validity of obligation given by corporation incident to purchase of entire stock by sole shareholder, 71 ALR3d 639.

## ARTICLE 13

### DISSENTERS' RIGHTS

**Law reviews.** — For article discussing financial statements required under the Georgia Business Corporation Code, see 3 Ga. L. Rev. 11 (1968). For article, "The Acquisition Process and the Closely-Held Corporation: Selected Legal Aspects," see 36 Mercer L. Rev. 567 (1985). For article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B.J. 29 (1987). For article, "Geor-

gia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988). For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989). For article, "Why Discounts Are Now Inappropriate Under Georgia's Dissenters' Rights Statute," see 6 Ga. St. B.J. 12 (2001).

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
FAIR VALUE

## General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-1202 and former Code Sections 14-2-251 and 14-2-252, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this article.

**Purpose.** — The general purpose of former § 14-2-251 was to provide an orderly and fair method to evaluate the ownership interests of shareholders who are forced from the corporation by their dissent from certain corporate action. *Atlantic States Constr., Inc. v. Beavers*, 169 Ga. App. 584, 314 S.E.2d 245 (1984) (decided under former § 14-2-251).

**Corporation's power to impair shareholder's rights differs from state's power.** — There is a substantial difference between corporation's attempting to reserve right to impair vested rights of its shareholders through altering or amending its internal structure and retention by state of power to modify or withdraw charters granted to corporations created by the state. *Baugh v. Citizens & S. Nat'l Bank*, 248 Ga. 180, 281 S.E.2d 531 (1981) (decided under former Code 1933, § 22-1202).

**Effect of state bank merger and consolidation provisions on shareholder's rights.** — Application of provisions dealing with merger and consolidation of state banks does not impair shareholder's rights in such a way as to offend constitutional prohibition against retroactivity. *Baugh v. Citizens & S. Nat'l Bank*, 248 Ga. 180, 281 S.E.2d 531 (1981) (decided under former Code 1933, § 22-1202).

**Conditional dissent by shareholder.** — Former Code 1933, § 41A-2408 (see O.C.G.A. § 7-1-537) and former Code 1933, § 22-1202 (former § 14-2-251) make no provision for conditional dissent by shareholder to plan or propose merger. *Baugh v. Citizens & S. Nat'l Bank*, 248 Ga. 180, 281 S.E.2d 531 (1981) (decided under former Code 1933, § 22-1202).

**Dissent by minority shareholder.** — Consideration of the minority nature of the dissenting shareholders' interest is not against public policy for purposes of determining fair value. *Atlantic States Constr., Inc. v. Beavers*, 169 Ga. App. 584, 314 S.E.2d 245 (1984) (decided under former § 14-2-251).

**Merger statutes not to be used solely to eliminate minority stockholder.** — Where a corporation is unable to eliminate a minority stockholder by simply adopting a bylaw or voting to purchase the minority's stock, its majority stockholders cannot accomplish the same purpose by setting up a second corporation wholly owned by them whose sole purpose is to enable it to take advantage of the merger statutes. *Bryan v. Brock & Blevins Co.*, 490 F.2d 563 (5th Cir.), cert. denied, 419 U.S. 844, 95 S. Ct. 77, 42 L. Ed. 2d 72 (1974) (decided under former Code 1933, § 22-1202).

**Injunction not an available remedy.** — The minority shareholders of a railroad company were not entitled to enjoin a merger between the railroad and a non-railroad corporation, having offered no facts to support the same, and having an adequate remedy at law under former § 14-2-251 and § 14-4-143, which provide for a fair and adequate price to dissenting shareholders. *Long v. Atlanta & W.P.R.R.*, 253 Ga. 257, 320 S.E.2d 530 (1984) (decided under former § 14-2-251).

**Trier of fact may reject expert opinion.** — Nothing in former § 14-2-251 abrogates the general rule allowing the trier of fact to reject an expert opinion. *Atlantic States Constr., Inc. v. Beavers*, 169 Ga. App. 584, 314 S.E.2d 245 (1984) (decided under former § 14-2-251).

**No direct appeal to Supreme Court.** — An appraisal proceeding pursuant to former § 14-2-251 is legal, not equitable, in character; and thus no right of direct appeal to the Supreme Court lies from such a proceeding. *Atlantic States Constr., Inc. v. Beavers*, 250 Ga. 828, 301 S.E.2d 635 (1983) (decided under former § 14-2-251).



Cited in Schnorbach v. Fuqua, 70 F.R.D. 424 (S.D. Ga. 1975); Gunter v. Hutcheson, 674 F.2d 862 (11th Cir. 1982); Multitex Corp. of Am. v. Dickinson, 683 F.2d 1325 (11th Cir. 1982); Atlantic States Constr., Inc. v. Beavers, 169 Ga. App. 584, 314 S.E.2d 245 (1984); Quinn v. Cardiovascular Physicians, 254 Ga. 216, 326 S.E.2d 460 (1985).

### Fair Value

**"Fair market value" defined.** — For discussion of establishment of "fair market value" under former Code 1933, § 22-1202 and pertinent jury instructions, see Multitex Corp. of Am. v. Dickinson, 683 F.2d 1325 (11th Cir. 1982) (decided under former Code 1933, § 22-1202).

**Use of "willing seller and buyer" test.** — The "willing seller, willing buyer" test should not be used to define "fair value," but should be limited to defining "market value." Atlantic States Constr., Inc. v. Beavers, 169 Ga. App. 584, 314 S.E.2d 245 (1984) (decided under former §§ 14-2-251 and 14-2-252).

**Factors to be considered in determining "fair value".** — When determining "fair value" of dissenting stockholder's shares under paragraph (4) of subsection (g) of former § 14-2-251, the trial court should maintain a flexible standard by considering all factors relevant to the per share fair value in each case, including market, earnings or investment, and asset value, and apply a reasonable methodology supported by the evidence. Atlantic States Constr., Inc. v. Beavers, 169 Ga. App. 584, 314 S.E.2d 245 (1984) (decided under former §§ 14-2-251 and 14-2-252).

**Initial burden of proof of "fair value" rests with the corporation.** Atlantic States Constr., Inc. v. Beavers, 169 Ga. App. 584, 314 S.E.2d 245 (1984) (decided under former §§ 14-2-251 and 14-2-252).

**Burden of proof for establishment of fair market value** of stock under former § 14-2-251 is upon the corporation and is similar to establishing price under a condemnation action. Multitex Corp. of Am. v. Dickinson, 683 F.2d 1325 (11th Cir. 1982) (decided under former § 14-2-251).

## PART 1

### RIGHT TO DISSENT AND OBTAIN PAYMENT FOR SHARES

#### RESEARCH REFERENCES

**ALR.** — Right of stockholder to redeem corporate property from execution or mortgage sale, 39 ALR 1056.

Statute for protection of dissenting shareholder upon change of corporate structure affecting his preferential rights, 78 ALR 1118.

Construction and effect of provisions for payment of dissenting stockholders in statutes relating to merger, consolidation, or reorganization of banks or other corpora-

tions, 87 ALR 597; 162 ALR 1237; 174 ALR 960.

Duty and liability of closely held corporation, its directors, officers, or majority stockholders, in acquiring stock of minority shareholder, 7 ALR3d 500.

Dominant shareholder's accountability to minority for profit, bonus, or the like, received on sale of stock to outsiders, 38 ALR3d 738.

### 14-2-1301. Definitions.

As used in this article, the term:

(1) "Beneficial shareholder" means the person who is a beneficial owner of shares held in a voting trust or by a nominee as the record shareholder.

(2) "Corporate action" means the transaction or other action by the corporation that creates dissenters' rights under Code Section 14-2-1302.

(3) "Corporation" means the issuer of shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.

(4) "Dissenter" means a shareholder who is entitled to dissent from corporate action under Code Section 14-2-1302 and who exercises that right when and in the manner required by Code Sections 14-2-1320 through 14-2-1327.

(5) "Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action.

(6) "Interest" means interest from the effective date of the corporate action until the date of payment, at a rate that is fair and equitable under all the circumstances.

(7) "Record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(8) "Shareholder" means the record shareholder or the beneficial shareholder. (Code 1981, § 14-2-1301, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 16.)

#### COMMENT

Source: Model Act, § 13.01. Former law contained some of these definitions in § 14-2-251.

Section 14-2-1301 contains specialized definitions applicable only to Article 13.

The Model Act's definition of "beneficial shareholder" has been renumbered as subsection (1) and expanded to include holders of voting trust certificates.

The definition of "dissenter" in subsection (3) is a limiting one, since only a shareholder who has performed all the conditions imposed on him by this article in order to obtain payment for his shares is a "dissenter." Under this definition, a shareholder who initially objects but fails to perform any of these conditions with the times specified by this article loses his status as "dissenter" under this section.

The definition of "fair value" in subsection (4) leaves to the parties (and ultimately to the courts) the details by which "fair value" is to be determined within the broad outlines of the definition. This definition recognizes that determination of value is a question of fact, and is to be determined on the basis of the best available information in the particular case. It specifically preserves the language of former § 14-2-251(f) excluding appreciation and depreciation in anticipation of the proposed corporate action. The Model Act permitted an exception for equitable considerations that was deleted from the Code. The Code's approach of excluding appreciation or depreciation in anticipation of the corporate action provides a minority shareholder with full protection. The equitable exception only introduces vagueness and uncertainty into an already difficult determination.

"Fair value" is to be determined immediately before the effectuation of the corporate action, instead of the date of the shareholder's vote, as was the case under former



§ 14-2-251(f). This comports with the plan of this article to preserve the dissenter's prior rights as a shareholder until the effective date of the corporate action, rather than leaving him in a twilight zone where he has lost his former rights, but has not yet gained his new ones.

The definition of "interest" in subsection (5) of the Model Act has been altered. Former § 14-2-251(g)(6) provided for interest "at such rate as the court finds to be equitable." The Model Act's approach, tying interest rates to the average rate paid by a corporation on its principal bank loans, created factual difficulties, and would have led to varying interest rate awards for dissenters in different corporations at the same time. The date from which interest runs has been changed from the date of the shareholders' vote to the effective date of the corporate action, in conformity with the change of the valuation date in subsection (4).

The definition of "record shareholder" in subsection (6) is the key to determination of dissenters' rights under Section 14-2-1302. This represents a departure from the Model Act, which granted dissenters' rights, under different conditions, to both "shareholders" and "record shareholders." Record ownership for purposes of determining who can vote on a transaction, under Section 14-2-707, may be set as much as 70 days in advance of the meeting. But the action triggering dissenters' rights in some cases may be taken without a shareholder vote (as in the case of a parent-subsidary merger under Section 14-2-1104), or by written consent of the holders of a sufficient number of shares authorized by articles of incorporation under Section 14-2-704, in which cases notice must be sent within ten days after the action is taken. In these cases Section 14-2-1320(b) requires a notice of dissenters' rights to be sent at that time, which would create a new "record date" for determining who is a "record shareholder." See the Comment to Section 14-2-1323.

Subsection (7) includes beneficial owners within the definition of "shareholder" for purpose of determining who can dissent, if a nominee certificate has been filed pursuant to Section 14-2-723 granting such rights.

**Note to 1993 Amendment**

The 1993 amendment added the definition of corporate action.

**Cross-References**

Act definitions, see § 14-2-140. Legal rate of interest, see § 7-4-12. Merger and share exchange, see Articles 11 and 11A (Article 11A has been redesignated as Part 3 of Article 11).

**JUDICIAL DECISIONS**

**Determining fair value.** — Under the dissenters' rights statute a court should not apply minority or marketability discounts in determining the fair value of dissenters' shares; rather, the term fair value encompasses the modern view expressed by the

Revised Model Business Corporation Act that a shareholder should generally be awarded his or her proportional interest in the corporation after valuing the corporation as a whole. *Blitch v. Peoples Bank*, 246 Ga. App. 453, 540 S.E.2d 667 (2000).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 810, 811, 836, 837.

**C.J.S.** — 19 C.J.S., Corporations, §§ 799-801.

**ALR.** — Status of owners of nonregistered stock as “stockholders” within state statute relating to merger or consolidation or reorganization of corporation, or sale of its entire assets, 158 ALR 983.

Conclusiveness of statement or decision of accountant or similar third person under

contract between others requiring property to be valued by him, 50 ALR2d 1268.

Valuation of stock of dissenting stockholders in case of consolidation or merger of corporation, sale of its assets, or the like, 48 ALR3d 430.

### **14-2-1302. Right to dissent.**

(a) A record shareholder of the corporation is entitled to dissent from, and obtain payment of the fair value of his or her shares in the event of, any of the following corporate actions:

(1) Consummation of a plan of merger to which the corporation is a party:

(A) If approval of the shareholders of the corporation is required for the merger by Code Section 14-2-1103 or the articles of incorporation and the shareholder is entitled to vote on the merger, unless:

(i) The corporation is merging into a subsidiary corporation pursuant to Code Section 14-2-1104;

(ii) Each shareholder of the corporation whose shares were outstanding immediately prior to the effective time of the merger shall receive a like number of shares of the surviving corporation, with designations, preferences, limitations, and relative rights identical to those previously held by each shareholder; and

(iii) The number and kind of shares of the surviving corporation outstanding immediately following the effective time of the merger, plus the number and kind of shares issuable as a result of the merger and by conversion of securities issued pursuant to the merger, shall not exceed the total number and kind of shares of the corporation authorized by its articles of incorporation immediately prior to the effective time of the merger; or

(B) If the corporation is a subsidiary that is merged with its parent under Code Section 14-2-1104;

(2) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan;

(3) Consummation of a sale or exchange of all or substantially all of the property of the corporation if a shareholder vote is required on the sale or exchange pursuant to Code Section 14-2-1202, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;



(4) An amendment of the articles of incorporation with respect to a class or series of shares that reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under Code Section 14-2-604; or

(5) Any corporate action taken pursuant to a shareholder vote to the extent that Article 9 of this chapter, the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(b) A shareholder entitled to dissent and obtain payment for his or her shares under this article may not challenge the corporate action creating his or her entitlement unless the corporate action fails to comply with procedural requirements of this chapter or the articles of incorporation or bylaws of the corporation or the vote required to obtain approval of the corporate action was obtained by fraudulent and deceptive means, regardless of whether the shareholder has exercised dissenter's rights.

(c) Notwithstanding any other provision of this article, there shall be no right of dissent in favor of the holder of shares of any class or series which, at the record date fixed to determine the shareholders entitled to receive notice of and to vote at a meeting at which a plan of merger or share exchange or a sale or exchange of property or an amendment of the articles of incorporation is to be acted on, were either listed on a national securities exchange or held of record by more than 2,000 shareholders, unless:

(1) In the case of a plan of merger or share exchange, the holders of shares of the class or series are required under the plan of merger or share exchange to accept for their shares anything except shares of the surviving corporation or another publicly held corporation which at the effective date of the merger or share exchange are either listed on a national securities exchange or held of record by more than 2,000 shareholders, except for scrip or cash payments in lieu of fractional shares; or

(2) The articles of incorporation or a resolution of the board of directors approving the transaction provides otherwise. (Code 1981, § 14-2-1302, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 58; Ga. L. 1999, p. 405, § 11; Ga. L. 2003, p. 897, § 11.)

**The 2003 amendment**, effective July 1, 2003, inserted "or her" throughout the Code section; in subsection (a), in subparagraph (a)(1)(A), deleted "14-2-1104 or" preceding "the articles", added ", unless the corporation:" at the end, and added subdivisions (a)(1)(A)(i) through (a)(1)(A)(iii), and rewrote paragraph (a)(4).

**Code Commission notes.** — Pursuant to

Code Section 28-9-5, in 2003, "unless: (i) The corporation" was substituted for "unless the corporation: (i)", "(ii) Each" was substituted for "(ii) each", and "(iii) The" was substituted for "(iii) the" in subparagraph (a)(1)(A).

**Law reviews.** — For article, "Business Associations," see 53 Mercer L. Rev. 109 (2001). For article, "Why Discounts are Now

Inappropriate Under Georgia's Dissenters' Rights Statute," see 6 Ga. St. B.J. 12 (2001).

### COMMENT

Source: Model Act, § 13.02; former § 14-2-250(d).

Subsection (a) establishes the scope of a shareholder's right to dissent (and his resulting right to obtain payment for his shares) by defining the transactions with respect to which a right to dissent exists. These transactions include, in subsection (a)(1), a plan of merger if (i) shareholder approval is required for the merger under Section 14-2-1103 or the articles of incorporation, and the shareholder is entitled to vote, or (ii) the shareholder is a shareholder of a subsidiary that is merged with a parent under Section 14-2-1104. Former § 14-2-250(a)(1) allowed a shareholder to dissent from any merger or consolidation. The reference to the shareholder's entitlement to vote excludes those shareholders of a surviving corporation who do not have the right to vote, as set out in Section 14-2-1103(g), generally because the number of shares being issued in the merger does not exceed those previously authorized, and because substantial rights of the shareholders are not being changed by the merger.

Section 14-2-1103(c) permits the board to condition submission of the plan of merger on any basis, which may include approval through a vote of a class or series of shares that would not otherwise be entitled to voting rights. Normally shareholders of a merging corporation will be entitled to voting rights under Section 14-2-1103(f) if the merger has the effect of an amendment to articles of incorporation that would significantly alter rights, and create voting rights under Section 14-2-1004. This subsection should be read in conjunction with subsection (a)(5), which provides dissenters' rights with respect to any corporate action to the extent the articles, bylaws, or a resolution of the board of directors grant a right of dissent. Georgia law previously contained no provision comparable to subsection (a)(5). Thus the corporation can accord dissenters' rights to holders of a class or series of stock where neither the Code nor articles of incorporation permit. These dissenters' rights can be coupled with voting rights if the board so chooses.

Other dissenters' rights are granted by subsection (a)(2) with respect to a share exchange under Section 14-2-1102 if the corporation is a party whose shares are being acquired by the plan and the shareholder is entitled to vote on the exchange; by subsection (a)(3) with respect to a sale or exchange of all or substantially all of the property of the corporation requiring approval by holders of the class of shares held by the shareholder under Section 14-2-1202 if a shareholder vote is required for the sale or exchange; and by subsection (a)(4) with respect to amendments to articles of incorporation that impair the shareholders' rights as shareholders in any of the enumerated ways.

Subsection (a)(4)(i) gives shareholders dissenters' rights if an amendment of the articles of incorporation materially and adversely affects rights because it alters or abolishes a preferential right of the shares. Former Georgia law was much more detailed about which alterations trigger these rights. Former § 14-2-250(a)(4) allowed shareholders to dissent to amendments to articles of incorporation making dividends on preferred shares non-cumulative, from action reducing a dividend preference on preferred shares, and from action reducing a preferential right of preferred shares upon liquidation, from any amendment of the articles that would, among other things, "alter his percentage of the equity in the corporation," and from any amendment of the articles that adversely affects the shareholder by "Imposing, altering, or abolishing any restriction on the transfer of any of his shares." No comparable provisions are found in § 14-2-1302.

Subsection (b) establishes dissenters' rights as the exclusive remedy of this article. Subsection (b) of the Model Act was amended by replacing the phrase "is unlawful"



with "fails to comply with the procedural requirements of this chapter or the articles of incorporation or bylaws of the corporation." Thus, the fact that the merger might be argued to be unlawful as a breach of the directors' duty of care is not ground for equitable relief at the instance of a shareholder. The dissenters' rights remedy is the exclusive remedy unless the transaction is not in compliance with the requirements of the Code, or the vote required to approve the action was obtained by fraudulent and deceptive means.

The theory underlying this section is as follows: when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous, and persuades a court that this is correct. Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss. Thus in general terms an exclusivity principle is justified. But the prospect that shareholders may be "paid off" does not justify the corporation in proceeding unlawfully or fraudulently. If the corporation attempts an action in violation of the corporation law on voting, in violation of clauses in articles of incorporation prohibiting it, or by deception of shareholders — to take some examples — the court's freedom to intervene should be unaffected by the presence or absence of dissenters' rights under this article.

Complaints of "unfairness" of the terms of a merger in which a majority takes out minority interests are not contemplated under subsection (b). In such business combinations, if the bylaws of the corporation so provide, minority shareholders frequently obtain their protection from the fair price and voting requirements of Sections 14-2-1111 and 14-2-1112(b), or from the business combination provisions of Article 11A. Thus, only those business combinations with an interested shareholder not subject to Part 2 of Article 11 raise issues of whether fairness requires some sharing of the gains with minority shareholders. The Code approach is to leave the parties with such rights as they may have contracted for, plus dissenters' rights. See Carney, Shareholder Coordination Costs, Shark Repellents, and Takeout Mergers: The Case Against Fiduciary Duties, 1983 Am. Bar Found. Res. J. 341.

The approach of subsection (c) follows the general approach of former Georgia law, which contained a market exception to appraisal rights. The language was drawn from Del. Code Ann. tit. 8, § 262, which limits appraisal rights to those cases where the shareholders do not receive shares of a publicly held corporation with comparable liquidity. Therefore holders of listed shares would have appraisal rights in a merger converting their shares to cash. The Code uses the Delaware approach of a "national securities exchange," rather than the limitation of former § 14-2-250(d)'s reference to the New York and American stock exchanges. A "national securities exchange" is defined under Section 14-2-140 by reference to the Georgia Securities Act of 1973, and its designation is intended to govern. See Section 14-2-140.

Restoration of dissenters' rights by the articles of incorporation, under subsection (c)(2) has the effect of making dissenters' rights exclusive under subsection (b). Similar treatment can be obtained under subsection (a) either by conditioning the merger upon approval of a class of shares (subsection (a)(1)) or by granting dissenters' rights to shareholders without voting rights by board resolution (subsection (a)(5)).

Several provisions of Article 9 of the Code also trigger dissenters' rights. Section 14-2-902 provides that a shareholder who votes against an election of statutory close corporation status may dissent. Similarly, a shareholder who votes against an election to terminate such status may dissent under Section 14-2-931. Section 14-2-914 provides that a close corporation may elect, in its articles of incorporation, provisions for mandatory buy-out of deceased shareholders. The procedures and price formulae set out in Sections 14-2-915 to 917 may be modified by an amendment to the articles of incorporation, and a shareholder who votes against such an amendment is entitled to

dissenters' rights if the amendment terminates or substantially alters his existing rights to have his shares purchased.

#### **Note to 1989 Amendment**

The 1989 amendment emphasizes the exclusive nature of the appraisal remedy under the Code. First, appraisal is exclusive regardless of whether the shareholder has chosen to exercise this remedy. While this was the intended effect of subsection (b), the addition of this phrase reinforced this intent. Second, the only exceptions from the exclusivity of appraisal remain "fraud or illegality," but the terms are more clearly specified. While the 1988 Code specified that illegality meant failure to comply with the procedural requirements of the Code, concerning adoption of appropriate director resolutions, plans of mergers, and proper notice to shareholders, as well as obtaining the requisite shareholder vote, it did not specify the nature of the "fraud" that would allow collateral challenges to the corporate action. Because fraud can be "actual fraud" that involves deception, or "constructive fraud," in equity, that involves some claim of a breach of a fiduciary duty, litigants in some cases have been permitted to use "fraud" claims, which are in essence claims that a fiduciary has acted unfairly, to litigate valuation issues that are appropriately disposed of in appraisal proceedings. Accordingly, the 1989 amendment made it clear that only "actual fraud," involving traditional notions of deception, permits collateral attack on the corporate action. In this respect the Code follows the general approach, but not the language, of Cal. Corp. Code § 1312(a), which makes appraisal exclusive "except in an action to test whether the number of shares required to authorize or approve the reorganization have been legally voted..." (California permits broader equitable challenges to mergers with controlling shareholders, but the shareholder who sues must relinquish his right to an appraisal proceeding.)

The 1989 amendment changed subsection (c)(1) by replacing the word "company" with "corporation." "Company" is not a defined word in the Code, although there are references to a "joint-stock company" as a form of "joint stock association" in section 14-2-1109(a)(1).

#### **Note to 1999 Amendment**

Subsection (a)(1)(A) was amended to provide for dissenters' rights in favor of the minority shareholders of a subsidiary corporation that is merged with its parent corporation pursuant to Section 14-2-1104. See 1999 amendment to § 14-2-1104.

#### **Note to 2003 Amendment**

See Comment to Code Section 14-2-1104 for an explanation of amendments to subparagraph (1) of subsection (a) of this Code Section.

The amendments to subparagraph (4) of subsection (a) of Code Section 14-2-1302 conform to the language of Section 13.02 of The Model Business Corporation Act (the "Model Act"), as amended in 1999. Section 13.02 of the Model Act was amended to eliminate dissenters' rights in connection with amendments to the articles of incorporation other than amendments effectuating reverse stock splits which reduce the number of shares that a shareholder owns of a class or series to a fractional share if the corporation has the obligation or right to repurchase the fractional share so created. The reasons for granting dissenters' rights in this situation are similar to those granting such rights in cases of cash-out mergers, as both transactions could compel affected shareholders to accept cash for their investment in an amount established by the corporation. The right to dissent is afforded only for those shareholders of a class or series whose interest is so affected.



### Cross-References

Amendment of articles of incorporation, see Article 10, Part 1. Bylaws, see § 14-2-205 and Article 10, Part 2. Cumulative voting, see § 14-2-728. Dissolution, see Article 14. Fractional shares, see § 14-2-604. "National securities exchange" defined, see § 14-2-140. Preemptive rights, see § 14-2-630. Redemption of shares, see §§ 14-2-601 & 14-2-631. Sale of assets, see Article 12. Share dividends, see § 14-2-623. Share preferences, see §§ 14-2-601 & 14-2-602. "Voting group" defined, see § 14-2-140. Voting rights generally, see § 14-2-721.

### JUDICIAL DECISIONS

**Determining fair value.** — Under the dissenters' rights statute a court should not apply minority or marketability discounts in determining the fair value of dissenters' shares; rather, the term fair value encompasses the modern view expressed by the Revised Model Business Corporation Act that a shareholder should generally be awarded his or her proportional interest in the corporation after valuing the corporation as a whole. *Blitch v. Peoples Bank*, 246 Ga. App. 453, 540 S.E.2d 667 (2000).

**Exclusivity of remedy.** — In an action by minority shareholders for breach of a merger agreement, where the claim was essentially one regarding the price the shareholders were to receive for shares, the statutory appraisal remedy was exclusive. *Grace Bros. v. Farley Indus., Inc.*, 264 Ga. 817, 450 S.E.2d 814 (1994).

Shareholders who object to a merger are entitled to receive the fair value of their shares prior to the effectuation of the merger, and any facts which shed light on the value of the dissenting shareholders' interests are to be considered in arriving at "fair value." *Grace Bros. v. Farley Indus., Inc.*, 264 Ga. 817, 450 S.E.2d 814 (1994).

Where shareholders' claims of fraud and violation of bylaws were not viable, they were

precluded from claiming that the premium paid to certain shareholders in connection with a merger violated the corporation's articles of incorporation. *Lewis v. Turner Broadcasting Sys.*, 232 Ga. App. 831, 503 S.E.2d 81 (1998).

**Appraisal remedy was not exclusive.** — Shareholder who had an individual, independent contract requiring the shareholder to sell, and the corporation to buy, the shareholder's shares at a certain time for a minimum price was not limited to the appraisal remedy set forth by O.C.G.A. § 14-2-1302. *Croxton v. MSC Holding, Inc.*, 227 Ga. App. 179, 489 S.E.2d 77 (1997).

**Dissenters' rights waived.** — Minority shareholder failed to perfect shareholder's dissenters' rights under O.C.G.A. § 14-2-1302(a) where the shareholder did not tender stock certificates and demand payment as required by the Code, but canceled certificates and had new certificates issued to another legal entity, placing the shareholder's certificates beyond the shareholder's power to tender to the corporation; consequently, the shareholder gave up the right to dissent, a right which attached to the possession of those particular stock certificates. *Magner v. One Secs. Corp.*, 258 Ga. App. 520, 574 S.E.2d 555 (2002).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 805, 810; 19 Am. Jur. 2d, Corporations, § 2574.

**C.J.S.** — 19 C.J.S., Corporations, § 799.

**ALR.** — Status of owners of nonregistered stock as "stockholders" within state statute relating to merger or consolidation or reorganization of corporation, or sale of its entire assets, 158 ALR 983.

Construction and effect of provision for payment of dissenting stockholders in statutes relating to merger, consolidation, or reorganization of banks or other corporations, 162 ALR 1237; 174 ALR 960.

Propriety of applying minority discount to value of shares purchased by corporation or its shareholders from minority shareholders, 13 ALR5th 840.

**14-2-1303. Dissent by nominees and beneficial owners.**

A record shareholder may assert dissenters' rights as to fewer than all the shares registered in his name only if he dissents with respect to all shares beneficially owned by any one beneficial shareholder and notifies the corporation in writing of the name and address of each person on whose behalf he asserts dissenters' rights. The rights of a partial dissenter under this Code section are determined as if the shares as to which he dissents and his other shares were registered in the names of different shareholders. (Code 1981, § 14-2-1303, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Act, § 13.03. This replaces former § 14-2-250(c).

Section 14-2-1303 addresses the relationship between dissenters' rights and the widespread practice of nominee or street name ownership of publicly held shares. Generally, a shareholder must dissent with respect to all the shares he owns or over which he has power to direct the vote. If a record shareholder is a nominee for several beneficial shareholders, however, some of whom wish to dissent and some of whom do not, Section 14-2-1303(a) permits the record shareholder to dissent with respect to a portion of the shares owned by him but only with respect to all the shares beneficially owned by a single person. Former § 14-2-250(c) was less clear.

The Model Act contained a subsection (b) that permitted beneficial owners to dissent directly. No such procedure existed in former Georgia law, in § 14-2-250(c), and that approach was preserved. The fiduciary duties of nominees and other fiduciaries will require them to dissent when requested by beneficial owners, unless they are trustees with trust powers to exercise their own discretion and judgment.

**Cross-References**

"Beneficial shareholder" defined, see § 14-2-1301. Notice to the corporation, see § 14-2-141. "Person" defined, see § 14-2-140. "Record shareholder" defined, see § 14-2-1301. "Shareholder" defined, see §§ 14-2-140 & 14-2-1301. Shares held by nominee, see § 14-2-723. Voting agreements, see § 14-2-731. Voting trusts, see § 14-2-730.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 810, 811.

**ALR.** — Status of owners of nonregistered stock as "stockholders" within state statute

relating to merger or consolidation or reorganization of corporation, or sale of its entire assets, 158 ALR 983.

**PART 2****PROCEDURE FOR EXERCISE OF DISSENTERS' RIGHTS****JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-251, are included in the annotations for this section.

**Accepting benefit of merger precludes attack on its validity.** — Minority shareholders who failed to appeal the denial of their motion to enjoin a merger and chose to



tender their shares at the offered price and accept the benefit of the merger, thereby abandoned their statutory rights and were barred from subsequently attacking the va-

lidity of the merger. *Columbus Mills, Inc. v. Kahn*, 259 Ga. 80, 377 S.E.2d 153 (1989) (decided under former § 14-2-251).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 828-835.

### 14-2-1320. Notice of dissenters' rights.

(a) If proposed corporate action creating dissenters' rights under Code Section 14-2-1302 is submitted to a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this article and be accompanied by a copy of this article.

(b) If corporate action creating dissenters' rights under Code Section 14-2-1302 is taken without a vote of shareholders, the corporation shall notify in writing all shareholders entitled to assert dissenters' rights that the action was taken and send them the dissenters' notice described in Code Section 14-2-1322 no later than ten days after the corporate action was taken. (Code 1981, § 14-2-1320, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 17.)

### COMMENT

Source: Model Act, § 13.20. This replaces former § 14-2-251.

Subsection (a) requires the corporation to notify record shareholders of the existence of dissenters' rights before the vote is taken on the corporate action. This notice provides the reassurance to investors that the right to dissent is intended to provide because many shareholders have no idea what rights of dissent they may have or how to assert them. If the corporation is uncertain whether or not the shareholders have dissenters' rights, it may comply with this notice requirement by stating that the shareholders "may have" dissenters' rights. Such notification was required by former law at the time of the notice of the meeting for amendments of the articles of incorporation by § 14-2-191(b)(2); for mergers by § 14-2-212(b)(2); and for asset sales by § 14-2-231(2).

Subsection (b) provides that notice be given after the action is taken in situations where the action is validly taken without a vote of shareholders, e.g., in a merger of a subsidiary into its parent under Section 14-2-1104, or in amendments of articles of incorporation taken by written consent of shareholders by a required vote under Section 14-2-704. Subsection 14-2-1104(c) requires the notice to be sent within ten days after corporate action is taken. Similarly, if action amending articles of incorporation is taken by written consent of the required number of shareholders, Section 14-2-704(g) requires notice to be sent to the remaining shareholders within ten days. This notice may be combined with the dissenters' notice required by Section 14-2-1322. This was previously required by § 14-2-214(b).

### Note to 1993 Amendment

The 1993 amendment added the phrase "no later than ten days after the corporate action was taken" to clarify that the notice required by Section 14-2-1322 does not need

to be provided when soliciting a consent, but only after the corporation takes the action creating the dissenters' rights.

#### Cross-References

Acting without meeting, see § 14-2-704. Meeting notice, see § 14-2-705. "Notice" defined, see § 14-2-141. "Record shareholder" defined, see § 14-2-1301. Right to dissent, see § 14-2-1302. "Shareholder" defined, see § 14-2-1301. Shareholders' meetings, see § 14-2-701 et seq.

#### RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, § 817.

#### 14-2-1321. Notice of intent to demand payment.

(a) If proposed corporate action creating dissenters' rights under Code Section 14-2-1302 is submitted to a vote at a shareholders' meeting, a record shareholder who wishes to assert dissenters' rights:

(1) Must deliver to the corporation before the vote is taken written notice of his intent to demand payment for his shares if the proposed action is effectuated; and

(2) Must not vote his shares in favor of the proposed action.

(b) A record shareholder who does not satisfy the requirements of subsection (a) of this Code section is not entitled to payment for his shares under this article. (Code 1981, § 14-2-1321, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 13.21. This replaces former § 14-2-251.

If a shareholder's vote is called for, subsection (a) requires the shareholder to give notice of his intent to demand payment before the vote on the corporate action is taken. This notice enables other voters to determine how much of a cash payment may be required. It also serves to limit the number of persons to whom the corporation must give further notice, including the technical details of depositing share certificates. This subsection has no application to actions taken without a shareholder vote. This is consistent with former law, § 14-2-251(a).

In order to be and remain a dissenter eligible to demand payment for his shares, the section requires that a shareholder must not only give the notice required by this section, but must also vote against, or abstain from voting on, the proposal. This is clearer than the similar provision of former § 14-2-251(b).

The time available to file the notice required in § 14-2-1321 may be shorter than the notice period previously available, because generally notice of meetings to approve mergers, share exchanges and asset sales is set at a minimum of 10 days under the Code, where it was 20 days under prior law. Thus § 14-2-1003(d) (amendments of articles of incorporation), § 14-2-1103(d) (mergers) and § 14-2-1202(d) (asset sales) all refer to the notice required by § 14-2-705, which sets notice requirements of no fewer than 10 nor more than 60 days, while previously the requirements were 10 days for amendments



to articles (§ 14-2-191(b)(2) and § 14-2-113(a)); 20 days for mergers and consolidations (§ 14-2-212(b)(1), and 20 days for asset sales (§ 14-2-231(2)).

#### Cross-References

"Deliver" includes mail, see § 14-2-140. Dissenters' rights as exclusive remedy, see § 14-2-1302. Effective date of notice, see § 14-2-141. "Notice" defined, see § 14-2-141.

### JUDICIAL DECISIONS

Cited in *Blitch v. Peoples Bank*, 246 Ga. App. 453, 540 S.E.2d 667 (2000).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 818 to 824.

**C.J.S.** — 19 C.J.S., Corporations, §§ 800, 801.

**ALR.** — Timeliness and sufficiency of

dissenting stockholder's notice of his objection to consolidation or merger and of his demand for payment for his shares, 40 ALR3d 260.

#### 14-2-1322. Dissenters' notice.

(a) If proposed corporate action creating dissenters' rights under Code Section 14-2-1302 is authorized at a shareholders' meeting, the corporation shall deliver a written dissenters' notice to all shareholders who satisfied the requirements of Code Section 14-2-1321.

(b) The dissenters' notice must be sent no later than ten days after the corporate action was taken and must:

(1) State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;

(2) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(3) Set a date by which the corporation must receive the payment demand, which date may not be fewer than 30 nor more than 60 days after the date the notice required in subsection (a) of this Code section is delivered; and

(4) Be accompanied by a copy of this article. (Code 1981, § 14-2-1322, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 13.22. This replaces former § 14-2-251(b) & (c).

The basic purpose of Section 14-2-1322 is to require the corporation to tell all actual or potential dissenters what they must do in order to take advantage of their right of dissent. The requirements of what this notice (called a "dissenters' notice") must contain are spelled out in detail to ensure that this notice serves this basic purpose. Section 14-2-1322(a) is substantially similar to former § 14-2-251(b).

In the case of an action that is submitted to the vote of shareholders, the dissenters' notice must be sent only to those persons who gave notice of their intention to dissent under Section 14-2-1321 and who refrained from voting in favor of the proposed actions. In the case of a transaction not involving a vote by shareholders, the dissenters' notice must be sent to all persons who are eligible to dissent and demand payment. In either case the dissenters' notice must be sent within 10 days after the corporate action is taken and must be accompanied by a copy of this article.

The notice must contain or be accompanied by a form which a person asserting dissenters' right may use to complete the demand for payment under Section 14-2-1323. The notice must also specify the date by which the payment demand must be received by the corporation, which date must be at least 30 days and not more than 60 days after the effective date of the notice of how to demand payment.

The dissenters' notice must also specify where and when share certificates must be deposited, or, in the case of uncertificated shares, when restrictions on transfer will become effective under Section 14-2-1324. The date for deposit of share certificates may not be set at a date earlier than the date for receiving the demand for payment.

The demand period set in subsection (b)(4), not less than 30 days, is longer than the 20 days previously provided by § 14-2-251(c).

#### **Cross-References**

Action without meeting, see § 14-2-704. Certificateless shares, see § 14-2-626. "Deliver" includes mail, see § 14-2-140. Effective date of notice, see § 14-2-141. "Notice" defined, see § 14-2-141. Share transfer restrictions, see §§ 14-2-627 & 14-2-1324.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 825.

#### **14-2-1323. Duty to demand payment.**

(a) A record shareholder sent a dissenters' notice described in Code Section 14-2-1322 must demand payment and deposit his certificates in accordance with the terms of the notice.

(b) A record shareholder who demands payment and deposits his shares under subsection (a) of this Code section retains all other rights of a shareholder until these rights are canceled or modified by the taking of the proposed corporate action.

(c) A record shareholder who does not demand payment or deposit his share certificates where required, each by the date set in the dissenters' notice, is not entitled to payment for his shares under this article. (Code 1981, § 14-2-1323, enacted by Ga. L. 1988, p. 1070, § 1.)

#### **COMMENT**

Source: Model Act, § 13.23. This replaces former § 14-2-251(d) & (e).

The demand for payment required by Section 14-2-1323 is the definitive statement by the dissenter. In the case of a transaction involving a vote by shareholders, it is a confirmation of the "intention" expressed earlier; in the case of any other transaction,



it is the person's first statement of position. In either event, the filing of these demands informs the corporation of the extent of the potential cash drain if it proceeds with the proposed corporate action.

The record date for approval or the date of announcement of corporate action is the cut-off date for determining who has dissenters' rights under this article. Former § 14-2-251(e) only required a dissenter to state his or her name, address, number, classes and series of shares as to which he or she dissented and a demand for payment of fair value.

Section 14-2-1323(a) also requires a person who files a demand for payment to deposit his share certificates as directed by the corporation in its dissenters' notice. The deposit of share certificates is necessary to prevent dissenters from giving themselves a 30-day option to take payment if the market price of the shares goes down, but sell their shares on the open market if the price goes up. If this kind of speculation were possible, all sophisticated investors might be expected to file demands that they would not intend to carry through unless the price should fall. If the shares are not represented by certificates, the corporation can prevent speculation by restricting their transfer, as authorized by Section 14-2-1324.

With respect to certificated shares, this provision differs from former law in that the certificates are "deposited" for retention, rather than "submitted for notation." Former § 14-2-251(e) required dissenters to submit certificates at the time of filing their notice of election to dissent or within 30 days thereafter. The corporation was required to note the election to dissent and to return the certificate to the shareholder. This change assumes that the corporation will retain the certificates unless it fails to effectuate the proposed corporate action; it thus avoids the need of sending the certificates back to the shareholders, only to be surrendered again when payment is made.

A shareholder who deposits his shares retains all other rights of a shareholder until those rights are modified by effectuation of the proposed corporate action. See Section 14-2-1323(b). Former § 14-2-251(d) was much more detailed, and limited dissenters' rights by providing that a notice of election to dissent terminates the shareholder's rights except to receive payment.

Subsection (c) provides that a person who fails to file the demand for payment or does not deposit his share certificates as required by Section 14-2-1323(a) loses his status as a dissenter entitled to payment for his shares. Former § 14-2-251(e) provided that if an electing shareholder failed to make a timely tender of his certificate, the corporation could cancel his dissenter's rights by written notice within 45 days of the date of filing of the notice of election to dissent. There was a final out: if the shareholder could show "good cause," (not defined in the statute) dissenters' rights could be preserved. The Code creates a bright line rather than leave the matter uncertain for extended periods.

### Cross-References

Dissenters' notice, see § 14-2-1322. Dissenters' rights as exclusive remedy, see § 14-2-1302. Effective date of notice, see § 14-2-141. Share transfer restrictions, see §§ 14-2-627 & 14-2-1324.

### JUDICIAL DECISIONS

**Tender of stock certificates.** — Where actions of the corporation deprived a dissenter of physical possession of a stock certificate, the dissenter was in compliance with the requirements establishing dissenters' rights, even though the certificate was not

tendered within the dissenters' rights time period. *VSI Enters., Inc. v. Edwards*, 238 Ga. App. 369, 518 S.E.2d 765 (1999).

**Waiver of timeliness of dissenter's notice.** — Dissenter was in compliance with the requirements establishing dissenter's rights,

even though the dissenter did not tender the stock certificate within the dissenters' rights time period. Just as O.C.G.A. § 14-2-1323 provides that a dissenter may waive the right to dissent by failing to comply, O.C.G.A.

§ 14-2-1330 provides that the corporation may waive its right to contest the dissenter's evaluation by not timely filing suit. *VSI Enters., Inc. v. Edwards*, 238 Ga. App. 369, 518 S.E.2d 765 (1999).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 815, 825.

**C.J.S.** — 19 C.J.S., Corporations, §§ 800, 801.

### 14-2-1324. Share restrictions.

(a) The corporation may restrict the transfer of uncertificated shares from the date the demand for their payment is received until the proposed corporate action is taken or the restrictions released under Code Section 14-2-1326.

(b) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until these rights are canceled or modified by the taking of the proposed corporate action. (Code 1981, § 14-2-1324, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 13.24. There were no comparable provisions in former Georgia law, since certificateless shares were not provided for.

Section 14-2-1324 deals with uncertificated shares in the dissent process. Section 14-2-1323(a) requires certificated shares to be deposited as directed by the corporation in its dissenters' notice; the restrictions on transfer of uncertificated shares provided by this section impose an analogous restriction on uncertificated shares for the same reasons. See the Comment to Section 14-2-1323.

Section 14-2-1324(b) makes express that the restriction on transfer of shares provided by this section does not affect any other rights of the shareholder until these rights are modified by the corporate action.

### Cross-References

Certificateless shares, see § 14-2-626. Information statement for certificateless shares, see § 14-2-626. Payment demand, see § 14-2-1323. Share transfer restrictions generally, see § 14-2-627.

### JUDICIAL DECISIONS

**Tender of stock certificates.** — Where actions of the corporation deprived a dissenter of physical possession of the stock certificate, the dissenter was in compliance with the requirements establishing dissent-

ers' rights, even though the certificate was not tendered within the dissenters' rights time period. *VSI Enters., Inc. v. Edwards*, 238 Ga. App. 369, 518 S.E.2d 765 (1999).



**14-2-1325. Offer of payment.**

(a) Except as provided in Code Section 14-2-1327, within ten days of the later of the date the proposed corporate action is taken or receipt of a payment demand, the corporation shall by notice to each dissenter who complied with Code Section 14-2-1323 offer to pay to such dissenter the amount the corporation estimates to be the fair value of his or her shares, plus accrued interest.

(b) The offer of payment must be accompanied by:

(1) The corporation's balance sheet as of the end of a fiscal year ending not more than 16 months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any;

(2) A statement of the corporation's estimate of the fair value of the shares;

(3) An explanation of how the interest was calculated;

(4) A statement of the dissenter's right to demand payment under Code Section 14-2-1327; and

(5) A copy of this article.

(c) If the shareholder accepts the corporation's offer by written notice to the corporation within 30 days after the corporation's offer or is deemed to have accepted such offer by failure to respond within said 30 days, payment for his or her shares shall be made within 60 days after the making of the offer or the taking of the proposed corporate action, whichever is later. (Code 1981, § 14-2-1325, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 59; Ga. L. 1993, p. 1231, § 18.)

**COMMENT**

Source: Model Act, § 13.25. This replaces former § 14-2-251(f).

Subsection (a) departs from the Model Act by preserving the approach of former Georgia law, in § 14-2-251(f). Former § 14-2-251(f) provided for the corporation to make a written offer of its estimate of fair value. Payment is only required to be made if the shareholder accepted the offer within 30 days, and then payment must be made within 60 days of the making of the offer or consummation of the corporate action, whichever is later. The Model Act contemplated changing this procedure by requiring immediate payment by the corporation upon completion of the transaction, without awaiting final agreement or a determination of fair value. As long as interest is paid on the amount finally determined or agreed upon, this shift adds nothing of substance to a dissenter's rights. Thus Section 14-2-1325(a) requires the corporation only to make an offer of the fair value of the shares.

Since the shareholder must decide whether or not to accept the payment in full satisfaction, he must be furnished at this time with the financial information specified in Section 14-2-1325(b), with a reminder of his further rights and liabilities, and with a copy of this article.

**Note to 1989 Amendment**

The 1989 amendments added subsection (c) to preserve the timetable of the former Code, set out in O.C.G.A. § 14-2-251(f) (1982). If the shareholder fails to accept the corporation's offer within 30 days, he loses the right to receive payment within the 60 day period provided. Under former § 14-2-251(f) his right to payment depended upon completion of the appraisal proceeding the corporation was obligated to initiate.

**Note to 1993 Amendment**

The 1993 amendment also adds a default provision in subparagraph (c) providing that if a shareholder who has asserted dissenters' rights pursuant to Section 14-2-1323 does not respond to the corporation's offer of payment within thirty days, the shareholder will be deemed to have accepted the offer.

**Cross-References**

Dissenters' notice, see § 14-2-1322. "Fair value" defined, see § 14-2-1301. "Interest" defined, see § 14-2-1301. Payment demand, see § 14-2-1323. Rejection of corporation's estimate of fair value, see § 14-2-1327.

**RESEARCH REFERENCES**

**ALR.** — Construction and effect of provision for payment to dissenting shareholders in statute relating to merger, consolidation, or reorganization of banks or other corporations, 162 ALR 1237; 174 ALR 960.

**14-2-1326. Failure to take action.**

(a) If the corporation does not take the proposed action within 60 days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares.

(b) If, after returning deposited certificates and releasing transfer restrictions, the corporation takes the proposed action, it must send a new dissenters' notice under Code Section 14-2-1322 and repeat the payment demand procedure. (Code 1981, § 14-2-1326, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 20.)

**COMMENT**

Source: Model Act, § 13.26. This was formerly covered by § 14-2-251(f).

Section 14-2-1326 essentially grants the corporation 60 days after the payment demand date to complete the transaction and make payment for the shares as required by Section 14-2-1325. If the corporation is unable to complete the corporate action within 60 days, it must release the shares, and give a new notice when it is ready to repeat the cycle. This requirement prevents the corporation from holding the dissenter indefinitely in a position where he has no possibility of realizing on his shares either by obtaining payment from the corporation or by selling them. Former § 14-2-251(f) contained a similar requirement, but it gave the corporation 90 days from the date of shareholder action approving the transaction. If the transaction has been effected but the corporation fails to make payment as required by this article, it is subject to the sanctions of Section 14-2-1331(b).



Subsection (b) makes it clear that the corporation at any time after returning the deposited shares may send a new dissenters' notice under Section 14-2-1322 and repeat the procedure.

#### **Note to 1990 Amendment**

The 1990 amendment corrected an erroneous statutory cross-reference.

#### **Cross-References**

Certificateless shares, see § 14-2-626. Court action to compel payment, see §§ 14-2-1330 & 14-2-1331. Dissenters' notice, see § 14-2-1322. Information statement for certificateless shares, see § 14-2-626. Share transfer restrictions, see § 14-2-1324.

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 826.

#### **14-2-1327. Procedure if shareholder dissatisfied with payment or offer.**

(a) A dissenter may notify the corporation in writing of his own estimate of the fair value of his shares and amount of interest due, and demand payment of his estimate of the fair value of his shares and interest due, if:

(1) The dissenter believes that the amount offered under Code Section 14-2-1325 is less than the fair value of his shares or that the interest due is incorrectly calculated; or

(2) The corporation, having failed to take the proposed action, does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within 60 days after the date set for demanding payment.

(b) A dissenter waives his or her right to demand payment under this Code section and is deemed to have accepted the corporation's offer unless he or she notifies the corporation of his or her demand in writing under subsection (a) of this Code section within 30 days after the corporation offered payment for his or her shares, as provided in Code Section 14-2-1325.

(c) If the corporation does not offer payment within the time set forth in subsection (a) of Code Section 14-2-1325:

(1) The shareholder may demand the information required under subsection (b) of Code Section 14-2-1325, and the corporation shall provide the information to the shareholder within ten days after receipt of a written demand for the information; and

(2) The shareholder may at any time, subject to the limitations period of Code Section 14-2-1332, notify the corporation of his own estimate of the fair value of his shares and the amount of interest due and demand payment of his estimate of the fair value of his shares and interest due.

(Code 1981, § 14-2-1327, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 60; Ga. L. 1990, p. 257, § 21; Ga. L. 1993, p. 1231, § 19.)

#### COMMENT

Source: Model Act, § 13.28. (Section 14-2-1327 of the Model Act was deleted entirely by the Code.) This replaces former § 14-2-251(e) & (g), and departs significantly from former law.

Under subsection (a), the dissenter who is not content with the corporations's offer must state in writing the amount he is willing to accept. A dissenter cannot, by remaining silent, force the corporation into the expense and delay of a judicial appraisal. Furthermore, if his demand is unreasonable, he runs the risk of being assessed litigation expenses under Section 14-2-1331. These provisions are designed to encourage settlement without a judicial proceeding. Former law did not require the dissenter to communicate the amount the dissenter would accept at any time prior to initiation of judicial proceedings. See former § 14-2-251(g).

Under subsection (b), a dissenter who has been offered payment must make his supplemental demand within 30 days after receipt of the offer of payment in order to permit the corporation to make an early decision on initiating appraisal proceedings. If he fails to do so, he loses the right to demand additional payment beyond that offered by the corporation.

If the corporation, having failed to take the corporate action and to make payment, also fails to return the certificates previously deposited or release the restrictions on transfer of uncertificated securities within 60 days, the shareholder may treat the shares as purchased by the corporation and demand payment of the full amount claimed under this section. See Section 14-2-1330(a). This provision creates no hardship for the corporation since, if it cannot complete the transaction within 60 days, it may return the certificates (or release the restrictions on uncertified shares) and start the process over again at any time. Former law contained no comparable provisions where the corporate action was not completed; § 14-2-251(e) merely contemplated that the corporation could make its offer conditional upon completion of the transaction.

#### Note to 1989 Amendment

The 1989 amendment added subsection (c). Where the corporation has failed to observe the procedures required by this part, subsection (c)(1) provides that the shareholder may demand the information that should have been provided by the corporation under Code Section 14-2-1325(b). Subsection (a) provides a procedure for a shareholder who disagrees with the amount offered by the corporation pursuant to section 1325; subsection (c)(2) provides a parallel procedure where the corporation has failed to make such an offer. This demand for payment has the same effect as one made under subsection (a). Thus, under Section 14-2-1330(a), if the corporation does not settle or commence an appraisal proceeding within 60 days after receiving a payment demand, the amount demanded becomes an absolute obligation of the corporation.

#### Note to 1990 Amendment

Under § 14-2-1325, a corporation must offer to pay its estimate of the fair value of the shares held by a dissenting shareholder who has complied with the terms of the dissenters' rights provisions. Unlike the Model Act, the corporation is not required to pay out, but only to offer, its estimate of the fair value of the shares. Thus, the procedure outlined in § 14-2-1327 is triggered only if a shareholder is dissatisfied with a corporation's offer of payment. Therefore, the words "made or" in subsection (b) were considered extraneous and were deleted by the 1990 amendment.



**Note to 1993 Amendment**

The 1993 amendment added the phrase "and is deemed to have accepted the corporation's offer" to clarify the effect of a dissenter's failure to respond within the applicable period.

**Cross-References**

"Deliver" includes mail, see § 14-2-140. "Dissenter" defined, see § 14-2-1301. Dissenters' rights as exclusive remedy, see § 14-2-1302. Effective date of notice, see § 14-2-141. "Fair value" defined, see § 14-2-1301. "Interest" defined, see § 14-2-1301. "Judicial appraisal" see § 14-2-1330. Limitation of actions, see § 14-2-1332. "Notice" defined, see § 14-2-141. Offer of payment for shares, see § 14-2-1325.

**JUDICIAL DECISIONS**

**Cited in** *Riddle-Bradley, Inc. v. Riddle*, 217 Ga. App. 725, 459 S.E.2d 576 (1995).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 825.

**ALR.** — Construction and effect of provision for payment of dissenting stockholders in statutes relating to merger, consolidation, or reorganization of banks or other corpo-

rations, 162 ALR 1237; 174 ALR 960.

Timeliness and sufficiency of dissenting stockholder's notice of his objection to consolidation or merger and of his demand for payment for his shares, 40 ALR3d 260.

**PART 3****JUDICIAL APPRAISAL OF SHARES****14-2-1330. Court action.**

(a) If a demand for payment under Code Section 14-2-1327 remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the 60 day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.

(b) The corporation shall commence the proceeding, which shall be a nonjury equitable valuation proceeding, in the superior court of the county where a corporation's registered office is located. If the surviving corporation is a foreign corporation without a registered office in this state, it shall commence the proceeding in the county in this state where the registered office of the domestic corporation merged with or whose shares were acquired by the foreign corporation was located.

(c) The corporation shall make all dissenters, whether or not residents of this state, whose demands remain unsettled parties to the proceeding, which shall have the effect of an action quasi in rem against their shares. The corporation shall serve a copy of the petition in the proceeding upon

each dissenting shareholder who is a resident of this state in the manner provided by law for the service of a summons and complaint, and upon each nonresident dissenting shareholder either by registered or certified mail or statutory overnight delivery or by publication, or in any other manner permitted by law.

(d) The jurisdiction of the court in which the proceeding is commenced under subsection (b) of this Code section is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them or in any amendment to it. Except as otherwise provided in this chapter, Chapter 11 of Title 9, known as the "Georgia Civil Practice Act," applies to any proceeding with respect to dissenters' rights under this chapter.

(e) Each dissenter made a party to the proceeding is entitled to judgment for the amount which the court finds to be the fair value of his shares, plus interest to the date of judgment. (Code 1981, § 14-2-1330, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 61; Ga. L. 1993, p. 1231, § 20; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

#### COMMENT

Source: Model Act. § 13.30. Section 14-2-1330 retains the concept of judicial appraisal as the ultimate means of determining fair value. It thus follows the basic pattern of former § 14-2-251(g).

Subsection (a) requires the proceeding to be commenced by the corporation within 60 days after receiving a demand for payment under Section 14-2-1327. Subsection (a) makes this time period critical; if the proceeding is not commenced within this period the corporation must pay the additional amounts demanded by the shareholders under Section 14-2-1327. See the Comment to that section. Former law merely provided that dissenters may begin an action if the corporation failed to do so. See former § 14-2-251(g)(2). Each shareholder may sue directly for this amount, if necessary, and in an appropriate case may be entitled to charge the corporation with the costs of suit. See Section 14-2-1331.

Subsections (b) and (c) provide that all demands for payment made under Section 14-2-1327 are to be resolved in a single proceeding brought in the county where the corporation's registered office is located. All shareholders making Section 14-2-1327 demands must be made parties, with service by publication authorized if necessary. Subsection (b) of the Model Act was amended to add the word "surviving" before "corporation" in the second sentence. This is intended to clarify the application of the dissenters' rights article — that it applies only to shareholders of Georgia corporations, but that their rights may be claims against a surviving corporation which is a foreign corporation. Subsection (c) was amended to restore language from former § 14-2-251(g)(3), which expressly provided that the action was quasi in rem against the shares.

Subsection (d) provides that appraisers may be appointed within the discretion of the court.



Subsection (e) provides that the final judgment establishes not only the fair value of the shares in the abstract but also determines how much each shareholder who made a Section 14-2-1327 demand should actually receive. The Model Act provision was amended to conform to previous Code changes in the Model Act, that eliminated a payment by the corporation before agreement is reached on the amount, and eliminated dissenters' rights for holders of after acquired shares.

#### Note to 1989 Amendment

The 1989 amendment to subsection (b) added the phrase "which shall be a non-jury equitable valuation proceeding," to clarify the nature of the proceeding. Appraisal proceedings have traditionally been proceedings in equity, with appraisers appointed to assist the court in determining fair value.

#### Note to 1993 Amendment

The 1993 amendment changed the notice by publication to be optional rather than mandatory, so that the corporation may choose to serve non-resident dissenting shareholders either by registered or certified mail or by publication, and no longer requires both methods.

#### Cross-References

"Dissenter" defined, see § 14-2-1301. "Fair value" defined, see § 14-2-1301. "Interest" defined, see § 14-2-1301. "Person" defined, see § 14-2-140. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. "Proceeding" defined, see § 14-2-140. Registered office: designated in annual registration, see § 14-2-1622; required, see §§ 14-2-202 & 14-2-501.

### JUDICIAL DECISIONS

#### Failure to timely commence proceeding.

— Because the time for filing a petition for judicial appraisal is set by O.C.G.A. § 14-2-1330(a) and O.C.G.A. § 9-11-6(b) did not apply to permit a trial court to grant an extension of time before the commencement of such a legal action; thus, where a corporation failed to commence the proceeding within the statutory 60-day period, the court did not have subject matter jurisdiction to reach the merits of the petition. *Riddle-Bradley, Inc. v. Riddle*, 217 Ga. App. 725, 459 S.E.2d 576 (1995).

#### Waiver of timeliness of dissenter's notice.

— Dissenter was in compliance with the requirements establishing dissenter's rights, even though the dissenter did not tender the

stock certificate within the dissenters' rights time period. Just as O.C.G.A. § 14-2-1323 provides that a dissenter may waive the right to dissent by failing to comply, O.C.G.A. § 14-2-1330 provides that the corporation may waive its right to contest the dissenter's evaluation by not timely filing suit. *VSI Enters., Inc. v. Edwards*, 238 Ga. App. 369, 518 S.E.2d 765 (1999).

**Fees and expenses not allowable.** — Because the action was not brought under this O.C.G.A. §§ 14-2-1330 and 14-2-1331 were not applicable and the court erred in awarding attorney fees, attorney expenses, and expert witness fees and expenses to the dissenter. *VSI Enters., Inc. v. Edwards*, 238 Ga. App. 369, 518 S.E.2d 765 (1999).

### RESEARCH REFERENCES

**ALR.** — Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him, 50 ALR2d 1268.

Valuation of stock of dissenting stockholders in case of consolidation or merger of corporation, sale of its assets, or the like, 48 ALR3d 430.

**14-2-1331. Court costs and counsel fees.**

(a) The court in an appraisal proceeding commenced under Code Section 14-2-1330 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court, but not including fees and expenses of attorneys and experts for the respective parties. The court shall assess the costs against the corporation, except that the court may assess the costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under Code Section 14-2-1327.

(b) The court may also assess the fees and expenses of attorneys and experts for the respective parties, in amounts the court finds equitable:

(1) Against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of Code Sections 14-2-1320 through 14-2-1327; or

(2) Against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.

(c) If the court finds that the services of attorneys for any dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to these attorneys reasonable fees to be paid out of the amounts awarded the dissenters who were benefited. (Code 1981, § 14-2-1331, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Act, § 13.31. This replaces former § 14-2-251(g)(7).

Subsection (a) provides that generally the costs of the appraisal proceeding should be assessed against the corporation. But the court is authorized to assess these costs, in whole or in part, against the dissenters if it concludes they acted arbitrarily, vexatiously, or not in good faith in making the Section 14-2-1327 demand for additional payment. Attorneys' fees and the costs of experts employed by the parties have been excluded from these assessments. This preserves the approach of former law, § 14-2-251(g)(7).

Similarly, subsection (b) provides that counsel fees and fees of experts may be charged against the corporation or against dissenters upon a finding of a failure to comply in good faith with the requirements of this article. Further, subsection (b)(1) permits the court to assess these fees against a corporation that has substantially failed to comply with this article, without a finding that the corporation has acted arbitrarily, vexatiously, or not in good faith. While this approach is similar to that of former law, § 14-2-251(g)(7) contained specific criteria for assessing these expenses. Under Section 14-2-1330(a) if the corporation fails to begin the proceeding, it is liable for the amount demanded by each dissenter whose claim remains unsettled, in addition to assessments made under this section.



Under subsection (c), individual dissenters, in turn, can be called upon to pay counsel fees for other dissenters if the court finds that the services were of substantial benefit to the other dissenters.

The purpose of all these grants of discretion with respect to costs and counsel fees is to increase the incentives of both sides to proceed in good faith under this article to attempt to resolve their disagreement without the need of a formal judicial appraisal of the value of shares.

#### Cross-References

Appraisers, see § 14-2-1330. "Dissenter" defined, see § 14-2-1301. "Proceeding" defined, see § 14-2-140.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-251, are included in the annotations for this section.

**Constitutionality.** — Federal district court's determination that a dissenting shareholder's refusal to accept a stock tender offer was "arbitrary, vexatious, or otherwise not in good faith" did not violate the shareholder's seventh amendment right to have a jury decide whether the dissenter had

acted arbitrarily. *Columbus Mills, Inc. v. Freeland*, 918 F.2d 1575 (11th Cir. 1990) (decided under former § 14-2-251).

**Fees and expenses not allowable.** — Because the action was not brought under O.C.G.A. §§ 14-2-1330 and 14-2-1331 were not applicable and the court erred in awarding attorney fees, attorney expenses, expert witness fees and expenses to the dissenter. *VSI Enters., Inc. v. Edwards*, 238 Ga. App. 369, 518 S.E.2d 765 (1999).

### RESEARCH REFERENCES

**ALR.** — Attorneys' fees and other expenses incident to controversy respecting internal affairs of corporation as charge against the corporation, 39 ALR2d 580.

#### 14-2-1332. Limitation of actions.

No action by any dissenter to enforce dissenters' rights shall be brought more than three years after the corporate action was taken, regardless of whether notice of the corporate action and of the right to dissent was given by the corporation in compliance with the provisions of Code Section 14-2-1320 and Code Section 14-2-1322. (Code 1981, § 14-2-1332, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

This section has no counterpart in the Model Act, or in former Georgia law, which was governed by general statutes of limitations. Three years is ample time for shareholders to assert dissenters' rights, even if they do not receive the notices required by this article. Normally a shareholder would become aware of corporate action giving rise to dissenters' rights in considerably less than three years after the action is taken. This provision will, after a reasonable period, remove the cloud of uncertainty that arises from failure to comply with the dissenters' rights provisions. Without certainty that no further contingent claims exist, new financings and other business activities may be severely hampered.

**Cross-References**

Dissenters' notice, see § 14-2-1322. Duty to bring action after demand for payment, see § 14-2-1330. Notice of corporate action creating dissenters' rights, see § 14-2-1320.

**ARTICLE 14****DISSOLUTION**

**Cross references.** — Voluntary dissolution of financial institutions, § 7-1-113 et seq.

**Administrative rules and regulations.** — Dissolutions, Revocations, and Withdrawals, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Commissioner of Corporations, Chapter 590-7-7.

**Law reviews.** — For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988). For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989).

**OPINIONS OF THE ATTORNEY GENERAL**

**Editor's notes.** — In light of the similarity of the provisions, an opinion under former Code 1933, § 22-101 et seq. and Article 13 of former Chapter 2, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Proper method of disposing of accumulated and undisbursed receivership funds held by the Insurance Commissioner** in cases where creditors or claimants of defunct domestic stock and mutual insurance companies cannot be located or where checks issued to them for their pro rata portion have been for any reason returned unpaid is to turn such funds over to the Fiscal Division

of the Department of Administrative Services (now the Office of Treasury and Fiscal Services), which shall ultimately remit the funds to the Board of Regents of the University System of Georgia; in cases involving all other types of defunct insurance companies, the Insurance Commissioner should petition the superior court that supervised the particular insurance company's dissolution proceedings for leave to deposit the accumulated and undisbursed receivership funds in its registry to be subsequently dealt with by order of the court as it deems advisable. 1975 Op. Att'y Gen. No. 75-83 (decided under former Code 1933, § 22-101 et seq.).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 173.

**ALR.** — Claim of one selling to corporation its own stock as provable against its estate in bankruptcy, 9 ALR 1296.

Imposition of franchise or excise tax on corporation in hands of receiver, 26 ALR 426.

Trademark or tradename as asset in case of bankruptcy, insolvency, or assignment for benefit of creditors, 44 ALR 706.

Insolvency of corporation as barring stockholders' right to rescind subscription on ground of fraud, 46 ALR 484.

Personal liability on contract made by

"trustees" or others in closing affairs of dissolved corporation, 76 ALR 1478.

Power of corporation after expiration or forfeiture of its charter; effects of dissolution, 97 ALR 477.

Right to set off liability of stockholder of insolvent corporation against corporation's debt to him, 98 ALR 647.

Right of stockholder to set off indebtedness of corporation against statutory added liability, 98 ALR 659.

Dissolution of corporation which executed mortgage, or purchased property subject to it, 128 ALR 572.

Dissolution of corporate lessee as affecting



lease and rights and liabilities incident thereto, 147 ALR 360.

Conditions accompanying or following dissolution of lessee corporation, as breach of covenant against assignment or sublease, 12 ALR2d 179.

Judicial relief other than by dissolution or receivership in cases of intracorporate deadlock, 47 ALR2d 365.

Dissolution of corporation on ground of intracorporate deadlock or dissension, 83 ALR3d 458.

Availability of and time for bringing action against former director, officer, or stockholder in dissolved corporation for personal injuries incurred after final dissolution, 20 ALR4th 414.

Relief other than by dissolution in cases of intracorporate deadlock or dissension, 34 ALR4th 13.

Liability of shareholders, directors, and officers where corporate business is continued after its dissolution, 72 ALR4th 419.

## PART 1

### VOLUNTARY DISSOLUTION

#### 14-2-1401. Dissolution by incorporators or initial directors.

A majority of the incorporators or initial directors of a corporation that has not issued shares or has not commenced business may dissolve the corporation by delivering to the Secretary of State for filing articles of dissolution that set forth:

- (1) The name of the corporation;
- (2) The date of its incorporation;
- (3) Either that:
  - (A) None of the corporation's shares has been issued; or
  - (B) The corporation has not commenced business;
- (4) That no debt of the corporation remains unpaid;
- (5) That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued; and
- (6) That a majority of the incorporators or initial directors authorized the dissolution. (Code 1981, § 14-2-1401, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For article, "Comparison of Features of Old and New Business Corporation Laws Relating to Domestic Corporations," see 5 Ga. St. B.J. 13 (1968).

### COMMENT

Source: Model Act, § 14.01. This replaces former § 14-2-270.

Section 14-2-1401 provides a simple method of voluntary dissolution for a corporation that has not issued shares or commenced business. These provisions depart from prior law in that they are alternative: a corporation may utilize Section 14-2-1401 not issued shares (even though it has commenced business) or if it has issued shares but has not commenced business. Dissolution may be accomplished in either of these situations simply by a majority vote of the incorporators or initial directors. In this respect it follows the approach of prior law, except that former § 14-2-270 required authorization of dissolution by two-thirds of the incorporators or directors, rather than a simple majority.

The form of articles of dissolution provided in Section 14-2-1401 takes account of the fact that a corporation may utilize this section even though it has received capital from the issuance of shares or has incurred liabilities either from the commencement of business without issuing shares or from its organization; hence the articles must state that no debts remain unpaid, and that the net assets of the corporation remaining after winding up have been distributed to the shareholders. Because no winding up is required where the corporation has not commenced business, the two-step dissolution process that begins with the filing of a notice of intent to dissolve under Section 14-2-1403 is not required.

#### Cross-References

Claims against dissolved corporation, see §§ 14-2-1406 & 14-2-1407. "Deliver" includes mail, see § 14-2-140. Dissolution by board of directors and shareholders, see § 14-2-1402. Dissolution by shareholders of statutory close corporation, see § 14-2-933. Effective date of dissolution, see § 14-2-1408. Effect of dissolution, see § 14-2-1408. Effect of notice of intent to dissolve, see § 14-2-1405. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Incorporators, see § 14-2-201. Initial directors, see § 14-2-205. Shareholders of statutory close corporation, see § 14-2-933.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2754-2757.

**C.J.S.** — 19 C.J.S., Corporations, §§ 813, 838.

### **14-2-1402. Dissolution by board of directors and shareholders.**

(a) A corporation's board of directors may propose dissolution for submission to the shareholders.

(b) For a proposal to dissolve to be adopted:

(1) The board of directors must recommend dissolution to the shareholders unless the board of directors elects, because of a conflict of interest or other special circumstances, to make no recommendation and communicates the basis for its determination to the shareholders; and

(2) The shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (e) of this Code section.

(c) The board of directors may condition its submission of the proposal for dissolution on any basis.

(d) The corporation shall notify each shareholder entitled to vote of the proposed shareholders' meeting in accordance with Code Section 14-2-705. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.

(e) Unless the articles of incorporation or the board of directors (acting pursuant to subsection (c) of this Code section) requires a greater vote or a vote by voting groups, the proposal to dissolve to be adopted must be approved by a majority of all the votes entitled to be cast on that proposal. (Code 1981, § 14-2-1402, enacted by Ga. L. 1988, p. 1070, § 1.)



**Law reviews.** — For article, "Some Distinctive Features of the Georgia Business Corporation Code," 28 Ga. St. B.J. 101 (1991).

### COMMENT

Source: Model Act, § 14.02. This replaces former §§ 14-2-272 & 273.

A corporation that has issued shares and commenced business may dissolve voluntarily only with the approval of its shareholders.

Subsection (a) requires the board of directors to propose dissolution and then submit the proposal to the shareholders. There is no Code counterpart to former § 14-2-272, which permitted dissolution by unanimous written consent of the shareholders, without formal board action. Obtaining board action is generally not difficult in closely held corporations, where the former procedure might have been employed. Shareholders of statutory close corporations may agree in advance to such dissolution arrangements as they may provide in the articles of incorporation, under Section 14-2-933.

Subsection (b) requires the board of directors to make a recommendation to the shareholders that the proposal to dissolve be approved, unless it elects that, because of conflict of interest or other special circumstances, it should make no recommendation. The Model Act language of a "determination" was replaced with "election" in subsection (b) of the Code, consistent with changes in Sections 14-2-1003, 1103 and 1202. See the Comment to Section 14-2-1003. There were no comparable provisions in prior law, which simply required the board to adopt a resolution recommending that the corporation be dissolved.

Subsection (c) allows the Board of Directors to condition its submission of the dissolution proposal. There was no comparable provision in prior law, although the power to make authorization of corporate dissolution conditional was generally thought to exist. See the discussion of conditional submissions in the Comment to Section 14-2-1003. Article 14 also permits the corporation to revoke the dissolution. See Section 14-2-1404 for the procedures for revocation of dissolution proceedings.

Subsection (d) requires the corporation to notify each shareholder entitled to vote of the proposed shareholder meeting. This preserves former Georgia practice under § 14-2-273(2), but departs from the Model Act, which also required notice to shareholders who were not entitled to vote.

Under subsection (e) dissolution, to be approved, must receive the vote of a majority of the outstanding votes entitled by the articles of incorporation to vote on the proposal. This is a greater vote than that required for ordinary matters under Section 14-2-725. Nonvoting classes of shares are not given a statutory right to vote on proposals to dissolve (either as separate voting groups or together with voting shares) by the Code on the theory that, upon dissolution, the liquidation rights of all classes or series of shares are fixed by the articles of incorporation. The articles of incorporation, however, may stipulate that specified classes or series of shares are entitled to vote by separate voting groups or that a greater percentage of votes is required to approve the proposal than is required by Section 14-2-1402.

### Cross-References

Director standards of conduct, see §§ 14-2-830 & 14-2-831. Dissolution by written consent of shareholders, see § 14-2-704. Effect of dissolution, see § 14-2-1408. Effect of notice of intent to dissolve, see § 14-2-1405. "Notice" defined, see § 14-2-141. Notice of shareholders' meeting, see § 14-2-705. Quorum at shareholders' meeting, see § 14-2-725. Revocation of dissolution proceedings, see § 14-2-1404. Supermajority quorum and voting requirements, see § 14-2-727. Voting by voting group, see

§§ 14-2-725 & 14-2-726. Voting entitlement of shareholders generally, see § 14-2-721. "Voting group" defined, see § 14-2-140.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2747-2753.

**C.J.S.** — 19 C.J.S., Corporations, §§ 813, 814.

#### 14-2-1403. Notice of intent to dissolve.

Upon approval of a proposal for dissolution pursuant to Code Section 14-2-1402, the corporation shall begin dissolution by delivering to the Secretary of State for filing a notice of intent to dissolve setting forth:

- (1) The name of the corporation;
- (2) The date dissolution was authorized;
- (3) If shareholder approval was required for dissolution, a statement that dissolution was duly approved by the shareholders in accordance with Code Section 14-2-1402. (Code 1981, § 14-2-1403, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 14.03. This replaces former §§ 14-2-273 & 14-2-274.

Section 14-2-1403 rejects the one-step filing procedure used in the Model Act for the two-step procedure required by former Georgia law under Sections 14-2-273 (statement of intent to dissolve) and 14-2-281 (articles of dissolution).

The act of filing the notice of intent to dissolve makes the decision to dissolve a matter of public record and establishes the time when the corporation must begin the process of winding up and cease carrying on its business except to the extent necessary for winding up. The notice omits the details of the shareholder vote, required by both prior law, § 14-2-273(4)(E) and the Model Act, which are of no relevance to the Secretary of State.

Section 14-2-1408 provides the final step in the formal dissolution process: the filing of articles of dissolution. If a corporation wishes, it may file this at the same time as the notice of intent to dissolve, provided it meets the conditions of Section 14-2-1408. This simultaneous filing will have no substantial effect on the rights of claimants against the corporation.

The notice may not be filed with the Secretary of State unless all fees and penalties owed by the corporation are paid. See Section 14-2-120(h).

#### Cross-References

Articles of dissolution, see § 14-2-1408. "Deliver" includes mail, see § 14-2-140. Dissolution by board of directors and shareholders, see § 14-2-1402. Dissolution of statutory close corporation by shareholders, see § 14-2-933. Dissolution by written consent of shareholders, see § 14-2-704. Effect of dissolution, see § 14-2-1408. Effect of notice of intent to dissolve, see § 14-2-1405. Effective time and date of filing, see § 14-2-123. Filing fees and penalties, see § 14-2-122. Filing requirements, see § 14-2-120. Publication of notice of intent to dissolve, see § 14-2-1403.1. Revocation of



dissolution proceedings, see § 14-2-1404. Voting by voting group, see §§ 14-2-725 & 14-2-726. "Voting group" defined, see § 14-2-140.

#### RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2748, 2834.

#### 14-2-1403.1. Publication of notice of intent to dissolve.

(a) Together with the notice of intent to dissolve provided for in Code Section 14-2-1403, the corporation shall deliver to the Secretary of State an undertaking (which may appear in the notice of intent to dissolve or be set forth in a letter or other instrument executed by an officer or any person authorized to act on behalf of such corporation) that the request for publication of a notice of intent to voluntarily dissolve the corporation and payment therefor will be made as required by subsection (b) of this Code section.

(b) No later than the next business day after filing the notice of intent to dissolve provided for in Code Section 14-2-1403, the corporation shall mail or deliver to the publisher of a newspaper which is the official organ of the county where the registered office of the corporation is located or which is a newspaper of general circulation published within such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation a request to publish a notice in substantially the following form:

#### "NOTICE OF INTENT TO VOLUNTARILY DISSOLVE A CORPORATION

Notice is given that a notice of intent to dissolve \_\_\_\_\_ (name of corporation), a Georgia corporation with its registered office at \_\_\_\_\_ (address of registered office), has been delivered to the Secretary of State for filing in accordance with the Georgia Business Corporation Code."

The notice may also include the information specified in Code Section 14-2-1407. The request for publication of the notice shall be accompanied by a check, draft, or money order in the amount of \$40.00 in payment of the cost of publication. The notice shall be published once a week for two consecutive weeks commencing within ten days after receipt of the notice by the newspaper. Failure on the part of the corporation to mail or deliver the notice or payment therefor or failure on the part of the newspaper to publish the notice in compliance with this subsection shall not invalidate the dissolution of the corporation. (Code 1981, § 14-2-1403.1, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 22; Ga. L. 1993, p. 1231, § 21.)

**COMMENT**

Source: Former § 14-2-276.

This replaces former § 14-2-276, which required publication of a similar notice for four consecutive weeks at a fee of \$60. Former § 14-2-274 also required filing with the state revenue commissioner. Publication requirements have been reduced and simplified.

Subsection (b) provides that the notice required by this section may also contain the notice to creditors described in § 14-2-1407.

**Note to 1990 Amendment**

The 1990 amendment makes it clear that any person acting on behalf of the corporation (such as an attorney or other agent) may execute the requisite certificate of publication.

**Note to 1993 Amendment**

The 1993 amendment deals with the timing of making a request for publication in connection with the dissolution process, permitting such a request to be delivered no later than the business day after filing the notice of intent to dissolve with the Secretary of State. The amendment also changes the form of notice in recognition that it generally is published after the filing has occurred.

**Cross-References**

Administrative dissolution for failure to publish notice of intent to dissolve, see § 14-2-1420(5). Notice of intent to dissolve, see § 14-2-1403. Limitation of actions against dissolved corporation, see §§ 14-2-1406 & 14-2-1407. Publication of notice to creditors, see § 14-2-1407.

**14-2-1404. Revocation of dissolution proceedings.**

(a) A corporation may revoke its dissolution proceedings at any time prior to the filing of articles of dissolution.

(b) Revocation of dissolution proceedings must be authorized in the same manner as the dissolution was authorized unless that authorization permitted revocation by action by the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder action.

(c) After the revocation of dissolution proceedings is authorized, the corporation may revoke the dissolution proceedings by delivering to the Secretary of State for filing a notice of revocation of intent to dissolve, together with a copy of its notice of intent to dissolve, that sets forth:

(1) The name of the corporation;

(2) The date that the revocation of dissolution proceedings was authorized;

(3) If the corporation's board of directors or incorporators revoked the dissolution proceedings, a statement to that effect;



(4) If the corporation's board of directors revoked the dissolution proceedings authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and

(5) If shareholder action was required to revoke the dissolution proceedings, the information required by paragraph (3) of Code Section 14-2-1403.

(d) Revocation of dissolution proceedings is effective when a notice of revocation of intent to dissolve is filed.

(e) When the revocation of dissolution proceedings is effective, it relates back to and takes effect as of the effective date of the filing of the notice of intent to dissolve and the corporation resumes carrying on its business as if dissolution proceedings had never occurred. (Code 1981, § 14-2-1404, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 62.)

#### COMMENT

Source: Model Act, § 14.04. While the structure of the Model Act was followed, substantial changes were made to reflect preservation of the pattern of prior law, found in § 14-2-278 — that of filing a notice of intent to dissolve at the beginning of the winding up process, with a subsequent filing of articles of dissolution only at the close of winding up. This replaces provisions previously found in §§ 14-2-277, 14-2-278, 14-2-279 & 14-2-280.

Subsection (a) provides that voluntary dissolution proceedings may be revoked at any time prior to the filing of articles of dissolution.

Subsection (b) generally requires shareholder authorization of revocation of dissolution proceedings (unless the dissolution was approved solely by the initial directors or incorporators under Section 14-2-1401). This preserves the approach of former § 14-2-278. Subsection (b), however, contemplates that the board of directors may revoke dissolution if it is granted that authority in advance by the shareholders when approving the dissolution. Such authorization is often included in proposals to dissolve that are contingent upon the effectuation of another transaction, such as a sale of corporate assets not in the ordinary course of business.

Subsection (c) requires the filing of a notice of revocation of intent to dissolve to reflect the decision to resume the business of the corporation. The information required in these articles parallels the information required in the original notice of intent to dissolve.

Subsection (d) provides for immediate effectiveness of a notice of revocation of intent to dissolve upon filing with the Secretary of State.

Subsection (e) provides that the effect of a notice of revocation of intent to dissolve is to eliminate the requirement that the corporation cease to conduct its business except as part of the winding up process and permit it to resume its business without limitation and as if dissolution proceedings had never occurred.

#### Note to 1989 Amendment

The 1989 amendment changed subsection (c) by deleting clause (2) ("The effective date of the dissolution that was revoked."). This describes the original Model Act approach, of a one-step filing of articles of dissolution, which was replaced in the Code

by a two-step procedure. The remaining clauses were renumbered, and subsections (c)(3) through (6) were amended by adding the word "proceedings" after dissolution, to conform the Model Act language to the Georgia variations.

The 1989 amendment changed subsection (e) by replacing "dissolution" with "filing of Notice of Intent to Dissolve," to conform the Model Act language to the Georgia variation.

#### **Cross-References**

Articles of dissolution, see § 14-2-1408. "Deliver" includes mail, see § 14-2-140. Dissolution by: board of directors and shareholders, see § 14-2-1402; incorporators or initial directors, see § 14-2-1401; shareholders of statutory close corporation, see § 14-2-933; written consent of shareholders, see § 14-2-704. Effective date of dissolution, see § 14-2-1408. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Notice of Intent to Dissolve, see § 14-2-1403.

### **14-2-1405. Effect of notice of intent to dissolve.**

A corporation that has filed a notice of intent to dissolve continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

- (1) Collecting its assets;
- (2) Disposing of its properties that will not be distributed in kind to its shareholders;
- (3) Discharging or making provision for discharging its liabilities;
- (4) Distributing its remaining property among its shareholders according to their interests; and
- (5) Doing every other act necessary to wind up and liquidate its business and affairs. (Code 1981, § 14-2-1405, enacted by Ga. L. 1988, p. 1070, § 1.)

**Cross references.** — Bringing of actions for collection of income taxes from assets of dissolved corporation, § 48-7-83.

**Law reviews.** — For comment on *Taylor v. R.O.A. Motors, Inc.*, 108 Ga. App. 635, 134 S.E.2d 486 (1963), as to foreign corporation's amenability to suit after dissolution, see 15 Mercer L. Rev. 498 (1964).

#### **COMMENT**

Source: Model Act, § 14.05. This replaces provisions previously found in §§ 14-2-275, 14-2-276 & 14-2-293.

Section 14-2-1405 provides that beginning dissolution proceedings does not terminate the corporate existence, but simply requires the corporation thereafter to devote itself to winding up its affairs and liquidating its assets; after filing a notice of intent to dissolve, the corporation may not carry on its business except as may be appropriate for winding up.

The Code uses the term "dissolution proceedings" in the specialized sense described above and not to describe the final step in the liquidation of the corporate business. The



term "dissolution proceedings," as used in Sections 14-21-1404 — 14-2-1406, and its equivalent "in dissolution," as used in Section 14-2-1407, are taken from former Sections 14-2-278 — 14-2-281, and refer to the process of winding up. Thus Article 14 dissolution proceedings do not have any of the characteristics of common law dissolution, which treated the corporate dissolution as analogous to the death of a natural person and abated lawsuits, vested equitable title to corporate property in the shareholders, imposed the fiduciary duty of trustees on directors who had custody of corporate assets, and revoked the authority of the registered agent.

### Cross-References

Administrative dissolution, see § 14-2-1420 et seq. Amendment of bylaws, see Article 10, Part 2. Claims against dissolved corporation, see §§ 14-2-1406 & 14-2-1407. Close corporations, dissolution, see § 14-2-943. Deposit with Department of Administrative Services, see § 14-2-1440. Directors: election, see § 14-2-803; removal, see §§ 14-2-808 & 14-2-809. Resignation, see § 14-2-807; standards of conduct, see §§ 14-2-830 & 14-2-831; terms, see § 14-2-805. Dissolution by: board of directors and shareholders, see § 14-2-1402; incorporators or initial directors, see § 14-2-1401; shareholders of statutory close corporation, see § 14-2-933. Distribution, see § 14-2-640. Effective date of dissolution, see § 14-2-1408. Judicial dissolution, see § 14-2-1430 et seq. Judicial dissolution of statutory close corporations, see § 14-2-943. Officers: appointment, see § 14-2-840; removal, see § 14-2-843; resignation, see § 14-2-843; standards of conduct, see § 14-2-842. "Proceeding" defined, see § 14-2-140. Quorum requirements: board of directors, see § 14-2-824. Shareholders, see §§ 14-2-725 & 14-2-726. Revocation of dissolution proceedings, see § 14-2-1404. Service of process on registered agent, see § 14-2-504. Voting requirements: directors, see § 14-2-824; shareholder, see §§ 14-2-725 & 14-2-726.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-1210 and former Code Section 14-2-293, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Demand or cause of action not extinguished by dissolution.** — If defendant insurance company were dissolved, its dissolution would not operate to extinguish the demand or cause of action against it in this state. *Manufacturing Lumbermen's Underwriters v. South Ga. Ry.*, 57 Ga. App. 699, 196 S.E. 244 (1938) (decided under former Code 1933, § 22-1210).

Dissolution did not prohibit an accounting firm from continuing a lawsuit to reclaim possession of certain corporate assets alleged to have been misappropriated. *Crews v. Wahl*, 238 Ga. App. 892, 520 S.E.2d 727 (1999).

**Effect of dissolution.** — An administratively dissolved corporation lacked the capacity to bring a federal antitrust action where the two-year limitation period for

reinstatement and for the initiation of any action by a dissolved corporation had expired. *Gas Pump, Inc. v. General Cinema Beverages of N. Fla., Inc.*, 263 Ga. 583, 436 S.E.2d 207 (1993).

**Substitution of parties refused.** — In a complicated antitrust case, when the president and sole shareholder moved to be personally substituted for the dissolved corporation, the court properly refused substitution because the shareholder's participation had been, and would have continued to be, highly disruptive of the orderly administration of the litigation. *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602 (11th Cir. 1984), cert. denied, 471 U.S. 1056, 105 S. Ct. 2120, 85 L. Ed. 2d 484 (1985); 474 U.S. 1013, 106 S. Ct. 544, 88 L. Ed. 2d 473 (1985) (decided under former § 14-2-293).

**In distress warrant proceedings,** where distress warrant was issued and levied on corporate properties prior to the order of the superior court dissolving the corporation, the suit did not abate, but the corporate existence continued to the extent that

the action still could be prosecuted against and defended by and in the name of the corporation. *Evans v. Fort Valley Motor Co.*, 52 Ga. App. 237, 183 S.E. 96 (1935) (decided under former Code 1933, § 22-1210).

**Former Code 1933, § 22-1210 (see O.C.G.A. § 14-2-1405) applied to foreign corporations.** *Taylor v. R.O.A. Motors, Inc.*, 108 Ga. App. 635, 134 S.E.2d 486 (1963) (decided under former Code 1933, § 22-1210).

**Former Code 1933, § 22-1210 (see O.C.G.A. § 14-2-1405) did not apply to foreign insurance corporations** which have been dissolved and are in liquidation. *Short v. State*, 235 Ga. 394, 219 S.E.2d 728 (1975) (decided under former Code 1933, § 22-1210).

**Protective scheme for collection of claims against foreign corporations.** — The statute providing for prosecution of pending suits after the dissolution of a foreign corporation

is part of the general scheme of Georgia law to protect Georgia citizens in the collection of just claims against foreign corporations which are dissolved and which have their principal assets in another state. *Manufacturing Lumbermen's Underwriters v. South Ga. Ry.*, 57 Ga. App. 699, 196 S.E. 244 (1938) (decided under former Code 1933, § 22-1210).

**Cited in** *Southern Land, Timber & Pulp Corp. v. United States*, 322 F. Supp. 788 (N.D. Ga. 1970); *Jones v. Citizens & S. Nat'l Bank*, 231 Ga. 765, 204 S.E.2d 116 (1974); *Rosing v. Dwoskin Decorating Co.*, 141 Ga. App. 617, 234 S.E.2d 128 (1977); *Boxwood Corp. v. Berry*, 144 Ga. App. 351, 241 S.E.2d 297 (1977); *Robert B. Vance & Assocs. v. Baronet Corp.*, 487 F. Supp. 790 (N.D. Ga. 1979); *Gas Pump, Inc. v. General Cinema Beverages of N. Fla., Inc.*, 982 F.2d 478 (11th Cir. 1993); *Exclusive Properties, Inc. v. Jones*, 218 Ga. App. 229, 460 S.E.2d 562 (1995).

#### RESEARCH REFERENCES

**ALR.** — Power of corporation after expiration or forfeiture of its charter; effects of dissolution, 97 ALR 477.

Dissolution of corporate lessee as affecting lease and rights and liabilities incident thereto, 147 ALR 360.

Dissolved corporation's power to participate in arbitration proceedings, 71 ALR2d 1121.

Similarity of ownership or control as basis for charging corporation acquiring assets of

another with liability for former owner's debts, 49 ALR3d 881.

Products liability: liability of successor corporation for injury or damage caused by product issued by predecessor, 66 ALR3d 824.

Availability of and time for bringing action against former director, officer, or stockholder in dissolved corporation for personal injuries incurred after final dissolution, 20 ALR4th 414.

#### 14-2-1406. Known claims against corporation in dissolution.

(a) A corporation that has filed a notice of intent to dissolve may dispose of the known claims against it by following the procedure described in this Code section.

(b) The corporation in dissolution shall notify its known claimants in writing of the dissolution proceedings at any time after the filing of the notice of intent to dissolve. The written notice must:

(1) Describe information that must be included in a claim;

(2) Provide a mailing address where a claim may be sent;

(3) State the deadline, which may not be less than six months from the effective date of the written notice, by which the dissolved corporation must receive the claim;



(4) State that the claim will be barred if not received by the deadline; and

(5) State that the corporation will give notice of acceptance or rejection of all claims that are received in timely fashion within six months of the deadline for receipt of claims.

(c) A claim against a corporation in dissolution is barred:

(1) If a claimant who was given written notice under subsection (b) of this Code section does not deliver the claim to the dissolved corporation by the deadline; or

(2) If a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within one year from the effective date of the rejection notice.

(d) For purposes of this Code section, the term “claim” does not include a contingent liability or a claim based on an event occurring after the filing of the notice of intent to dissolve. (Code 1981, § 14-2-1406, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 14.06. This replaces provisions previously found in §§ 14-2-276, 14-2-292 & 14-2-293.

Sections 14-2-1406 and 14-2-1407 provide a system for handling known and unknown claims against a corporation in dissolution, and after completion of dissolution proceedings, including claims based on events that occur after the dissolution of the corporation. Section 14-2-1406 deals solely with known claims while Section 14-2-1407 deals with unknown or subsequently arising claims. A claim is a “known” claim even if it is unliquidated (see Section 14-2-1406(d)); a claim that is contingent or has not matured so that there is no immediate right to bring suit is not a “known” claim. Thus it is covered by Section 14-2-1407.

The timetable provided by Sections 14-2-1406 and 14-2-1407 for handling claims contemplates that all known claims will be satisfied or provided for within two years of initiation of dissolution proceedings. Thus, a corporation must give claimants six months to file their claims, and has six months within which to accept or reject claims. This provides a reasonable period for negotiation and settlement of disputed claims. If no resolution is reached, a claimant has one year from the date of a rejection notice within which to bring suit to enforce a claim. Proceedings to enforce unknown and contingent claims, treated in Section 14-2-1407, must be brought within two years after completion of dissolution proceedings, which are completed with the filing of articles of dissolution.

Known claims are handled in Section 14-2-1406 through a process of written notice to claimants; the written notice must contain the information described in subsection (b). This actual notice is superior to the constructive notice previously required, in the form of a newspaper publication, under § 14-2-276(1). Subsection (c) then provides fixed deadlines by which claims are barred under various circumstances, not expressly provided by prior law, except in the case of judicial supervision of liquidation under §§ 14-2-276(3) and 14-2-288, as follows:

(1) If a claimant receives written notice satisfying subsection (b) but fails to file the claim by the deadline specified by the corporation, the claim is barred by subsection (c)(1). The deadline may not be less than six months. Previously § 14-2-288 provided

that if, in judicially supervised liquidations, the court required the filing of claims, it shall provide a cut-off date, which may not be less than four months from the date of the order.

(2) If a claimant receives written notice satisfying subsection (b) and files the claim as required:

(i) but the corporation rejects the claim, the claimant must commence a proceeding to enforce the claim within one year of the rejection or the claim is barred by subsection (c)(2) (this is an expansion of the 90 days allowed by the Model Act); or

(ii) if the corporation does not act on the claim or fails to notify the claimant of the rejection, the claimant is not barred by Section 14-2-1406(c) until the corporation notifies the claimant.

(3) If the corporation publishes notice under Section 14-2-1407, a claimant who was not notified in writing is barred unless he commences a proceeding within two years after publication of the notice.

(4) If the corporation does not publish notice under Section 14-2-1407, a claimant who was not notified in writing is not barred by Section 14-2-1406(c) from pursuing his claim.

These principles, it should be emphasized, do not lengthen statutes of limitation applicable under general state law by reviving barred claims. Thus claims that are not barred under the foregoing rules — for example, if the corporation does not act on a claim — will nevertheless be subject to the general statute of limitations applicable to claims of that type.

#### Cross-References

Administrative dissolution, see § 14-2-1420 et seq. Corporation in dissolution proceedings, see §§ 14-2-1403 & 14-2-1405. "Deliver" includes mail, see § 14-2-140. Distributions, see §§ 14-2-640 & 14-2-831. Effective date of dissolution, see § 14-2-1408. Effective date of notice, see § 14-2-141. Judicial dissolution, see § 14-2-1430 et seq. Judicial dissolution of statutory close corporation, see § 14-2-943. "Notice" defined, see § 14-2-141. Notice to the corporation, see § 14-2-141. "Proceeding" defined, see § 14-2-140. Unknown claims, see § 14-2-1407.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-293, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Purpose.** — The obvious intent of former § 14-2-293 is only to provide that dissolution will not abate legal claims by and against a

corporation, just as death will not abate personal claims by and against an individual. It is not authority for a dissolved corporation to transact post-dissolution business. *Savannah Laundry & Mach. Co. v. Owenby*, 186 Ga. App. 130, 366 S.E.2d 787, cert. denied, 186 Ga. App. 787, 368 S.E.2d 550 (1988) (decided under former § 14-2-293).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2829, 2862-2870.

**C.J.S.** — 19 C.J.S., Corporations, §§ 863, 864, 872-874, 878.

**ALR.** — Availability of and time for bring-

ing action against former director, officer, or stockholder in dissolved corporation for personal injuries incurred after final dissolution, 20 ALR4th 414.



**14-2-1407. Unknown claims against corporation in dissolution.**

(a) A corporation that has filed a notice of intent to dissolve may include in the notice of its intent to dissolve published under Code Section 14-2-1403.1 a request that persons with claims against the corporation present them in accordance with subsection (b) of this Code section.

(b) The request must:

(1) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(2) State that, except for claims that are contingent at the time of the filing of the notice of intent to dissolve or that arise after the filing of the notice of intent to dissolve, a claim against the corporation not otherwise barred will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of the notice.

(c) If a corporation that has filed a notice of intent to dissolve publishes a newspaper notice containing the information specified in subsection (b) of this Code section, all claims not otherwise barred will be barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within two years after the publication date of the newspaper notice except:

(1) Claims that are contingent at the time of the filing of the notice of intent to dissolve; and

(2) Claims that arise after the filing of the notice of intent to dissolve.

(d) If a corporation in dissolution publishes a newspaper notice containing the information specified in subsection (b) of this Code section, a claim not otherwise barred of a claimant whose claim is contingent or based on an event occurring after the filing of the notice of intent to dissolve is barred against the corporation, its shareholders, officers, and directors unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within two years after the date of filing of articles of dissolution or five years after the date of publication in accordance with subsection (b) of this Code section, whichever is later.

(e) Subject to the provisions of this Code section, a claim against a corporation in dissolution or against a dissolved corporation may be enforced under this Code section:

(1) Against the corporation, to the extent of its undistributed assets; or

(2) If the assets have been distributed in liquidation, against a shareholder of the corporation to the extent of his pro rata share of the claim or the corporate assets distributed to him in liquidation, whichever is less, but a shareholder's total liability for all claims under this Code

section may not exceed the total amount of assets distributed to him. (Code 1981, § 14-2-1407, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 14.07. This replaces provisions previously found in § 14-2-293.

Earlier versions of the Model Act did not recognize the serious problem created by possible claims that might arise long after the dissolution process was completed and the corporate assets distributed to shareholders. Most of these claims were based on personal injuries occurring after dissolution but caused by allegedly defective products sold before dissolution, but they also involved negligence for which the statute of limitations did not begin to run until the negligence was discovered (e.g., a surgical instrument left inside the patient). The application of the former provisions of Georgia law to this problem led to confusing and inconsistent results. The problems raised by this type of litigation are intractable; on the one hand, the application of a mechanical two-year limitation period to a claim for injury that occurs after the period has expired involves obvious injustice to the plaintiff. On the other hand, to permit these suits generally makes it impossible ever to complete the winding up of the corporation, make suitable provisions for creditors, and distribute the balance of the corporate assets to the shareholders.

The solution adopted in Section 14-2-1407 with respect to claims that are contingent at the time of the publication of the notice, or that arise after the notice, the effect of the Code is to continue liability for five years after the corporation publishes notice of intent to dissolve, or two years after final dissolution, whichever is later. (Subsection (d).) The approach of prior law, under § 14-2-293 was also to cut off claims two years after the date of dissolution. It is recognized that a five year cut-off is itself arbitrary, but it is believed that the great bulk of post dissolution claims will arise during this period. This provision is therefore believed to be a reasonable compromise between the competing considerations of providing a remedy to injured plaintiffs and providing a period of repose after which assets distributed by dissolved corporations to their shareholders are free of all claims and shareholders may hold them secure in the knowledge that they may not be reclaimed.

Subsection (a) permits a corporation to publish a notice to claimants in its notice of intent to dissolve published in accordance with Section 14-2-1403.1, and subsection (b) sets out the required contents of the notice.

Subsection (c) provides that creditors who hold known and non-contingent claims not otherwise barred by applicable statutes of limitations will be barred two years after the publication date, unless they commence a proceeding to enforce the claim during that period. The reference to contingent claims is to claims that are contingent with respect to corporate liability, and not simply unliquidated as to amount. Unliquidated claims can be reduced to a judgment during the winding up process. Thus claims arising both during the winding up period and after the filing of articles of dissolution are excluded from these limitations.

Subsection (d) provides the relevant statute of limitations for contingent claims and those arising after the filing of the notice of intent to dissolve. This bars suits against the officers and directors of the corporation as well as against the corporation itself. Unknown and contingent claimants are thus given at least five years from the publication of notice of intent to dissolve to bring their claims. They are further protected by being allowed to bring claims for two years after filing of articles of dissolution, if this is a later date. Thus most products liability claimants will have a minimum of five years from the cessation of normal business activities, except for buyers of those products produced during the winding up process. Claims arising during the winding up process are assured at least two years from the filing of articles of dissolution.



Directors must generally discharge or make provision for discharging all of the corporation's liabilities before distributing the remaining assets to the shareholders. See the Comment to Section 14-2-1406. But Section 14-2-1407 does not contemplate that liquidating distributions to shareholders will be deferred until all possible claims are barred under Section 14-2-1407. Many claims covered by this section are of a type for which provision may be made by the purchase of insurance or by the setting aside of a portion of the assets, thereby permitting prompt distributions in liquidation. Claimants, of course, may always have recourse to the remaining assets of the dissolved corporation. See subsection (e)(1). Further, where unexpected claims arise after distributions have been made to shareholders in liquidation, subsection (e)(2) authorizes recovery against the shareholders receiving the earlier distributions. The recovery, however, is limited to the smaller of the recipient shareholder's pro rata share of the claim or the total amount of assets received as liquidating distributions by the shareholder from the corporation. The provision ensures that claimants seeking to recover distributions from shareholders will try to recover from the entire class of shareholders rather than concentrating only on the larger shareholders, and protects the limited liability of shareholders.

#### Cross-References

Administrative dissolution, see § 14-2-1420 et seq. "Claim" defined, see § 14-2-1406. "Deliver" includes mail, see § 14-2-140. Distributions, see §§ 14-2-640 & 14-2-831. Effective date of dissolution, see § 14-2-1408. Effective date of notice, see § 14-2-141. Judicial dissolution, see § 14-2-1430. Judicial dissolution of statutory close corporation, see § 14-2-943. Known claims, see § 14-2-1406. "Notice" defined, see § 14-2-141. Notice of intent to dissolve, see § 14-2-1403. Notice to the corporation, see § 14-2-141. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. "Proceeding" defined, see § 14-2-140. Registered office: designated in annual registration, see § 14-2-1622; required, see §§ 14-2-202 & 14-2-501.

#### JUDICIAL DECISIONS

**Statute of limitations.** — Claims against a corporation that was dissolved in 1988 were barred by the former two-year statute of limitations. *Smith v. Branch*, 226 Ga. App. 626, 487 S.E.2d 35 (1997).

Cited in *Garbutt v. Southern Clays, Inc.*, 844 F. Supp. 1551 (M.D. Ga. 1994).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2829, 2830, 2862-2870.

**C.J.S.** — 19 C.J.S., Corporations, §§ 823, 826, 831, 863, 864.

**ALR.** — Availability of and time for bring-

ing action against former director, officer, or stockholder in dissolved corporation for personal injuries incurred after final dissolution, 20 ALR4th 414.

#### 14-2-1408. Articles of dissolution.

(a) If a notice of intent to dissolve under Code Section 14-2-1403 has not been revoked, when all known debts, liabilities, and obligations of the corporation have been paid and discharged, or adequate provision made therefor, the corporation may dissolve by delivering to the Secretary of State for filing articles of dissolution setting forth:

- (1) The name of the corporation;

(2) The date on which a notice of intent to dissolve was filed and a statement that it has not been revoked;

(3) A statement that all known debts, liabilities, and obligations of the corporation have been paid and discharged, or that adequate provision has been made therefor;

(4) A statement that all remaining property and assets of the corporation have been distributed among its shareholders in accordance with their respective rights and interests, or that adequate provision has been made therefor, or that such property and assets have been deposited with the Office of Treasury and Fiscal Services as provided in Code Section 14-2-1440; and

(5) A statement that there are no actions pending against the corporation in any court, or that adequate provision has been made for the satisfaction of any judgment, order, or decree which may be entered against it in any pending action.

(b) Upon filing of articles of dissolution the corporation shall cease to exist, except for the purpose of actions or other proceedings, which may be brought against the corporation by service upon any of its last executive officers named in its last annual registration, and except for such actions as the shareholders, directors, and officers take to protect any remedy, right, or claim on behalf of the corporation, or to defend, compromise, or settle any claim against the corporation, all of which may proceed in the corporate name.

(c) Deeds or other transfer instruments requiring execution after the dissolution of a corporation may be signed by any two of the last officers or directors of the corporation and shall operate to convey the interest of the corporation in the real estate or other property described. (Code 1981, § 14-2-1408, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 63; Ga. L. 1990, p. 257, § 23; Ga. L. 2001, p. 796, § 1.)

**The 2001 amendment**, effective July 1, Fiscal Services” for “Department of Administrative Services” in paragraph (a)(4). 2001, substituted “Office of Treasury and

#### COMMENT

Source: Former §§ 14-2-4(e), 14-2-281, 14-2-282(g), 14-2-292 and 14-2-293.

This section contemplates the filing of articles of dissolution at the completion of the winding up process. It follows the general pattern of Sections 92, 93b and 105 of the Model Act 2d (1969).

Subsection (a) provides that before articles of dissolution can be filed all known debts must have been paid or provided for, or discharged. Subsection (a) also specifies the contents of articles of dissolution, and is based on former § 14-2-281. It requires affirmation that the conditions precedent, discussed above, have been complied with, and adequate provision made for known claims.

Subsection (b) is drawn from former § 14-2-282(g) and former § 14-2-293, which were based on former Model Act 2d §§ 93 and 105. The purpose of this section is to



indicate that while corporate existence is deemed to end for most purposes at the time of filing of articles of dissolution, its existence continues for purposes of legal actions. Thus the corporation can continue to sue and be sued in its corporate name, and to defend claims against it. As noted in the Comment to Section 14-2-1405, Article 14 dissolution proceedings do not have any of the characteristics of common law dissolution, which treated corporate dissolution as analogous to the death of a natural person and abated lawsuits, vested equitable title to corporate property in the shareholders, imposed the fiduciary duty of trustees on directors who had custody of corporate assets, and revoked the authority of the registered agent. This implements the statutory scheme of Sections 14-2-1406 and 14-2-1407, which contemplate the possibility of post-dissolution claims being brought against the corporation.

Subsection (c) preserves former § 14-2-4(e), and specifies the officials who have the power to convey property for dissolved corporations, a matter frequently not specified by the corporation itself.

#### **Note to 1989 Amendment**

The 1989 amendment changed subsection (b) to add the phrase, "which may be brought against the corporation by service upon any of its last executive officers named in its last annual registration," after the reference to "actions or other proceedings." This was to clarify that even after the corporation lacks a registered agent, the executive officers of the corporation can be served with process for the corporation.

#### **Note to 1990 Amendment**

The 1990 amendment deleted a requirement that the articles of dissolution set forth a statement that a notice to creditors has been published in accordance with § 14-2-1407. Such a requirement is inconsistent with the optional nature of the notice to claimants procedures specified by § 14-2-1407.

#### **Cross-References**

Articles of dissolution filed by incorporators or initial directors, see § 14-2-1401. Claims against dissolved corporation, see §§ 14-2-1406 & 14-2-1407. Effect of notice of intent to dissolve, see § 14-2-1405. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Notice of intent to dissolve, see § 14-2-1403.

### **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-281, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Cited in** *United States v. Bartlett*, 633 F.2d 1184 (5th Cir. 1981); *Exclusive Properties, Inc. v. Jones*, 218 Ga. App. 229, 460 S.E.2d 562 (1995); *Flateau v. Reinhardt, Whitley & Wilmot*, 220 Ga. App. 188, 469 S.E.2d 222 (1996).

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2879, 2880.

**C.J.S.** — 19 C.J.S., Corporations, § 837.

**ALR.** — Power of corporation after expiration or forfeiture of its charter; effects of dissolution, 97 ALR 477.

Dissolution of corporate lessee as affecting

lease and rights and liabilities incident thereto, 147 ALR 360.

Dissolved corporation's power to participate in arbitration proceedings, 71 ALR2d 1121.

Similarity of ownership or control as basis for charging corporation acquiring assets of

another with liability for former owner's debts, 49 ALR3d 881.

Products liability: liability of successor corporation for injury or damage caused by product issued by predecessor, 66 ALR3d 824.

Availability of and time for bringing action against former director, officer, or stockholder in dissolved corporation for personal injuries incurred after final dissolution, 20 ALR4th 414.

### **14-2-1409. Revival of corporation after dissolution by expiration of period of duration.**

(a) A corporation that has been dissolved by the expiration of its period of duration but which has continued in business notwithstanding the expiration, may revive its corporate existence by amending its articles of incorporation at any time during a period of ten years immediately following the expiration date fixed by the articles of incorporation, so as to extend its period of duration.

(b) If a corporation whose period of duration has expired has failed to revive its corporate existence within ten years of the expiration date fixed by its articles of incorporation as provided in subsection (a) of this Code section, the corporation may thereafter revive its corporate existence by amending its articles of incorporation so as to extend its period of duration at any time during the period beginning ten years, and ending 20 years, immediately following the expiration date fixed by its articles of incorporation and filing with the Secretary of State an affidavit attested by one or more of its officers or directors, stating as follows:

(1) That the corporation has continued in business, notwithstanding the expiration of its period of duration, at all times since the expiration date fixed by its articles of incorporation;

(2) That the corporation has not been disqualified from making distributions for the reasons set out in subsection (c) of Code Section 14-2-640 since such expiration date; and

(3) That the revival will not injure the corporation's shareholders, creditors, or the public.

(c) As of the effective date of the amendment of articles of incorporation pursuant to subsection (a) or (b) of this Code section, the corporate existence shall be deemed to have continued without interruption from the former expiration date. If, during the period between expiration and revival, the name of the corporation has been assumed, reserved, or registered by any other person or corporation, the revived corporation shall not engage in business until it has amended its articles of incorporation to change its name. (Code 1981, § 14-2-1409, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 64.)

### **COMMENT**

Source: Former §§ 14-2-294 & 14-2-295.



This section, like prior law, provides for revival of corporations that have been dissolved by reason of the expiration of their periods of duration.

Subsection (a) provides for liberal revival of corporations during the first ten years after expiration of their period of duration. The only condition is that the corporation must have continued its business in ignorance of the expiration of its period of duration. The process calls for an amendment of its articles of incorporation. Under Section 14-2-1002, this amendment may be adopted by the board of directors without shareholder action. Under Section 14-2-302, unless articles of incorporation provide otherwise, corporations have perpetual duration, so that an amendment deleting earlier provisions in the articles concerning duration will be sufficient to accomplish revival.

Subsection (b) provides for revival of corporations that have failed to revive in timely fashion under subsection (a). Beginning after the expiration of the ten years provided in subsection (a), and running for ten years, these corporations can revive their existence by filing articles of amendment to the articles of incorporation, adopted in the manner described above, accompanied by an affidavit of an officer or director, setting out that the requirements of subsection (b) have been complied with. In addition to ignorance of the expiration of its period of duration, the affidavit must show that the corporation has not suffered insolvency of the kinds described in Section 14-2-640(c), and that revival will not injure the corporation's shareholders, creditors, or the public.

Subsection (c) provides that the revival of the corporation under subsections (a) or (b) relates back to the date of expiration of the period of duration. This protects the officers, directors, and shareholders from any claims that might arise under Section 14-2-204, for purporting to act as a corporation, knowing that none was in existence, or from claims that they were liable as partners.

### Cross-References

Amendment of articles of incorporation, see § 14-2-1003. Amendment of articles of incorporation by board of directors to extend duration, see § 14-2-1002. Assumed corporate name, see § 14-2-1506. Corporate name: generally, see § 14-2-401; reserved, see § 14-2-402. "Distribution": defined, see § 14-2-140; limitations on, see § 14-2-640. Duration of corporations, see § 14-2-302. Effective date of dissolution, see § 14-2-1408. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues dealt with in the provisions, decisions under former Code 1933, § 22-601, are included in the annotations for this Code section.

**Corporation is not entirely extinguished by expiration of its charter.** West v. Flynn

Realty Co., 53 Ga. App. 594, 186 S.E. 753 (1936).

**Status as de facto corporation.** — During the period within which it can be revived, the company must be treated as a de facto corporation. West v. Flynn Realty Co., 53 Ga. App. 594, 186 S.E. 753 (1936).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former

Code 1933, § 22-202, are included in the annotations for this section.

**Dissolved corporation not revived under this section is not a corporation.** — A corporation which dissolved by expiration of its charter prior to April 1, 1969, effective date of former Chapter 2, and which had not been revived within ten years after expiration of its period of duration as provided in former Code 1933, § 22-1326 was not a corporation for purposes of former Code 1933, § 22-907, and could not file reinstated articles of incorporation. 1980 Op. Att'y Gen. No. 80-20 (decided under former Code 1933, § 22-202).

**Paragraph (a)(2) of former Code 1933, § 22-202 did not grant perpetual duration to a de facto corporation dissolved by expiration of its charter prior to effective date of former Chapter 2.** 1980 Op. Att'y Gen. No. 80-20 (decided under former Code 1933, § 22-202).

**Former Code 1933, § 22-1326 provided for survival of expired corporation.** — Former Code 1933, § 22-1326 made specific provision for survival of corporation whose period of duration had expired. To extent that provisions of former Code 1933, § 22-1326 would provide perpetual duration for such a corporation, the general language of former Code 1933, § 22-202(a)(2) conflicted with specific provisions in former Code 1933, § 22-1326. Where there is a conflict between general and specific provisions in one act, the specific provision controls. Thus, to extent that former Code 1933, § 22-202(a)(2) conflicted with former Code 1933, § 22-1326, the latter controlled. 1980 Op. Att'y Gen. No. 80-20 (decided under former Code 1933, § 22-202).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2914-2920.

**C.J.S.** — 19 C.J.S., Corporations, § 860.

**ALR.** — Reinstatement of repealed, for-

feited, expired, or suspended corporate charter as validating interim acts of corporation, 42 ALR4th 392.

#### 14-2-1410. Preservation of remedies of dissolved corporations.

The dissolution of a corporation in any manner, except by a decree of the superior court when the court has supervised the liquidation of the assets and business of the corporation as provided in Code Sections 14-2-1430 through 14-2-1433, shall not take away or impair any remedy available to such corporation, its directors, officers, or shareholders for any right or claim existing prior to such dissolution if action or other proceeding thereon is pending on the date of such dissolution or is commenced within two years after the date of such dissolution. Any such action or proceeding by the corporation may be prosecuted by the corporation in its corporate name. The shareholders, directors, and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim. (Code 1981, § 14-2-1410, enacted by Ga. L. 1996, p. 1203, § 9.)

**Law reviews.** — For review of 1996 corporation, partnership, and association legislation, see 13 Ga. St. U. L. Rev. 70.



## COMMENT

## Note to 1996 Amendment

This restores former O.C.G.A. § 14-2-293 (1981), which provided for nonabatement of claims of dissolved corporations.

## JUDICIAL DECISIONS

Cited in Clarence L. Martin, P.C. v. Wallace, 248 Ga. App. 284, 546 S.E.2d 55 (2001).

## PART 2

## ADMINISTRATIVE DISSOLUTION

**Cross references.** — Forfeiture of articles of incorporation of financial institutions, § 7-1-92.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-1314 and former Code Section 14-2-283, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this part.

**Dissolution of corporation does not can-**

**cel debt due the corporation.** Sachs v. Lee & Sandra Assocs., 153 Ga. App. 823, 266 S.E.2d 573 (1980) (decided under former Code 1933, § 22-1314).

Cited in S. Donald Norton Properties, Inc. v. Triangle Pac., Inc., 253 Ga. 761, 325 S.E.2d 160 (1985).

**14-2-1420. Grounds for administrative dissolution.**

The Secretary of State may commence a proceeding under Code Section 14-2-1421 to dissolve a corporation administratively if:

(1) The state revenue commissioner has certified to the Secretary of State that the corporation has failed to file a license or occupation tax return and that a period of one year has expired since the last day permitted for timely filing without the filing and payment of all required license and occupation taxes and penalties by the corporation; provided, however, that dissolution proceedings shall be stayed so long as the corporation is contesting, in good faith, in any appropriate proceeding, the alleged grounds for dissolution;

(2) The corporation does not deliver its annual registration to the Secretary of State, together with all required fees and penalties, within 60 days after it is due;

(3) The corporation is without a registered agent or registered office in this state for 60 days or more;

(4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that

its registered agent has resigned, or that its registered office has been discontinued;

(5) The corporation pays a fee as required to be collected by the Secretary of State pursuant to the Code by a check or some other form of payment which is dishonored and the corporation or its incorporator or its agent does not submit payment for said dishonored payment within 60 days from notice of nonpayment issued by the Secretary of State; or

(6) Any notice which is required to be published by Code Section 14-2-201.1, 14-2-1006.1, 14-2-1105.1, or 14-2-1403.1 has not been published. (Code 1981, § 14-2-1420, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 65; Ga. L. 1993, p. 1231, § 22.)

#### COMMENT

Source: Model Act, § 14.20. This replaces provisions previously found in § 14-2-283(a).

Subsection (1) provides for administrative dissolution for failure to file any required tax return for at least one year. The Model Act provision was amended to require payment of all filing and late fees, and reflects the prior law in § 14-2-283(a)(1).

Subsection (2) permits administrative dissolution when an annual registration is more than 60 days late, while former § 14-2-283(1) permitted dissolution only when it was more than one year late. Subsection (2) was amended to preserve former Georgia practice, and is taken from former § 14-2-283(a)(2).

Subsection (3) permits administrative dissolution when a corporation is without a registered agent or office for 60 days, while former § 14-2-283(a)(3) allowed only 30 days to appoint and maintain a registered agent (but was silent on registered offices).

Subsection (4) permits administrative dissolution 60 days after a failure to notify the Secretary of State that its registered office or agent has changed. Previously § 14-2-283(a)(4) allowed administrative dissolution 30 days after a failure to file a statement of change of registered agent or office.

Subsection (5) is a Georgia addition to the Model Act, providing for administrative dissolution for failure to publish notices required by the Code. No penalties are imposed on publishers who fail to publish.

#### Note to 1989 Amendment

The 1989 amendment limits the ground for dissolution in subsection (1) to failure to file required license and occupation tax returns, rather than all tax returns. This reflects prior Georgia law, under O.C.G.A. § 14-2-283(a)(2). A further qualification was provided that stays dissolution if the corporation is contesting the obligation to file the returns or to pay the franchise or license taxes.

#### Note to 1993 Amendment

The 1993 amendment added a new subparagraph (5) which authorizes administrative dissolution if the payment of fees to the Secretary of State is dishonored and not thereafter satisfied within a stated period of time.

#### Cross-References

Annual registration, see § 14-2-1622. Appeal from administrative dissolution, see § 14-2-1423. "Deliver" includes mail, see § 14-2-140. Duration of corporation, see



§ 14-2-302. Judicial dissolution, see § 14-2-1430 et seq. Judicial dissolution of statutory close corporation, see § 14-2-943. Publication of notices, see §§ 14-2-201.1, 14-2-1006.1, 14-2-1105.1 & 14-2-1403.1. Registered office and agent, see Article 5. Reinstatement following administrative dissolution, see § 14-2-1422. Voluntary dissolution, see §§ 14-2-1401 & 14-2-1402.

### JUDICIAL DECISIONS

**Failure to amend corporate registry.** — Where the defendant admitted that name was left on the corporate registry, merely asserting that the failure to remove defendant was due to the “negligence of the corporation,” because defendant had “received assurances” that defendant’s name

would be removed, the trial court correctly determined that there was no genuine issue of material fact as to the defendant’s status as a corporate officer during all periods relevant to the suit. *Speir v. Krieger*, 235 Ga. App. 392, 509 S.E.2d 684 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2794, 2795, 2802, 2803, 2822, 2823.

**C.J.S.** — 19 C.J.S., Corporations, §§ 817, 818, 823.

### 14-2-1421. Procedure for and effect of administrative dissolution.

(a) If the Secretary of State determines that one or more grounds exist under Code Section 14-2-1420 for dissolving a corporation, he shall provide the corporation with written notice of his determination by mailing a copy of the notice, first-class mail, to the corporation at the last known address of its principal office or to the registered agent.

(b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is provided to the corporation, the Secretary of State shall administratively dissolve the corporation by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The Secretary of State shall file the original of the certificate.

(c) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Code Section 14-2-1405. Winding up the business of a corporation administratively dissolved may include the corporation’s proceeding, at any time after the effective date of the administrative dissolution, (1) in accordance with Code Section 14-2-1406 to notify known claimants, and (2) to mail or deliver, with accompanying payment of the cost of publication, a notice containing the information specified in subsection (b) of Code Section 14-2-1407 for publication in accordance with subsection (b) of Code Section 14-2-1403.1. Upon such notice, claims against the administratively dissolved corporation will be limited as specified in Code Sections 14-2-1406 and 14-2-1407, respectively.

(d) The administrative dissolution of a corporation does not terminate the authority of its registered agent. (Code 1981, § 14-2-1421, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 24.)

#### COMMENT

Source: Model Act, § 14.21. This replaces provisions previously found in § 14-2-283.

Many failures to comply with statutory requirements that may give rise to administrative dissolution under Section 14-2-1420 occur because of oversight or inadvertence by responsible corporate officers of corporations that are continuing in business. Such failures are usually corrected promptly when brought to the corporation's attention. Sections 14-2-1421(a) and (b) therefore provide a mandatory notice by the Secretary of State to each corporation subject to administrative dissolution and a 60-day grace period following the notice before the certificate of administrative dissolution may be filed. This follows prior law, § 14-2-283(b). The Model Act provision called for notice in accordance with Section 14-2-504 of the Code, which calls for service on the registered agent, or if there is none, service by registered or certified mail to the secretary of the corporation at its principal office. The Code preserves the more flexible approach of prior law, § 14-2-283(b), by permitting, in the alternative, notice by regular mail to the principal office of the corporation.

In most instances, the issue whether the corporation is subject to administrative dissolution will not be controverted. If a corporation is administratively dissolved, it may petition the Secretary of State for reinstatement under Section 14-2-1422 and, if this is denied, it may appeal to the courts under Section 14-2-1423.

Subsection (c) provides that the corporate existence continues for purposes of winding up pursuant to Section 14-2-1405. This protects officers and directors engaged in winding up from personal liability for corporate debts. Previously § 14-2-283(g) provided that shareholders were not rendered personally liable for debts incurred subsequent to dissolution, but left directors and officers in a very different position, providing that directors, officers and agents would be liable only if they had actual notice of the dissolution. This raised questions about whether an officer could safely engage in winding up activities once notified of involuntary dissolution, although the statute permitted ratification of the officers' and agents' acts once the corporation was reinstated.

#### Note to 1990 Amendment

The 1990 amendment clarifies that administratively dissolved corporations may provide notice to known and unknown claimants pursuant to the notice provisions of § 14-2-1406 and § 14-2-1407, respectively.

#### Cross-References

Appeal from denial of reinstatement, see § 14-2-1423. Claims, see §§ 14-2-1406 & 14-2-1407. Deposit with Department of Administrative Services, see § 14-2-1440. Effective date of service, see § 14-2-504. Reinstatement following administrative dissolution, see § 14-2-1422. Winding up, see § 14-2-1405.

#### JUDICIAL DECISIONS

A corporation continued to exist as a corporate entity even after administrative dissolution and, therefore, personal liability of the president of the corporation to a seller of goods could not be based on the

traditional theory that the president was acting for a nonexistent principal; this was true regardless of whether the corporation applied for reinstatement and was ultimately restored to its status prior to dissolution.



*Fulton Paper Co. v. Reeves*, 212 Ga. App. 341, 441 S.E.2d 881 (1994).

The general powers of a corporation exist independently of the purpose for continued existence stated in the provision for administrative dissolution. *Fulton Paper Co. v. Reeves*, 212 Ga. App. 341, 441 S.E.2d 881 (1994).

**Effect of Dissolution.** — An administratively dissolved corporation lacked the capacity to bring a federal antitrust action where the two-year limitation period for reinstatement and for the initiation of any action by a dissolved corporation had expired. *Gas Pump, Inc. v. General Cinema Beverages of N. Fla., Inc.*, 263 Ga. 583, 436 S.E.2d 207 (1993).

**Federal antitrust claim barred.** — A corporation that is administratively dissolved pursuant to O.C.G.A. § 14-2-1421 has no capacity to bring a federal antitrust claim. *Gas Pump, Inc. v. General Cinema Beverages of N. Fla., Inc.*, 12 F.3d 181 (11th Cir. 1994).

**Malpractice action dismissed.** — Where a corporation was administratively dissolved subsequent to its filing of a legal malpractice action, dismissal of the corporation's claims was proper since the lawsuit was not neces-

sary to wind up the corporation's business affairs. *Exclusive Properties, Inc. v. Jones*, 218 Ga. App. 229, 460 S.E.2d 562 (1995).

**Shareholders not substituted as parties.** — Where a corporation was administratively dissolved subsequent to its filing of a legal malpractice action, the court did not err in failing to allow the corporation to substitute its shareholders as real parties in interest in the case, since the lawsuit was not a corporate asset to which the shareholders became entitled upon the dissolution of the corporation. *Exclusive Properties, Inc. v. Jones*, 218 Ga. App. 229, 460 S.E.2d 562 (1995).

**Prosecuting an action.** — Because a dissolved corporation would retain capacity under Tennessee law to prosecute an action to wind up its affairs, the trial court correctly held that the Tennessee corporation had the capacity to bring a renewal action in Georgia. *Tillett Bros. Constr. Co. v. DOT*, 210 Ga. App. 84, 435 S.E.2d 241 (1993).

Dissolution did not prohibit an accounting firm from continuing a lawsuit to reclaim possession of certain corporate assets alleged to have been misappropriated. *Crews v. Wahl*, 238 Ga. App. 892, 520 S.E.2d 727 (1999).

## 14-2-1422. Reinstatement following administrative dissolution.

(a) A corporation administratively dissolved under Code Section 14-2-1421 may apply to the Secretary of State for reinstatement. The application must:

(1) Recite the name of the corporation and the effective date of its administrative dissolution;

(2) State that the ground or grounds for dissolution either did not exist or have been eliminated;

(3) State that the name by which the corporation will be known after reinstatement satisfies the requirements of Code Section 14-2-401;

(4) Contain a statement by the corporation reciting that all taxes owed by the corporation have been paid; and

(5) Be accompanied by an amount equal to the total annual registration fees and penalties that would have been payable during the periods between dissolution and reinstatement, plus the fee required for the application for reinstatement, and any other fees and penalties payable for earlier periods.

(b) If the corporation's name no longer satisfies the requirements of Code Section 14-2-401, the corporation shall, as a condition of reinstatement,

ment, include in its application for reinstatement the adoption of a corporate name that is available in accordance with Code Section 14-2-401 and that has been reserved pursuant to Code Section 14-2-402. If the application for reinstatement contains a new corporate name, the articles of incorporation shall be deemed to have been amended to change the name of the corporation to the name so adopted.

(c) If the Secretary of State determines that the application contains the information required by subsection (a) of this Code section and that the information is correct, the Secretary of State shall prepare a certificate of reinstatement that recites his or her determination and the effective date of reinstatement, file the original of the certificate, and serve a copy on the corporation under Code Section 14-2-504.

(d) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

(e) This Code section shall apply to all corporations administratively dissolved under Code Section 14-2-1421 or any similar former statute, regardless of the date of dissolution. (Code 1981, § 14-2-1422, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1995, p. 975, § 1; Ga. L. 1997, p. 1165, § 11.1.)

**Law reviews.** — For annual survey article discussing administrative dissolution issues, see 46 Mercer L. Rev. 71 (1994).

#### COMMENT

Source: Model Act, § 14.22. This replaces provisions previously found in § 14-2-283.

Section 14-2-1422 provides a two-year period during which a corporation may seek reinstatement following administrative dissolution. Prior law provided five years. § 14-2-283(e). This section may apply when a corporation through inadvertence or a failure to maintain a registered agent fails to receive or respond to the predissolution notice of default required by Section 14-2-1421. A corporation that is reinstated pursuant to this section resumes carrying on its business as before dissolution.

In order to be eligible for reinstatement, a corporation must comply with all statutory requirements at the time it seeks reinstatement. It must establish, for example, that all taxes have been paid and that its name is available when it files the application for reinstatement.

Subsection (a)(4) follows the prior law, § 14-2-283(e), which required establishment to the satisfaction of the Secretary of State that payment had been made of all fees, taxes, and penalties which accrued before the dissolution.

Subsection (a)(5) is a Georgia addition to the Model Act, based upon former § 14-2-283(e), which required payment of all annual registration fees and penalties that would have been payable between dissolution and reinstatement, as well as fees and penalties remaining unpaid at dissolution, if any.



Section 14-2-1422(c) states that reinstatement relates back to the date of dissolution; this follows former § 14-2-283(e).

#### Cross-References

Appeal from denial of reinstatement, see § 14-2-1423. Corporate name generally, see Article 4. Effective date of administrative dissolution, see § 14-2-1421. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Grounds for administrative dissolution, see § 14-2-1420.

### JUDICIAL DECISIONS

**A corporation continued to exist as a corporate entity** even after administrative dissolution and, therefore, personal liability of the president of the corporation to a seller of goods could not be based on the traditional theory that the president was acting for a nonexistent principal; this was true regardless of whether the corporation applied for reinstatement and was ultimately restored to its status prior to dissolution. *Fulton Paper Co. v. Reeves*, 212 Ga. App. 341, 441 S.E.2d 881 (1994).

**Effect of Dissolution.** — An administratively dissolved corporation lacked the capacity to bring a federal antitrust action

where the two-year limitation period for reinstatement and for the initiation of any action by a dissolved corporation had expired. *Gas Pump, Inc. v. General Cinema Beverages of N. Fla., Inc.*, 263 Ga. 583, 436 S.E.2d 207 (1993).

**Litigation time-barred.** — Once O.C.G.A. § 14-2-1422's two-year period has passed, the corporation's demise is complete; it may no longer initiate any activity, including the bringing of lawsuits. *Gas Pump, Inc. v. General Cinema Beverages of N. Fla., Inc.*, 12 F.3d 181 (11th Cir. 1994).

Cited in *Powell v. Lewis*, 218 Ga. App. 567, 462 S.E.2d 460 (1995).

### OPINIONS OF THE ATTORNEY GENERAL

**Applicability of prior law to reinstatement.** — A foreign or domestic business corporation which was dissolved or revoked under the law in effect prior to July 1, 1989, may be reinstated in accordance with the prior law in effect at the time of the revocation or dissolution. 1990 Op. Att'y Gen. No. 90-39.

**Penalty for operating without certificate of incorporation.** — Where a foreign business corporation had its certificate of author-

ity revoked under the former corporation code and sought reinstatement after July 1, 1989, the civil penalty of \$500.00 per year or part thereof for operation without a certificate of authority should be assessed for the period of time between revocation and reinstatement, if the foreign corporation continued to transact business in Georgia without a certificate of authority. 1990 Op. Att'y Gen. No. 90-39.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2908-2913.

**C.J.S.** — 19 C.J.S., Corporations, § 860.

#### 14-2-1423. Appeal from denial of reinstatement.

(a) If the Secretary of State denies a corporation's application for reinstatement following administrative dissolution, he shall serve the corporation under Code Section 14-2-504 with a written notice that explains the reason or reasons for denial.

(b) The corporation may appeal the denial of reinstatement to the superior court of the county where the corporation's registered office is or was located within 30 days after service of the notice of denial is perfected. The corporation appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the Secretary of State's certificate of dissolution, the corporation's application for reinstatement, and the Secretary of State's notice of denial.

(c) The court's final decision may be appealed as in other civil proceedings. (Code 1981, § 14-2-1423, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 14.23.

Section 14-2-1423 provides for an appeal from a decision by the Secretary of State denying a petition for reinstatement. Previously appeals were authorized under the more general provisions of § 14-2-393(a), which authorized appeals to the Superior Court from a variety of adverse decisions, all within 40 days of the secretary of state's actions.

This section is intended to make it clear that a corporation must exhaust its remedies with the Secretary of State, including an application for reinstatement, before an appeal to the courts is permitted.

#### Cross-References

Effective date of service, see § 14-2-504. Grounds for administrative dissolution, see § 14-2-1420. "Notice" defined, see § 14-2-141. Reinstatement following administrative dissolution, see § 14-2-1422.

### PART 3

## JUDICIAL DISSOLUTION

**Law reviews.** — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution

of venue questions, see 9 Ga. St. B.J. 254 (1972).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 22-1317 and 22-1318 and former Code Sections 14-2-285 and 14-2-286, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Actual waste must be shown.** — To support a dissolution on the ground that corporate assets are being misapplied or wasted, actual waste, not simply inadequate management, must be shown. *Gregory v. J.T. Gregory & Son*, 176 Ga. App. 788, 338 S.E.2d 7 (1985) (decided under former § 14-2-285).

**Determination whether employee's salary**

**is waste of assets.** — The appropriate criterion for determining whether the payment of a given salary to a corporate employee is a waste of corporate assets is whether the employee has performed services to the corporation commensurate with the salary paid. *L.L. Minor Co. v. Perkins*, 246 Ga. 6, 268 S.E.2d 637 (1980) (decided under former Code 1933, § 22-1317).

**Power of receiver to investigate and record debts owed to the corporation.** — A liquidating receiver directed to marshal and sell the assets of a corporation has the power to investigate and record the debts owed to the corporation, notwithstanding the fact



that those debts were incurred prior to the receiver's appointment. *Nesmith v. J & G Shoes, Inc.*, 244 Ga. 244, 260 S.E.2d 3 (1979) (decided under former Code 1933, § 22-1318).

**Trial judge authorized to award attorney's fees.** — Former Code 1933, § 22-1318 authorized the trial judge to award such fees to the attorneys "in the proceeding" as the judge, in the exercise of controlled discretion, finds appropriate. *Nesmith v. J & G Shoes, Inc.*, 244 Ga. 244, 260 S.E.2d 3 (1979) (decided under former Code 1933, § 22-1318).

**Setoffs by receiver.** — Under the circum-

stances, liquidating receiver could setoff overpayments to defendants corporate president and treasurer from their pro rata distributive share. *Nesmith v. J & G Shoes, Inc.*, 244 Ga. 244, 260 S.E.2d 3 (1979) (decided under former Code 1933, § 22-1318).

**Cited in** *Pickett v. Paine*, 230 Ga. 786, 199 S.E.2d 223 (1973); *Claire v. Rue de Paris, Inc.*, 239 Ga. 191, 236 S.E.2d 272 (1977); *Nesmith v. J & G Shoes, Inc.*, 244 Ga. 244, 260 S.E.2d 3 (1979); *Kellos v. Parker-Sharpe, Inc.*, 245 Ga. 130, 263 S.E.2d 138 (1980); *L.L. Minor Co. v. Perkins*, 246 Ga. 6, 268 S.E.2d 637 (1980).

### RESEARCH REFERENCES

**ALR.** — When receiver of corporation deemed to be vested with title to assets so as to entitle him to sue in a foreign jurisdiction, 3 ALR 262; 29 ALR 1495.

**Inherent power of equity,** at instance of a stockholder, to appoint receiver for, or to wind up, a solvent, going corporation, on

ground of fraud, mismanagement, or dissensions, 61 ALR 1212; 91 ALR 665.

**Friendly or consent receiverships,** 90 ALR 406.

**Dissolving or winding up affairs of corporation domiciled in another state,** 19 ALR3d 1279.

### 14-2-1430. Grounds for judicial dissolution.

The superior court may dissolve a corporation:

(1) In a proceeding by the Attorney General if it is established that:

(A) The corporation obtained its articles of incorporation through fraud; or

(B) The corporation has continued to exceed or abuse the authority conferred upon it by law;

(2) In a proceeding by a shareholder if it is established that:

(A) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;

(B) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal or fraudulent in connection with the operation or management of the business and affairs of the corporation, and the proceeding is initiated by the holders of at least 20 percent or more of all outstanding shares of a corporation;

(C) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired; or

(D) The corporate assets are being misapplied or wasted;

(3) In a proceeding by a creditor if it is established that:

(A) The creditor's claim has been reduced to judgment, the execution on the judgment has been returned unsatisfied, and the corporation is insolvent; or

(B) The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent; or

(4) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision;

provided, however, that all of the actions described in paragraphs (1) through (3) of this Code section shall be stayed so long as the corporation is contesting, in good faith, in any appropriate proceeding, the alleged grounds for dissolution. (Code 1981, § 14-2-1430, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 66.)

**Law reviews.** — For article, "The Development of the Shareholder's Direct Action Damage Remedy," see 28 Ga. St. B.J. 195 (1992). For article, "Business Associations," see 53 Mercer L. Rev. 109 (2001).

### COMMENT

Source: Model Act, § 14.30. This replaces provisions previously found in §§ 14-2-284 & 14-2-285.

Section 14-2-1430 provides grounds for the judicial dissolution of corporations at the request of the state, a shareholder, a creditor, or a corporation which has commenced voluntary dissolution. This section states that a court "may" order dissolution if a ground for dissolution exists. Thus there is discretion on the part of the court as to whether dissolution is appropriate even though grounds exist under the specific circumstances. Article 9, and Sections 14-2-940 — 14-2-943, expressly grant the courts authority to order alternative forms of relief for statutory close corporations. Since, under the Code, each section has independent legal significance, nothing therein is intended to be imply that, in the case of corporations that are not statutory close corporations, the courts would lack the traditional powers of courts of equity to fashion remedies suitable to the circumstances.

Paragraphs (1) — (3) are modified by a proviso, which incorporates the approach of prior law, § 14-2-284(a)(2), and stays dissolution actions if the corporation is contesting the grounds for dissolution in another forum. A decision unfavorable to the corporation would operate as a collateral estoppel, and a delay in dissolution proceedings will serve the interests of judicial and corporate economy.

Paragraph (1) preserves long standing and traditional provisions authorizing the state to seek to dissolve involuntarily a corporation by judicial decree. See former § 14-2-284(a). Paragraph (1) limits the power of the state in this regard to grounds that are reasonably related to this objective.



Paragraph (2) provides for involuntary dissolution at the suit of a shareholder under circumstances involving deadlock or significant abuse of power by controlling shareholders or directors. These grounds generally follow those of prior law, § 14-2-285(a)(1) — (3).

Dissolution because of deadlock is available if there is a deadlock at the directors' level but only if (1) the shareholders are unable to break the deadlock and (2) either "irreparable injury" to the corporation is being threatened or suffered or the business and affairs "can no longer be conducted to the advantage of the shareholders." This language closely follows the earlier versions of the Model Act except that the requirement of "irreparable injury" has been relaxed to some extent. Previously, under § 14-2-285(a)(1)(A), both deadlock and irreparable injury to the corporation were required; under the Code, either irreparable injury to the corporation or a condition such that the corporation's business can no longer be conducted to the advantage of the shareholders generally is sufficient, in conjunction with a director deadlock. Another significant difference is that board deadlock under prior law was only a ground for liquidation where it was shown "that it is impracticable for the court to appoint a provisional director . . . or to continue one in office." See § 14-2-285(a)(1)(A). That is omitted in Paragraph (2) because the Code contains no general provisions for appointment of a provisional director. The provisions for a provisional director are contained in Section 14-2-941, and deal only with statutory close corporations. Obviously in all deadlock cases the court should consider alternative, and less drastic, remedies before granting dissolution.

Dissolution is also available because of deadlock at the shareholders' level if the shareholders are unable to elect directors over a two-year period. This preserves the rule of former § 14-2-285(a)(1)(C). Dissolution under Paragraph (2)(C) is not dependent on irreparable injury or misconduct by the directors then in office; if injury or misconduct is present, a deadlocked shareholder may proceed under Paragraph (2)(B).

A shareholder may sue for involuntary dissolution upon proof either that those in control of the corporation are acting illegally or fraudulently (Paragraph (2)(B)) or that the corporate assets are being misapplied or wasted (Paragraph (2)(D)). The application of these grounds for dissolution to specific circumstances involves judicial discretion in the application of a general standard to concrete circumstances. The courts should be cautious in the application of these grounds so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation. To restrict their use for purpose of extortion by minority interests, the Model Act provisions were modified to require that such a petition must be signed by the holders of at least twenty percent of the outstanding shares of the corporation, to assure that substantial economic interests are being asserted. This limitation, based on N.Y. Bus. Corp. L. § 1104-a, was added to clarify that illegal conduct unrelated to the corporation's operations is not grounds for dissolution. Thus, dissolution should not be granted merely because one side is disappointed with the results of a power struggle, or a decision concerning distribution policies. Further, the ground of oppression was stricken from Paragraph (2)(B), because it is too vague, and is often the complaint of those who have lost a corporate disagreement. In this respect, the approach of former Georgia law was preserved. See former § 14-2-285(a)(1)(B). Investors concerned about losing such disputes must consider more specific contracts to prevent majority dominance, including adopting statutory close corporation status. See also Carney, *The Theory of the Firm: Investor Coordination Costs, Control Premiums and Capital Structure*, 65 Wash. Univ. L. Q. 1 (1987).

Creditors may obtain involuntary dissolution only when the corporation is insolvent and only in the limited circumstances set forth in Paragraph (3). Typically, a proceeding under the federal Bankruptcy Act is an alternative in these situations.

A corporation that has commenced voluntary dissolution may petition a court to supervise its dissolution under Paragraph (4). Such an action may be appropriate to permit the orderly liquidation of the corporate assets and to protect the corporation from a multitude of creditors' suits or suits by dissatisfied shareholders. This follows the approach of former § 14-2-276(3).

#### Note to 1989 Amendment

Subsection (2)(C) was amended by the addition of the phrase "or would have expired". This restored language from former O.C.G.A. § 14-2-285(a)(1)(C), and is consistent with the approach of Code Section 14-2-805(e), which continues a director in office after expiration of a term until a successor is elected and qualifies.

#### Cross-References

Administrative dissolution, see § 14-2-1420 et seq. Alternative remedies, statutory close corporations, see § 14-2-940 et seq. Director action, see § 14-2-820 et seq. Dissolution of statutory close corporations, see § 14-2-943. Election of directors, see § 14-2-803. "Proceeding" defined, see § 14-2-140. Revocation of articles of incorporation by state, see § 14-2-203. Shareholder voting, see § 14-2-725 et seq. Terms of directors, see §§ 14-2-805 & 14-2-806. Ultra vires acts, see § 14-2-304. Voluntary dissolution, see § 14-2-1401 et seq.

### JUDICIAL DECISIONS

A **deadlock** occurs where stock of a corporation is owned in equal shares by two contending parties, which condition threatens to result in destruction of the business, it appears that the parties cannot agree upon management of the business, and under existing circumstances, it appears that neither one is authorized to impose its views upon the other. *Black v. Graham*, 266 Ga. 154, 464 S.E.2d 814 (1996).

Where sole and equal shareholders functioned as de facto directors who were wholly unable to agree on the management of the business, neither had the authority to prevail in their individual view, and the hostile and static situation threatened to do irreparable harm to the corporation, the appointment

of a receiver and dissolution was warranted. *Black v. Graham*, 266 Ga. 154, 464 S.E.2d 814 (1996).

Where a party was able to show deadlock and the threat of irreparable injury, that party did not have to show misapplication or waste of corporate assets. *Black v. Graham*, 266 Ga. 154, 464 S.E.2d 814 (1996).

**Status as shareholder.** — A petition seeking judicial dissolution failed to state a claim upon which relief could be granted because the petitioner had relinquished ownership of the shares in the corporation and was no longer a shareholder at the time the petition was filed. *Cook v. Regional Communications, Inc.*, 244 Ga. App. 869, 539 S.E.2d 171 (2000).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2758, 2764-2769, 2776, 2786, 2787.

**C.J.S.** — 19 C.J.S., Corporations, §§ 816-819, 826-828, 831.

#### 14-2-1431. Procedure for judicial dissolution.

(a) Venue for a proceeding by the Attorney General to dissolve a corporation and for a proceeding brought by any other party named in Code Section 14-2-1430 lies in the county where a corporation's registered office is or was last located.



(b) It is not necessary to make shareholders or directors parties to a proceeding to dissolve a corporation unless relief is sought against them individually.

(c) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing can be held. (Code 1981, § 14-2-1431, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 14.31. This replaces provisions previously found in §§ 14-2-284 & 285.

Sections 14-2-1430 and 14-2-1431 designate the attorney general as the officer to bring suits for involuntary dissolution by the state. Section 14-2-1430(1) specifies the grounds for such actions.

Subsection (a) requires that suits brought for judicial dissolution must be brought where the corporation's registered office is located or, if not located in this state, where its registered office is or was last located. These preserve the venue requirements of former §§ 14-2-284(c) and 285(b).

Subsection (b) provides that directors and shareholders are not necessary parties to a dissolution action, which follows former § 14-2-285(c).

Subsection (c) is similar to former § 14-2-286(a), in setting out the general powers of courts in dissolution proceedings. This confirms the general powers of a court of equity to protect the legal rights of interested parties.

#### Cross-References

Custodian, see § 14-2-1432. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. "Proceeding" defined, see § 14-2-140. Receiver, see § 14-2-1432. Registered office: designated in annual registration, see § 14-2-1622; required, see §§ 14-2-202 & 14-2-501.

#### JUDICIAL DECISIONS

Cited in 350 Marietta, Inc. v. Reardon, 246 Ga. App. 812, 542 S.E.2d 552 (2000).

#### RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2811, 2818-2820, 2847, 2848. C.J.S. — 19 C.J.S., Corporations, §§ 841-843.

#### 14-2-1432. Receivership or custodianship.

(a) A court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding

and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all its property wherever located.

(b) The court may appoint an individual or a domestic or foreign corporation (authorized to transact business in this state) as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(c) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(1) The receiver:

(A) May dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and

(B) May sue and defend in his own name as receiver of the corporation in all courts of this state; or

(2) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.

(d) The court during a receivership may redesignate the receiver a custodian and, during a custodianship, may redesignate the custodian a receiver, if doing so is in the best interests of the corporation, its shareholders, and creditors.

(e) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and his attorney from the assets of the corporation or proceeds from the sale of the assets. (Code 1981, § 14-2-1432, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 14.32. This replaces provisions previously found in §§ 14-2-286, 14-2-287 & 14-2-289.

Section 14-2-1432 preserves provisions from earlier versions of the Model Act authorizing the appointment of a receiver, and adds authority to appoint a custodian as an alternative, for a corporation in a judicial dissolution proceeding. Section 14-2-1432 is designed to supplement these general provisions and grant the court power to take the steps it considers necessary to resolve the internal corporate problem or to effect liquidation of the corporation in an efficient manner.

Subsection (a) generally parallels former §§ 14-2-286(a) & (b), which set out in more detail the duties of a receiver. The powers of the receiver covered in subsection (c) also parallel some of the language of former § 14-2-286(b).



Subsection (b) permits appointment of an individual or domestic or foreign corporation as receiver, with or without a bond. This provides more flexibility than former Section 14-2-287, which required such receiver, if an individual, to be a U.S. citizen and required the posting of bond.

#### **Cross-References**

Custodianship pendente lite, see § 14-2-1431. "Notice" defined, see § 14-2-141. Receivership pendente lite, see § 14-2-1431.

### **JUDICIAL DECISIONS**

Cited in 350 Marietta, Inc. v. Reardon, 246 Ga. App. 812, 542 S.E.2d 552 (2000).

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2847-2878.

**C.J.S.** — 19 C.J.S., Corporations, §§ 866-868.

**ALR.** — Liability of corporate custodian for negligence in dealing with affairs or assets of corporation, 74 ALR4th 770.

#### **14-2-1433. Decree of dissolution.**

(a) If after a hearing the court determines that one or more grounds for judicial dissolution described in Code Section 14-2-1430 exist, it may enter a decree ordering the corporation dissolved, and the clerk of the court shall deliver a certified copy of the decree to the Secretary of State, who shall file it, with the same effect as a notice of intent to dissolve.

(b) After entering the order of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with Code Section 14-2-1405. Winding up the business of a corporation judicially dissolved may include the corporation's proceeding, after the date of the order of dissolution, (1) in accordance with Code Section 14-2-1406 to notify known claimants, and (2) to mail or deliver, with accompanying payment of the cost of publication, a notice containing the information specified in subsection (b) of Code Section 14-2-1407 for publication in accordance with subsection (b) of Code Section 14-2-1403.1. Upon such notice, claims against the dissolved corporation will be limited as specified in Code Sections 14-2-1406 and 14-2-1407, respectively.

(c) When the costs and expenses of dissolution proceedings and all debts, obligations, and liabilities of the corporation have been paid and discharged or provided for and all of its remaining assets distributed to its shareholders or provided for or such assets have been deposited with the Office of Treasury and Fiscal Services as provided in Code Section 14-2-1440, the court shall enter a decree of dissolution, and upon filing of the decree with the Secretary of State, it shall have the same effect as articles of dissolution. (Code 1981, § 14-2-1433, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 25; Ga. L. 2001, p. 796, § 2.)

**The 2001 amendment**, effective July 1, Fiscal Services" for "Department of Administrative Services" in subsection (c).  
2001, substituted "Office of Treasury and

### COMMENT

Source: Model Act, § 14.33. This replaces provisions previously found in §§ 14-2-290 & 14-2-291.

A court decree ordering that a corporation be dissolved involuntarily has the same legal effect as filing a notice of intent to dissolve. Subsection (a) requires that the Secretary of State receive and file a copy of the decree. Thereafter the corporation's business and affairs are to be wound up as provided in Sections 14-2-1405, 14-2-1406, and 14-2-1407. The completion of the judicially supervised dissolution has the same effect as filing articles of dissolution, as provided in subsection (c).

Subsection (b) provides for notification of claimants in the manner provided in §§ 14-2-1406 and 14-2-1407. Those sections contain time limits that cut off claims. See the Comments to Sections 14-2-1406 and 14-2-1407.

#### Note to 1990 Amendment

The 1990 amendment clarifies that judicially dissolved corporations may provide notice to known and unknown claimants pursuant to the notice provisions of §§ 14-2-1406 and 14-2-1407, respectively.

#### Cross-References

Articles of dissolution, see § 14-2-1408. Claims, see §§ 14-2-1406, & 14-2-1407. Custodianship, see §§ 14-2-1431 & 14-2-1432. "Deliver" includes mail, see § 14-2-140. Deposit with Office of Treasury and Fiscal Services, see § 14-2-1440. Dissolution does not terminate authority of registered agent, see § 14-2-1405. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. "Proceeding" defined, see § 14-2-140. Receivership, see §§ 14-2-1431 & 14-2-1432. Secretary of State's filing duties, see § 14-2-125. Winding up, see § 14-2-1405.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2827, 2881. **C.J.S.** — 19 C.J.S., Corporations, §§ 843, 849.

## PART 4

### MISCELLANEOUS

#### 14-2-1440. Deposit of assets with Office of Treasury and Fiscal Services.

Assets of a dissolved corporation that should be transferred to a creditor, claimant, or shareholder of the corporation who cannot be found or who is not competent to receive them shall be reduced to cash and deposited with the Office of Treasury and Fiscal Services for safekeeping. When the creditor, claimant, or shareholder furnishes satisfactory proof of entitlement to the amount deposited, the Office of Treasury and Fiscal Services shall pay him or her or his or her representative that amount. After the Office of Treasury and Fiscal Services has held the unclaimed cash for six months, the Office of Treasury and Fiscal Services shall pay such cash to the



Board of Regents of the University System of Georgia, to be held without liability for profit or interest until a claim for such cash shall be filed with the Office of Treasury and Fiscal Services by the parties entitled thereto. No such claim shall be made more than six years after such cash is deposited with the Office of Treasury and Fiscal Services. (Code 1981, § 14-2-1440, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2001, p. 796, § 3.)

**The 2001 amendment**, effective July 1, 2001, substituted "Office of Treasury and Fiscal Services" for "Department of Administrative Services" throughout the Code section and inserted "or her" in two places in the second sentence.

**Cross references.** — Disposition of unclaimed assets upon dissolution of corporation, § 44-12-197.

### COMMENT

Source: Model Act, § 14.40. This replaces provisions previously found in § 14-2-292.

Section 14-2-1440 is both a deposit and an escheat provision, and follows former § 14-2-292, rather than the Model Act, which was a deposit, but not an escheat provision. After 6 months the money must be paid to Board of Regents of the University System of Georgia, to be held without liability for profit or interest until a claim is filed. No claim can be made after 6 years.

### Cross-References

Administrative dissolution, see § 14-2-1420. Claims, see §§ 14-2-1406 & 14-2-1407. Judicial dissolution, see § 14-2-1430. Voluntary dissolution, see § 14-2-1405.

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code 1933, § 22-1324 and former Code Section 14-2-292, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Department to act pursuant to legal evidence.** — In receiving and disbursing the funds, the state treasurer (now the Department of Administrative Services) always should act pursuant to legal evidence, satisfactory to the treasurer (it), reciting all facts necessary under former Code 1933, § 22-1324 (see O.C.G.A. § 14-2-1440) to entitle the applicant to deposit with or receive from the treasurer (Department) the sum in question. 1970 Op. Att'y Gen. No. 70-42 (decided under former Code 1933, § 22-1324).

**Proper method of disposing of accumulated and undisbursed receivership**

**funds** held by the Insurance Commissioner in cases where creditors or claimants of defunct domestic stock and mutual insurance companies cannot be located or where checks issued to them for their pro rata portion have been for any reason returned unpaid is to turn such funds over to the Fiscal Division of the Department of Administrative Services (now the Office of Treasury and Fiscal Services), which shall ultimately remit the funds to the Board of Regents of the University System of Georgia; in cases involving all other types of defunct insurance companies, the Insurance Commissioner should petition the superior court that supervised the particular insurance company's dissolution proceedings for leave to deposit the accumulated and undisbursed receivership funds in its registry to be subsequently dealt with by order of the court as it deems advisable. 1975 Op. Att'y Gen. No. 75-83 (decided under former § 14-2-292).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2829, 2830.

## ARTICLE 15

## FOREIGN CORPORATIONS

**Cross references.** — Applicability of article to international bank agencies doing business in state, § 7-1-712.

**Administrative rules and regulations.** — Corporate Information Center, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Commissioner of Corporations, Chapter 590-7-5.

**Law reviews.** — For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973). For article discussing establishment and transaction of business in Georgia by a foreign corporation, see 27 Mercer L. Rev. 629 (1976). For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J.

158 (1988). For article, "Changes in Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989).

For note discussing the interrelationship between the International Banking Act (Title 7, Ch. 1, Art. 5), the provisions of the Financial Institutions Code relating to domestic banking (Title 7, Ch. 1, Art. 2, Parts 1-16), and the Foreign Corporations Article of the Corporation Code in the regulation of international banking in Georgia and comparing Georgia provisions with those of New York and California, see 27 Mercer L. Rev. 827 (1976).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under Art. 14 of former Code 1933, Chapter 22-14 which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this article.

**Foreign corporation cannot "fail" to appoint agent unless required to register.** — Unless a foreign corporation is required to

register with Secretary of State, pursuant to the provisions of former Chapter 22-14, it cannot "fail" to appoint or maintain an agent in this state so as to trigger service of process provisions of former Code 1933, § 22-1401 (now O.C.G.A. § 14-2-1501). *Camp v. Sellers & Co.*, 158 Ga. App. 646, 281 S.E.2d 621 (1981) (decided under former Code 1933, Chapter 22-14).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, an opinion under Art. 14 of former Code 1933, Chapter 22-14 which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this article.

**"Qualification to transact business" not enough.** — "Qualification to transact business"

under former Code 1933, § 22-1401 was not equivalent to qualification for license under Art. 2, Ch. 3, T. 44, therefore, a corporation meeting the licensing requirements of Art. 2, Ch. 3, T. 44 must also qualify to do business under the Corporate Code. 1973 Op. Att'y Gen. No. 73-140 (decided under Code 1933, Chapter 22-14).

## RESEARCH REFERENCES

**ALR.** — Jurisdiction of action or proceeding involving internal affairs of foreign cor-

poration, 18 ALR 1383; 89 ALR 736; 155 ALR 1231; 72 ALR2d 1211.



Status, citizenship, domicil, residence, or location of national corporations, 88 ALR 873.

Local property of insolvent foreign corporation for which a liquidator or receiver has been appointed in another state as subject to sequestration or seizure under execution or attachment, 98 ALR 351.

Right of foreign corporation upon ceasing to do business in state in respect of money or securities paid or deposited as condition of doing business in state, 116 ALR 965.

Right of foreign corporation to plead statute of limitations, 122 ALR 1194.

Effect of domestication of foreign corporations, 126 ALR 1503.

Foreign corporation's rights in respect to property sold under conditional sale as affected by failure to comply with conditions of doing business in state, 130 ALR 999.

Power to regulate activities of foreign corporation without state as condition of its doing business within, 132 ALR 482.

Statutory requirements respecting issuance of corporate stock as applicable to foreign corporation, 8 ALR2d 1185.

Validity, under federal constitution, of state tax on, or measured by, income of foreign corporation, 67 ALR2d 1322.

Stockholder's right to inspect books and records of foreign corporation, 19 ALR3d 869.

Foreign corporation's leasing of personal property as doing business within statutes prescribing conditions of right to do business, 50 ALR3d 1020.

State regulation of land ownership by alien corporation, 21 ALR4th 1329.

Personal liability of stockholder, officer, or agent for debt of foreign corporation doing business in the state, 27 ALR4th 387.

Construction, application, and operation of state "retaliatory" statutes imposing special taxes or fees on foreign insurers doing business within state, 30 ALR4th 873.

## PART 1

### CERTIFICATE OF AUTHORITY

#### 14-2-1501. Authority to transact business required.

(a) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State.

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a) of this Code section:

(1) Maintaining or defending any action or any administrative or arbitration proceeding or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts, share accounts in savings and loan associations, custodian or agency arrangements with a bank or trust company, or stock or bond brokerage accounts;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities or appointing and maintaining trustees or depositories with respect to its securities;

(5) Effecting sales through independent contractors;

(6) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where the orders require acceptance outside this state before becoming binding contracts and where the contracts do not involve any local performance other than delivery and installation;

(7) Making loans or creating or acquiring evidences of debt, mortgages, or liens on real or personal property, or recording same;

(8) Securing or collecting debts or enforcing any rights in property securing the same;

(9) Owning, without more, real or personal property;

(10) Conducting an isolated transaction not in the course of a number of repeated transactions of a like nature;

(11) Effecting transactions in interstate or foreign commerce;

(12) Serving as trustee, executor, administrator, or guardian, or in like fiduciary capacity, where permitted so to serve by the laws of this state;

(13) Owning (directly or indirectly) an interest in or controlling (directly or indirectly) another entity organized under the laws of, or transacting business within, this state; or

(14) Serving as a manager of a limited liability company organized under the laws of, or transacting business within, this state.

(c) The list of activities in subsection (b) of this Code section is not exhaustive.

(d) This chapter shall not be deemed to establish a standard for activities which may subject a foreign corporation to taxation or to service of process under any of the laws of this state. (Code 1981, § 14-2-1501, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 23; Ga. L. 1995, p. 482, § 7; Ga. L. 1999, p. 405, § 12; Ga. L. 2003, p. 140, § 14.)

**The 2003 amendment**, effective May 14, 2003, part of an Act to revise, modernize, and correct the Code, revised language in paragraph (b)(6).

**Law reviews.** — For article summarizing law relating to jurisdiction and venue over

domestic and foreign corporations in Georgia, and service therein, see 21 Mercer L. Rev. 457 (1970). For article, "Georgia's 'Door-Closing' Statute: Who Bears the Burden?," see 24 Ga. St. B.J. 141 (1988).

#### COMMENT

Source: Model Act, § 15.01. This replaces provisions of former § 14-2-310.

Article 15 requires that a foreign corporation seeking to transact business within the state must (1) obtain a certificate of authority from the Secretary of State and (2) maintain a registered office and appoint a registered agent within the state.

Subsection (a) states the basic requirement that a foreign corporation must obtain a certificate of authority before it transacts business within the state. Section 14-2-1505



describes the scope of the privilege obtained by a certificate of authority while Section 14-2-1502 describes the consequences of transacting business in the state without first obtaining the certificate of authority.

The Code does not attempt to formulate an inclusive definition of what constitutes the transaction of business. Rather, the concept is defined in a negative fashion by subsection (b), which states that certain activities do not constitute the transaction of business. In general terms, any conduct more regular, systematic, or extensive than that described in subsection (b) constitutes the transaction of business and requires the corporation to obtain a certificate of authority. Typical conduct requiring a certificate of authority includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general corporate purposes. But the passive owning of real estate for investment purposes does not constitute transacting business. See subsection (b)(9).

The Model Act list of activities in subsection (b) has been modified to follow former Georgia law, in § 14-2-310(b). While the differences in language are not substantial, the older language was preserved to eliminate any inferences of a legislative intent to change the substance of these descriptions.

Subsection (c) makes clear that the list of transactions in subsection (b) is not exhaustive. Among the large number of other transactions which do not give rise to the requirement that a certificate of authority be obtained are the ownership of all the shares of stock in a corporation that is engaged in local business within the state or as a limited partner in a limited partnership engaged in local business, or taking ministerial actions such as filing financing statements or registering trademarks.

Subsection (d) was added to the Model Act provisions from former § 14-2-310(c). The test of "transacting business" defined in a negative way in subsection (b) applies only to the question whether the corporation's contacts with the state are such that it must obtain a certificate of authority. It is not applicable to other questions such as whether the corporation is amenable to service of process under state "long-arm" statutes or liable for state or local taxes. A corporation that has obtained (or is required to obtain) a certificate of authority to transact business under Article 15 will generally be subject to suit and state taxation in the state, while a corporation that is subject to service of process or state taxation in the state will not necessarily be required to obtain a certificate of authority under Article 15. These provisions concerning qualification of foreign corporations with the Secretary of State are intended to have independent legal significance, and are not intended to govern what constitutes "doing business" for other purposes under Georgia law.

#### **Note to 1993 Amendment**

The 1993 amendment added a new subparagraph (b)(14) which provides that a corporation which serves as general partner of a Georgia limited partnership or qualified foreign entity need not itself qualify as a foreign corporation in Georgia on that basis alone. This result is consistent with Georgia's limited partnership law, which does not require qualification of a foreign limited partnership which serves as the general partner of a Georgia limited partnership.

#### **Note to 1999 Amendment**

Subsection 13 was amended to change the word "person" to "entity." Subsection 14 was added to provide that serving as a manager of a limited liability company organized under the laws of, or transacting business in, Georgia, will not constitute "transacting business" in Georgia.

### Cross-References

Application of Act to existing qualified foreign corporation, see § 14-2-1702. Board of directors meeting, see § 14-2-820. Certificate of authority: application for, see § 14-2-1503; effect of, see § 14-2-1505. "Foreign corporation" defined, see § 14-2-140. Penalty for transacting business without authority, see § 14-2-1502. "Proceeding" defined, see § 14-2-140. Shareholders' meetings, see §§ 14-2-701 — 703.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### TRANSACTING BUSINESS

#### INTERSTATE COMMERCE

#### LEGAL ACTION AND PROCEDURE

### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 22-102 and 22-1401 and former Code Section 14-2-310, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Purpose of former Code 1933, § 22-1401** was to require registration of foreign corporations which intend to conduct business in Georgia on a continuous basis, not as a temporary matter; activity related to a single transaction or contract was not contemplated. *Reisman v. Martori, Meyer, Hendricks, & Victor*, 155 Ga. App. 551, 271 S.E.2d 685 (1980) (decided under former Code 1933, § 22-1401).

**Registration required.** — Foreign corporation cannot lawfully transact business in Georgia without registering in accordance with former Code 1933, § 22-1401. *Image Mills, Inc. v. Vora*, 146 Ga. App. 196, 245 S.E.2d 882 (1978) (decided under former Code 1933, § 22-1401).

**Effect of registering and transacting business outside Georgia.** — Foreign corporation does not necessarily shed its nonresidence by registering and transacting business without Georgia. *Image Mills, Inc. v. Vora*, 146 Ga. App. 196, 245 S.E.2d 882 (1978) (decided under former Code 1933, § 22-1401).

**More substantial activity required for registration than for jurisdiction.** — Under registration statute more substantial activity within state is required than under jurisdictional statute because significant duties, and

perhaps penalties, may be incurred. *Barker v. County of Forsyth*, 248 Ga. 73, 281 S.E.2d 549 (1981) (decided under former Code 1933, § 22-1401).

**Foreign corporation cannot "fail" to appoint agent unless required to register.** — Unless a foreign corporation is required to register with Secretary of State, pursuant to provisions of the former Chapter, it cannot "fail" to appoint or maintain an agent in this state so as to trigger service of process provisions of the former Corporate Service Act, Code 1933, § 22-1401. *Camp v. Sellers & Co.*, 158 Ga. App. 646, 281 S.E.2d 621 (1981) (decided under former Code 1933, § 22-1401).

**When qualification required.** — If activities are extensive in scope and involve much work over time, qualification is required despite all such activities being related to a single contract. *Winston Corp. v. Park Elec. Co.*, 126 Ga. App. 489, 191 S.E.2d 340 (1972) (decided under former Code 1933, § 22-1401).

Where activities are minimal and unsubstantial in connection with only one contract and there is displayed no intention to continue these activities after completion of the single contract, the foreign corporation does not have to qualify because its contacts with Georgia relate to an isolated transaction. *Winston Corp. v. Park Elec. Co.*, 126 Ga. App. 489, 191 S.E.2d 340 (1972) (decided under former Code 1933, § 22-1401).

**Cited in** *Ellison v. Labor Pool of Am., Inc.*, 228 Ga. 147, 184 S.E.2d 572 (1971); *Coe & Payne Co. v. Wood-Mosaic Corp.*, 125 Ga. App. 845, 189 S.E.2d 459 (1972); *T.E. McCutcheon Enters., Inc. v. Snelling &*



Snelling, Inc., 232 Ga. 609, 212 S.E.2d 319 (1974); A.B.R. Metals & Servs., Inc. v. Roach-Russell, Inc., 135 Ga. App. 193, 217 S.E.2d 447 (1975); Healey v. Morgan, 135 Ga. App. 915, 219 S.E.2d 628 (1975); Van Bergen Belfoundries, Inc. v. Executive Equities, Inc., 139 Ga. App. 319, 228 S.E.2d 356 (1976); Atlas Match Corp. v. Berry Realty Co., 142 Ga. App. 588, 236 S.E.2d 554 (1977); Evans v. Smithdeal, 143 Ga. App. 287, 238 S.E.2d 278 (1977); LDH Properties, Inc. v. Morgan Guar. Trust Co., 145 Ga. App. 132, 243 S.E.2d 278 (1978); Metric Steel Co. v. BLI Constr. Co., 147 Ga. App. 380, 249 S.E.2d 121 (1978); Shackelford v. Central Bank, 148 Ga. App. 494, 251 S.E.2d 569 (1978); Riordan v. W.J. Bremer, Inc., 466 F. Supp. 411 (S.D. Ga. 1979); Spiegel, Inc. v. Odum, 153 Ga. App. 380, 265 S.E.2d 297 (1980); DeDaviss v. U-Haul Co., 154 Ga. App. 124, 267 S.E.2d 633 (1980); Cosby v. A.M. Smyre Mfg. Co., 158 Ga. App. 587, 281 S.E.2d 332 (1981); Bobst v. Citizens & S. Fin. Corp., 159 Ga. App. 128, 282 S.E.2d 749 (1981); Morgan Guar. Trust Co. v. Blum, 649 F.2d 342 (5th Cir. 1981); McPhaul v. Hindle Son & Co., 158 Ga. App. 650, 281 S.E.2d 636 (1981); Bouldin v. Aragona-Garcia Enters., Inc., 161 Ga. App. 396, 288 S.E.2d 673 (1982); Gorham Jewelers, Inc. v. A. Cohen & Sons Corp., 165 Ga. App. 85, 299 S.E.2d 156 (1983); Miller & Meier & Assocs. v. Diedrich, 174 Ga. App. 249, 329 S.E.2d 918 (1985); Diedrich v. Miller & Meier & Assocs., 254 Ga. 734, 334 S.E.2d 308 (1985); George C. Carroll Constr. Co. v. Langford Constr. Co., 182 Ga. App. 258, 355 S.E.2d 756 (1987); Nippon Credit Bank, Ltd. v. Matthews, 291 F.3d 738 (11th Cir. 2002).

### Transacting Business

**Activities not considered transacting business.** — Former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501) listed activities which should not be considered transacting business, and a foreign corporation involved in any one of these activities required no certificate. Unilease No. 16, Inc. v. Dunrite Sales Corp., 147 Ga. App. 728, 250 S.E.2d 179 (1978) (decided under former Code 1933, § 22-1401).

**List nonexclusive.** — Former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501) contained a nonexclusive list of activities which did not constitute transacting business

within the state. A.S. Int'l Corp. v. Salem Carpet Mills, Inc., 441 F. Supp. 125 (N.D. Ga. 1977) (decided under former Code 1933, § 22-1401).

**"Transacting business" construed.** — Term "transacting business" as used in registration statute such as former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501) was not to be confused with same term when used in jurisdictional statute subjecting foreign corporation to service of process in action brought within state. Barker v. County of Forsyth, 248 Ga. 73, 281 S.E.2d 549 (1981) (decided under former Code 1933, § 22-1401); Roberts v. Chancellor Fleet Corp., 182 Ga. App. 69, 354 S.E.2d 628 (1987) (decided under former § 14-2-310).

Bermuda corporation was not transacting business in Georgia, where it had no office in Georgia or any employees working regularly or residing in Georgia, never maintained any warehouses, shipping terminals, telephone listings, books or records in Georgia, and its representatives traveled to Georgia only twice and on both occasions the trips were primarily for purposes other than business with Georgia customers. International Capital Equip. Ltd. v. Computer Atlanta, Inc., 715 F. Supp. 371 (N.D. Ga. 1989) (decided under former § 14-2-310).

Activity related to a single transaction or contract is not sufficient to establish that a foreign corporation is transacting business in the state so as to require a certificate of authority. Manufacturers Nat'l Bank v. Tri-State Glass, Inc., 201 Ga. App. 253, 410 S.E.2d 808 (1991).

**Question of "doing business" is to be considered matter of fact** to be resolved on an ad hoc or case-by-case basis and not by application of a mechanical rule. Winston Corp. v. Park Elec. Co., 126 Ga. App. 489, 191 S.E.2d 340 (1972) (decided under former Code 1933, § 22-1401); Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685 (1980) (decided under former Code 1933, § 22-1401).

**Meaning of "isolated transaction" is largely one of fact** to be decided according to the circumstances of each particular case including consideration of the purpose for which the term is being used so that the local activities of the foreign corporation must be judged as a whole. Winston Corp. v. Park Elec. Co., 126 Ga. App. 489, 191 S.E.2d 340

**Transacting Business (Cont'd)**

(1972) (decided under former Code 1933, § 22-1401); *Reisman v. Martori*, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685 (1980) (decided under former Code 1933, § 22-1401).

**May have jurisdiction without qualification to do business.** — Statutory scheme established by Georgia clearly anticipates activities of foreign corporation within state that would encompass minimum contacts necessary to confer jurisdiction under Georgia long-arm statute, former Ga. L. 1966, p. 343 (see now O.C.G.A. § 9-10-91), but which do not require foreign corporation to qualify to transact business under former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501). *Al & Dick, Inc. v. Cuisinarts, Inc.*, 528 F. Supp. 633 (N.D. Ga. 1981) (decided under former Code 1933, § 22-1401).

**Section determines applicability of § 14-2-1502.** — The applicability of former § 14-2-331 (see O.C.G.A. § 14-2-1502), prohibiting foreign corporations from maintaining actions in the courts of this state unless they have obtained a certificate of authority, was contingent on whether the foreign corporation was transacting business within the state as that term was used in former § 14-2-331 (see O.C.G.A. § 14-2-1501), and therefore was required to obtain a certificate of authority under former § 14-2-310. *Roberts v. Chancellor Fleet Corp.*, 182 Ga. App. 69, 354 S.E.2d 628 (1987) (decided under former § 14-2-310).

**Only corporations required to qualify may be served.** — A foreign corporation can be served pursuant to former Code 1933, § 22-1410 (see O.C.G.A. § 14-2-1510) only if it was a corporation that had qualified, or should have qualified, to transact business in accordance with former Code 1933, § 22-1401 (see O.C.G.A. § 22-1401). *Al & Dick, Inc. v. Cuisinarts, Inc.*, 528 F. Supp. 633 (N.D. Ga. 1981) (decided under former Code 1933, § 22-1401).

**Corporate officer's trips to Georgia twice a year to take orders** for merchandise to be shipped from corporation's place of business in Maryland did not constitute transacting business within the state pursuant to former § 14-2-310. *Work Clothes Outlet, Inc. v. M & S Purchasing, Inc.*, 188 Ga. App. 179, 372 S.E.2d 509 (1988) (decided under former § 14-2-310).

**Occasional trips to Georgia in connection with employees soliciting orders.** — Having employees soliciting orders within Georgia was not grounds requiring qualification to do business under former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501). Accordingly, it would be anomalous, at best, to hold that occasional trips to Georgia to hire, supervise, or promote work of those employees did require qualification under that section. By the same token, if such product promotion would require qualification, as a practical matter, former Code 1933, § 22-1401(b)(6) would have few, if any, applications. *Al & Dick, Inc. v. Cuisinarts, Inc.*, 528 F. Supp. 633 (N.D. Ga. 1981) (decided under former Code 1933, § 22-1401).

**Maintaining suit, making loans, creating or acquiring evidence of debt.** — A foreign corporation shall have the right to maintain a suit, and make loans and create or acquire evidence of debt in this state without being considered as transacting business in this state, although if it is found to be transacting business in this state without a certificate of authority it shall not be permitted to maintain any action, suit, or proceeding in any court of this state. *Tankersley v. Security Nat'l Corp.*, 122 Ga. App. 129, 176 S.E.2d 274 (1970) (decided under former Code 1933, § 22-1401).

**Mere fact of office address standing alone was insufficient** to establish that activities of foreign corporation did not fall within any of the activities listed in former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501) not considered transacting business, and for which a foreign corporation was not required to obtain a certificate of authority to do business in Georgia. *Unilease No. 16, Inc. v. Dunrite Sales Corp.*, 147 Ga. App. 728, 250 S.E.2d 179 (1978) (decided under former Code 1933, § 22-1401).

**Business activities in Georgia found within enumerated exceptions** to general requirement that foreign corporation obtain certificate of authority to transact business in state. *Homac, Inc. v. Fort Wayne Mtg. Co.*, 577 F. Supp. 1065 (N.D. Ga. 1983) (decided under former § 14-2-310).

**Foreign corporation's limited activities did not subject it to requirement** of obtaining certificate of authority. *Ely & Walker v. Dux-Mixture Hdwe. Co.*, 582 F. Supp. 285 (N.D. Ga. 1982), *aff'd*, 732 F.2d 821 (11th



Cir. 1984) (decided under former § 14-2-310); *Roberts v. Chancellor Fleet Corp.*, 182 Ga. App. 69, 354 S.E.2d 628 (1987) (decided under former § 14-2-310).

Certificate of authority not required to do such limited activities as provide for out-of-state acceptance of contracts and shipment of goods only after credit department's approval. *Ely & Walker v. Dux-Mixture Hdwe. Co.*, 732 F.2d 821 (11th Cir. 1984) (decided under former § 14-2-310).

### Interstate Commerce

**Interstate commerce exception.** — Where a foreign corporation's transaction is exclusively or dominantly interstate in nature, it will be characterized as "interstate" and the foreign corporation need not comply with former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501). *Record Data, Inc. v. Vinylgrain Indus. of Ga., Inc.*, 143 Ga. App. 854, 240 S.E.2d 223 (1977) (decided under former Code 1933, § 22-1401).

**Purpose of the interstate commerce exception** was that a state may not, by discriminatory legislation, exclude, obstruct, impose burdensome conditions, or in any way, fetter or interfere with the right of foreign corporations to engage in interstate commerce, because of the preeminence of the "commerce clause" of the United States Constitution. *DeKalb Cablevision Corp. v. Press Ass'n*, 141 Ga. App. 1, 232 S.E.2d 353 (1977) (decided under former Code 1933, § 22-1401).

**Determination of dominant characteristics of transactions.** — Transactions in Georgia between a foreign corporation and a local entity, which exhibit both interstate and intrastate features, must be examined to determine their dominant characteristics. If the transaction is exclusively or dominantly interstate in nature, it will be characterized as "interstate" and the foreign corporation need not comply with this section. *DeKalb Cablevision Corp. v. Press Ass'n*, 141 Ga. App. 1, 232 S.E.2d 353 (1977) (decided under former Code 1933, § 22-1401).

**Compliance required where local activities constitute substantial business.** — If the local activities of the foreign corporation are not merely ancillary to the interstate features, but constitute a substantial local and domestic business separate from its interstate business, the foreign corporation must comply

with former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501). *DeKalb Cablevision Corp. v. Press Ass'n*, 141 Ga. App. 1, 232 S.E.2d 353 (1977) (decided under former Code 1933, § 22-1401); *Briarcliff Communications Group, Inc. v. Associated Press*, 154 Ga. App. 369, 268 S.E.2d 356 (1980) (decided under former Code 1933, § 22-1401).

### Legal Action and Procedure

**Service on corporations not required to qualify.** — Georgia law provides methods of service upon foreign corporations not required to qualify under section. *Al & Dick, Inc. v. Cuisinarts, Inc.*, 528 F. Supp. 633 (N.D. Ga. 1981) (decided under former Code 1933, § 22-1401).

**Service on corporation authorized to do business in state.** — Georgia's long arm statute does not apply to service on a corporation that is authorized to do business in the state. *Teledata World Servs. Inc. v. Tele-Mart, Inc.*, 242 Ga. App. 842, 531 S.E.2d 372 (2000).

**When foreign corporation need not obtain certificate before commencing action.** — Even where a case is originally filed in another district but is transferred to Georgia, a foreign corporation must obtain a certificate of authority to transact business in Georgia prior to commencing the action unless that corporation was not required to obtain a certificate of authority under former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501), the enforcement of the requirement would unreasonably burden interstate commerce, or the plaintiff has been forced to pursue its case in a jurisdiction not of its own choosing. *Durkan Enters., Inc. v. Cohutta Banking Co.*, 501 F. Supp. 350 (N.D. Ga. 1980) (decided under former Code 1933, § 22-1401).

**Suit on interstate transaction.** — A foreign corporation may avail itself of the opportunity to sue in the courts without the necessity of complying with the registration statute if the transaction sued upon is exclusively or dominantly interstate in nature. *Briarcliff Communications Group, Inc. v. Associated Press*, 154 Ga. App. 369, 268 S.E.2d 356 (1980) (decided under former Code 1933, § 22-1401).

**Nonregistered foreign corporation may sue if not transacting business.** — A foreign corporation which is not registered to do business within the state may sue in the

**Legal Action and Procedure (Cont'd)**

courts of Georgia so long as it is not transacting business within the meaning of former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501). *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. 1974). (decided under former Code 1933, § 22-1401).

**Distinction between corporation's right and state's right.** — A distinction must be made between the right of this state to assert jurisdiction over a defendant foreign corporation doing business within this state, and a plaintiff foreign corporation transacting business within this state which avails itself of the right to sue in the state courts. *DeKalb Cablevision Corp. v. Press Ass'n*, 141 Ga. App. 1, 232 S.E.2d 353 (1977) (decided under former Code 1933, § 22-1401).

**No limitation on state court jurisdiction under long arm statute.** — Paragraphs (7) and (8) of subsection (b) of former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501) apply in determining whether a foreign corporation is required to obtain a certificate of authority from the Secretary of State to transact business in this state. They are not a limitation upon the jurisdiction of this state's

courts under the long arm statute. *McIntosh v. Mid-State Homes, Inc.*, 232 Ga. 871, 209 S.E.2d 203 (1974) (decided under former Code 1933, § 22-1401).

**Substantial compliance with registration requirement.** — Trial court erred in granting a motion to dismiss for failure to have a certificate of authority at the time the complaint was filed since the plaintiff substantially complied with the registration requirements for a foreign corporation by obtaining a certificate of authority later. *Health Horizons, Inc. v. State Farm Mut. Auto. Ins. Co.*, 239 Ga. App. 440, 521 S.E.2d 383 (1999).

**Failure to obtain certificate is proper subject of dilatory plea.** — The failure of a foreign corporation to obtain a certificate of authority to transact business in this state is properly the subject of a dilatory plea. *Safwat v. U.S. Leasing Corp.*, 154 Ga. App. 341, 268 S.E.2d 395 (1980) (decided under former Code 1933, § 22-1401).

A motion to dismiss an action on the ground the plaintiff is a foreign corporation which is not authorized to maintain an action in this state is a dilatory plea or a motion in abatement. *Manufacturers Nat'l Bank v. Tri-State Glass, Inc.*, 201 Ga. App. 253, 410 S.E.2d 808 (1991).

**OPINIONS OF THE ATTORNEY GENERAL**

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code 1933, §§ 22-102 and 22-1401 and former Code Section 14-2-310, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Registration as a dealer under the former Georgia Securities Act of 1973** did not exempt a foreign corporation from needing a certificate of authority under the former Georgia Business Corporation Code. 1975 Op. Att'y Gen. No. 75-38 (decided under former Code 1933, § 22-1401).

**Qualification not equivalent to qualification under Art. 2, Ch. 3, T. 44.** — "Qualification to transact business" under the Out-of-State Land Sales Act is not equivalent to qualification for license under the Act; therefore, a corporation meeting the licensing requirements of the Act, must also qualify to do business under the Corporate Code.

1973 Op. Att'y Gen. No. 73-140 (decided under former Code 1933, § 22-1401).

**Effect of licensing under the Out-of-State Land Sales Act.** — A foreign corporation that is licensed under the Out-of-State Land Sales Act was not required to comply with the provisions of former Code 1933, § 22-1401 (see O.C.G.A. § 14-2-1501) if the corporation would be otherwise exempt pursuant to subsection (b) of that section. 1974 Op. Att'y Gen. No. 74-49 (decided under former Code 1933, § 22-1401).

**Business trust need not register because not corporate entity.** — The definition of "foreign corporation" found at former Code 1933, § 22-102 (see O.C.G.A. § 14-2-140(10)) was based upon the premise that such an entity must be a corporation; thus, since a business trust was not considered a corporate entity, it cannot be a foreign corporation under Georgia law and does not have to register with the Secretary



of State as a corporation under the Georgia Business Corporation Act. 1978 Op. Att'y Gen. No. 78-42 (decided under former Code 1933, § 22-102).

**Unincorporated foreign foundation is not required to qualify** under this section to transact business in this state, but a foreign corporation which owns an office building in Georgia, which it has managed on its behalf by another entity is required to qualify under this section to transact business in this state. 1978 Op. Att'y Gen. No. 78-41 (decided under former Code 1933, § 22-102).

**Foreign professional corporation is not entitled to certificate** of authority to transact business in this state. 1970 Op. Att'y Gen. No. 70-64 (decided under former Code 1933, § 22-102).

**Out-of-state medical professional service corporation.** — "One-man" Florida professional service corporation formed for purpose of practicing medicine in Florida and Georgia cannot register as foreign corporation under former Code 1933, § 22-1401. 1969 Op. Att'y Gen. No. 69-507 (decided under former Code 1933, § 22-1401).

**Annual report required of all corporations.** — Each corporation, domestic and foreign, authorized to transact business in this state is required to file an annual report with the Secretary of State's office, regardless of where its authority to transact business may have originated, since the exemption contained in subsection (a) of this section extends only to the requirements for

qualification to do business and does not supersede the reporting requirements contained in the Georgia Corporation Code, which are imposed by the state in exchange for the privilege of doing business as a corporation, domestic or foreign, for there is no such exemption contained in former Chapter 22-15. 1977 Op. Att'y Gen. No. 77-62 (decided under former Code 1933, § 22-1401).

**Foreign corporation as partner in limited partnership.** — A foreign corporation transacting business in Georgia as a general partner in a limited partnership must qualify to do business. 1982 Op. Att'y Gen. No. 82-95 (decided under former § 14-2-310).

**Requirements of RICO Act.** — The Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-4-1 et seq., requires foreign alien corporations to comply with registration requirements when they desire to acquire or maintain of record any real property in this state. 1982 Op. Att'y Gen. No. 82-89 (decided under former § 14-2-310).

**Acquiring and servicing mortgages.** — While acquiring mortgages from lenders and enforcing related rights does not alone constitute doing business in the state so as to require a certificate of authority, other activities involved in such servicing of mortgages may constitute doing business under former § 14-2-310, depending on the particular facts of each case. 1983 Op. Att'y Gen. No. 83-75 (decided under former § 14-2-310).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 17, 171, 219, 220, 283 et seq.

**C.J.S.** — 19 C.J.S., Corporations, §§ 903, 907-918.

**ALR.** — Mode of proving authority of foreign corporations to do business within state, 2 ALR 1235.

Effect of agreement by foreign corporation to install article within the state to bring transaction within state control, 11 ALR 614; 101 ALR 356.

Jurisdiction of action or proceeding involving internal affairs of foreign corporation, 18 ALR 1383; 89 ALR 736; 155 ALR 1231; 72 ALR2d 1211.

Applicability of state anti-trust Act to interstate transaction, 24 ALR 787.

Interference with operation of plant producing goods destined for shipment out of state as restraint of trade or commerce among the states within inhibition of Sherman Anti-trust Act, 28 ALR 1015; 128 ALR 1075.

Foreign corporations: soliciting subscriptions to or selling corporate stock as doing business within state, 35 ALR 625.

Construction work by foreign corporation as doing business within the state, 55 ALR 726.

Solicitation within state of orders for goods to be shipped from other state as doing business within state within statutes

prescribing conditions of doing business or providing for service of process, 60 ALR 994; 101 ALR 126; 146 ALR 941.

Power of state to require foreign corporation to become incorporated under its laws as a condition of doing business in state, 72 ALR 105.

Subsequent compliance with conditions of doing business in state as affecting enforceability of contract of foreign corporation made before compliance with such conditions, 75 ALR 446.

Discrimination by state against foreign corporations in imposition of taxes and license fees, 77 ALR 1490.

Applicability of provisions explicitly invalidating contracts made by foreign corporation not licensed to do business in state, to contracts made out of the state, 81 ALR 1134.

Payment of fees or taxes imposed as condition of foreign corporation doing business within state as exempting it from other taxes, 82 ALR 1437.

Failure of foreign corporation to comply or delay in complying with conditions of its right to do business as affecting its right to assert mechanics' lien, 95 ALR 367.

Withdrawal of foreign corporation from state as affecting conditions under which it

may be readmitted to do business in state and its rights and duties if readmitted, 110 ALR 528.

Collateral business activities incident to, or in aid of, interstate transportation, as related to interstate commerce, 152 ALR 1078.

What amounts to presence of foreign corporation in state, so as to render it liable to action therein to recover unemployment compensation tax, 161 ALR 1068.

Ownership or control by foreign corporation of stock of other corporation as constituting doing business within state, 18 ALR2d 187.

Foreign corporation's leasing of personal property as doing business within statutes prescribing conditions of right to do business, 50 ALR3d 1020.

Construction work by foreign corporation as doing business for purposes of statute requiring foreign corporation to qualify as condition of access to local courts, 90 ALR3d 937.

What constitutes doing business within state for purposes of state "closed-door" statute barring unqualified or unregistered foreign corporation from local courts — modern cases, 88 ALR4th 466.

### **14-2-1502. Consequences of transacting business without authority.**

(a) A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

(b) Each foreign corporation that has not obtained a certificate of authority within 30 calendar days after the first day on which it transacts business in this state shall be liable for the civil penalty set out in Code Section 14-2-122. Such civil penalty shall be in addition to other consequences set out in this Code section and shall be collected without discretion by the Secretary of State.

(c) The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state unless before the commencement of the proceeding the foreign corporation or its successor obtains a certificate of authority.

(d) Notwithstanding subsections (a), (b), and (c) of this Code section, the failure of a foreign corporation to obtain a certificate of authority does



not impair the validity of its corporate acts or prevent it from defending any proceeding in this state. (Code 1981, § 14-2-1502, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 26; Ga. L. 2002, p. 989, § 5.)

**The 2002 amendment**, effective July 1, 2002, deleted “for each year or part thereof during which it so transacts business” following “Code Section 14-2-122” at the end of the first sentence in subsection (b).

**Law reviews.** — For article, “Defending

the Lawsuit: A First-Round Checklist,” see 22 Ga. St. B.J. 24 (1985). For article, “Georgia’s ‘Door-Closing’ Statute: Who Bears the Burden?,” see 24 Ga. St. B.J. 141 (1988). For annual survey article on evidence law, see 52 Mercer L. Rev. 303 (2000).

### COMMENT

Source: Model Act, § 15.02. This replaces provisions of former § 14-2-331.

The purpose of Section 14-2-1502 is to induce corporations that are required to obtain a certificate of authority but have not to qualify promptly, without imposing harsh or erratic sanctions.

Subsection (a) is similar to Georgia’s former provisions barring suits by unqualified corporations. The language of former § 14-2-331(b) suggested a bar on actions entirely, stating that a corporation may not bring an action “unless before commencement of the action a certificate of authority shall have been obtained...,” which was the interpretation in *A.B.R. Metals & Servs. Inc. v. Roach-Russell, Inc.*, 135 Ga. App. 193, 217 S.E.2d 447 (1975) (granting a motion to dismiss). In this respect Georgia departed from the prior Model Act, and that departure is preserved in the Code.

Subsection (b) prevents evasion of Section 14-2-1502(a) by an assignment of a claim on which the foreign corporation is barred from bringing suit. The replacement of the word “until” with “unless before the commencement of the proceeding” restores former Georgia law, described in the preceding paragraph. However, this sanction is not a punitive one: subsection (c) states that the failure of the corporation to qualify does not affect the validity of the corporate acts, including contracts. Thus, a contract made by a nonqualified corporation may be enforced by the corporation simply by obtaining a certificate of authority before commencing a proceeding.

Subsection (c) does not prevent a foreign corporation that has failed to obtain a certificate of authority from “defending any proceeding.” The distinction between “maintaining” a proceeding under subsection (a) and “defending any proceeding” under subsection (c) is determined on the basis of whether affirmative relief is sought. A nonqualified corporation may interpose any defense or permissive or mandatory counterclaim to defeat a claimed recovery, but may not obtain an affirmative judgment or decree based on the counterclaim unless it has obtained a certificate of authority.

#### Note to 1990 Amendment

The 1990 amendment added the provision that foreign corporations transacting business without a certificate of authority are liable for civil penalties provided in § 14-2-122.

#### Cross-References

Certificate of authority: application for, see § 14-2-1503; effect of, see § 14-2-1505. Civil penalty for transacting business without certificate of authority, see § 14-2-122. “Foreign corporation” defined, see § 14-2-140. “Proceeding” defined, see § 14-2-140. Transacting business, see § 14-2-1501.

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
 TRANSACTING BUSINESS  
 WHEN CERTIFICATE NOT REQUIRED  
 WAIVER  
 DISMISSAL

## General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-1421 and former Code Section 14-2-331, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Section denies certain rights but not existence.** — Former Code 1933, § 22-1421 denied uncertified corporation certain rights and privileges but did not deny its existence. *Evans v. Smithdeal*, 143 Ga. App. 287, 238 S.E.2d 278 (1977) (decided under former Code 1933, § 22-1421).

**Section relevant to standing or jurisdiction.** — Former Code 1933, § 22-1421 could be characterized as relevant to standing or personal jurisdiction. *A.S. Int'l Corp. v. Salem Carpet Mills, Inc.*, 441 F. Supp. 125 (N.D. Ga. 1977) (decided under former Code 1933, § 22-1421).

**Distinction between corporation's right and state's right.** — A distinction must be made between the right of this state to assert jurisdiction over a defendant foreign corporation doing business within this state, and a plaintiff foreign corporation transacting business within this state which avails itself of the right to sue in the state courts. *DeKalb Cablevision Corp. v. Press Ass'n*, 141 Ga. App. 1, 232 S.E.2d 353 (1977) (decided under former Code 1933, § 22-1421).

**Bar to suing Georgia defendant until certificate obtained.** — The clear intention of subsection (a) of former Code 1933, § 22-1421 was to bar foreign corporations coming under this chapter from suing a Georgia defendant until the certificate of authority has been obtained. *A.B.R. Metals & Servs., Inc. v. Roach-Russell, Inc.*, 135 Ga. App. 193, 217 S.E.2d 447 (1975) (decided under former Code 1933, § 22-1421).

**Initiation of action by uncertified foreign corporation.** — The phrase "maintain an

action" is interpreted to mean the continuation of a lawsuit already begun; thus, an uncertified foreign corporation may initiate the action but not continue it without obtaining a certificate of authority. *Transportation Ins. Co. v. El Chico Restaurants, Inc.*, 271 Ga. 774, 524 S.E.2d 486 (1999).

**Leave to amend class action suit granted in federal court.** — Where leave to amend a class action complaint was granted in federal court, where a defendant seeking to raise the defense of failure to obtain a certificate of authority must do so in affirmative pleadings, the action was properly pending in superior court and remained viable. *El Chico Restaurants, Inc. v. Transportation Ins. Co.*, 235 Ga. App. 427, 509 S.E.2d 681 (1998).

**Characterization of defense under this section.** — The Georgia Supreme Court characterized a defense under former Code 1933, § 22-1421 as a dilatory plea or plea in abatement; in absence of a more specific definition, the defense under former Code 1933, § 22-1421 was either an affirmative defense, Fed. R. Civ. P. 8(c), a question of capacity to sue or be sued, Fed. R. Civ. P. 9(a), or a question of personal jurisdiction, Fed. R. Civ. P. 12(b)(2). *Morgan Guar. Trust Co. v. Blum*, 649 F.2d 342 (5th Cir. 1981) (decided under former Code 1933, § 22-1421).

**For benefit of subsection (a), declare contract void.** — Under former Code 1933, § 22-1421, party to contract must declare it void unless foreign corporation obtained certificate of authority prior to final judgment, if defending party was going to avail itself of benefit of the benefit of this section (see now O.C.G.A. § 14-2-1502(a)). *Bobst v. Citizens & S. Fin. Corp.*, 159 Ga. App. 128, 282 S.E.2d 749 (1981) (decided under former § 14-2-331).

**Failure to obtain certificate is subject of dilatory plea.** — The failure of a foreign corporation to obtain a certificate of author-



ity to transact business in this state is properly the subject of a dilatory plea. *Safwat v. U.S. Leasing Corp.*, 154 Ga. App. 341, 268 S.E.2d 395 (1980) (decided under former § 14-2-331).

**Grant of dilatory plea not adjudication on merits.** — The failure of a foreign corporation to obtain a certificate of authority can be made the basis of a dilatory plea; however, the grant of a dilatory plea is not an adjudication on the merits. *National Heritage Corp. v. Mount Olive Mem. Gardens, Inc.*, 244 Ga. 240, 260 S.E.2d 1 (1979) (decided under former § 14-2-331).

**Former § 14-2-331 did not prevent resolution of federal law claims in federal court.** *Kinetic Concepts, Inc. v. Kinetic Concepts, Inc.*, 601 F. Supp. 496 (N.D. Ga. 1985) (decided under former § 14-2-331).

**Renewal action maintainable.** — Although Tennessee corporation did not have a certificate to transact business in the state in 1991 when it filed a renewal action for a suit previously dismissed for want of prosecution, it had the requisite certificate at all times it transacted business in Georgia. Accordingly, the trial court correctly held that corporation's failure to obtain said certificate did not bar action, since corporation possessed the requisite certificate at all times it conducted business in Georgia. *Tillett Bros. Constr. Co. v. DOT*, 210 Ga. App. 84, 435 S.E.2d 241 (1993).

**Assignee acquires no greater rights than assignor.** — Although former Code 1933, § 22-1421 prohibited a foreign corporate assignee from maintaining an action unless the foreign corporate assignor has obtained a certificate of authority, it did not impose that prohibition against a person as assignee. Even so, however, an assignee can acquire no greater rights than the assignor had. *Healey v. Morgan*, 135 Ga. App. 915, 219 S.E.2d 628 (1975) (decided under former Code 1933, § 22-1421).

**Requirement of certificate not avoided by assignment.** — An assignment by a foreign corporation to a resident individual does not avoid the requirement of a certificate of authority for the corporation before filing suit. *Healey v. Morgan*, 135 Ga. App. 915, 219 S.E.2d 628 (1975) (decided under former Code 1933, § 22-1421).

**Cited in** *Ellison v. Labor Pool of Am., Inc.*, 228 Ga. 147, 184 S.E.2d 572 (1971); R.N.

*Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973); *T.E. McCutcheon Enters., Inc. v. Snelling & Snelling, Inc.*, 232 Ga. 609, 212 S.E.2d 319 (1974); *Van Bergen Belfoundries, Inc. v. Executive Equities, Inc.*, 139 Ga. App. 319, 228 S.E.2d 356 (1976); *Roach-Russell, Inc. v. A.B.R. Metals & Servs., Inc.*, 140 Ga. App. 307, 231 S.E.2d 114 (1976); *Atlas Match Corp. v. Berry Realty Co.*, 142 Ga. App. 588, 236 S.E.2d 554 (1977); *LDH Properties, Inc. v. Morgan Guar. Trust Co.*, 145 Ga. App. 132, 243 S.E.2d 278 (1978); *Metric Steel Co. v. BLI Constr. Co.*, 147 Ga. App. 380, 249 S.E.2d 121 (1978); *National Heritage Corp. v. Mount Olive Mem. Gardens, Inc.*, 148 Ga. App. 398, 251 S.E.2d 311 (1978); *Gorrell v. Fowler*, 248 Ga. 801, 286 S.E.2d 13 (1982); *Barker v. County of Forsyth*, 248 Ga. 73, 281 S.E.2d 549 (1981); *Bouldin v. Aragona-Garcia Enters., Inc.*, 161 Ga. App. 396, 288 S.E.2d 673 (1982); *Gorham Jewelers, Inc. v. A. Cohen & Sons Corp.*, 165 Ga. App. 85, 299 S.E.2d 156 (1983); *Homac, Inc. v. Fort Wayne Mtg. Co.*, 577 F. Supp. 1065 (N.D. Ga. 1983); *Ely & Walker v. Dux-Mixture Hdwe. Co.*, 582 F. Supp. 285 (N.D. Ga. 1982).

### Transacting Business

**Applicability of former subsection (b)** (see O.C.G.A. § 14-2-1502(a)) is contingent on whether the foreign corporation was transacting business within the state as that term was used in former § 14-2-310 (see now § 14-2-1501), and therefore was required to obtain a certificate of authority under that section. *Roberts v. Chancellor Fleet Corp.*, 182 Ga. App. 69, 354 S.E.2d 628 (1987) (decided under former § 14-2-331).

**Corporation may not maintain action if transacting business without certificate.** — A foreign corporation shall have the right to maintain a suit and make loans and create or acquire evidence of debt in this state without being considered as transacting business in this state, although if it is found to be transacting business in this state without a certificate of authority it shall not be permitted to maintain any action, suit, or proceeding in any court of this state. *Tankersley v. Security Nat'l Corp.*, 122 Ga. App. 129, 176 S.E.2d 274 (1970) (decided under former Code 1933, § 22-1421).

**Transacting Business (Cont'd)**

**Single or isolated transactions do not constitute doing business.** — In most jurisdictions, single or isolated transactions do not constitute doing business within the meaning of such statutes as this, although they are part of the very business which the corporation is organized to transact, if engaging therein the corporation indicated no purpose of continuity of conduct in that respect. *Reisman v. Martori, Meyer, Hendricks, & Victor*, 155 Ga. App. 551, 271 S.E.2d 685 (1980) (decided under former Code 1933, § 22-1421).

**When Certificate Not Required**

**When uncertified corporation may avoid proscription on right to file suit.** — There are three methods by which a corporation which is not certified to transact business may avoid the statutory proscription on its right to file suit in Georgia. First, the corporation may qualify under one of the statutory exceptions enumerated in former Code 1933, § 22-1401 (see now § 14-2-1501). Second, former Code 1933, § 22-1421 (see O.C.G.A. § 14-2-1502) may not be enforced if it would unreasonably burden interstate commerce. Third, former Code 1933, § 22-1421 (see now O.C.G.A. § 14-2-1502) may not be enforced when plaintiff has been forced to pursue its case in a jurisdiction not of its own choosing. An estoppel arises to defeat the inequitable intent of a party which results in a detrimental change of position by another. *A.S. Int'l Corp. v. Salem Carpet Mills, Inc.*, 441 F. Supp. 125 (N.D. Ga. 1977); *Durkan Enters., Inc. v. Cohutta Banking Co.*, 501 F. Supp. 350 (N.D. Ga. 1980) (decided under former Code 1933, § 22-1421).

**Assertion counterclaim without obtaining certificate.** — Former subsection (b) of § 14-2-331 (see now O.C.G.A. § 14-2-1502(a)) did not bar a foreign corporation, which had not obtained a certificate of authority before the commencement of an action against it, from asserting a compulsory counterclaim. *Clayton Carpet Mills, Inc. v. Martin Processing, Inc.*, 563 F. Supp. 288 (N.D. Ga. 1983) (decided under former § 14-2-331).

**Corporation may maintain action though certificate subsequently revoked.** — When a

foreign corporation was licensed to do business at the time it was transacting business and at the time suit was filed, but its certificate is subsequently revoked, it may maintain the action. *Sportsman Camping Ctrs. of Am., Inc. v. Bagwell*, 140 Ga. App. 312, 231 S.E.2d 118 (1976) (decided under former Code 1933, § 22-1421).

**Waiver**

**Affirmative defenses not specifically pleaded will be deemed waived.** — All affirmative defenses must be specifically pleaded in answer or in amended answer permitted under Fed. R. Civ. P. 15(a), or be deemed waived, Fed. R. Civ. P. 8(c). *Morgan Guar. Trust Co. v. Blum*, 649 F.2d 342 (5th Cir. 1981) (decided under former Code 1933, § 22-1421).

**Issue of party's capacity must be specifically pleaded.** — Any party wishing to raise issue of capacity of any party to sue or be sued must do so by specific negative averment in appropriate pleading or amendment or be deemed waived, Fed. R. Civ. P. 9(a). *Morgan Guar. Trust Co. v. Blum*, 649 F.2d 342 (5th Cir. 1981) (decided under former Code 1933, § 22-1421).

**Suing foreign corporation waives protections of subsection (a).** — A Georgia-based corporation, by suing a foreign corporation which has not obtained a certificate of authority before the commencement of the action, effectively waives any protection former subsection (b) (see now subsection (a)) of former § 14-2-331 affords it. *Clayton Carpet Mills, Inc. v. Martin Processing, Inc.*, 563 F. Supp. 288 (N.D. Ga. 1983) (decided under former § 14-2-331).

**In diversity cases, Federal Rules of Civil Procedure control on defenses.** — In diversity of citizenship actions, state law defines nature of defenses, but Federal Rules of Civil Procedure provide manner and time in which defenses are raised and when waiver occurs. *Morgan Guar. Trust Co. v. Blum*, 649 F.2d 342 (5th Cir. 1981) (decided under former Code 1933, § 22-1421).

**Dismissal**

**Dismissal under section is without prejudice.** — Any dismissal for failure to comply with former Code 1933, § 22-1421 (see O.C.G.A. § 14-2-1502) must be without prej-



udice. *Durkan Enters., Inc. v. Cohutta Banking Co.*, 501 F. Supp. 350 (N.D. Ga. 1980) (decided under former Code 1933, § 22-1421).

**Right to dismiss state law claims waived by untimely motion.** — Defendant's right to move to dismiss plaintiff's state law claims on the grounds of nonregistration was waived since by raising the defense in their answer to plaintiff's first amended complaint rather than in their first answer ten months earlier, the motion was not brought in a timely

fashion. *Kinetic Concepts, Inc. v. Kinetic Concepts, Inc.*, 601 F. Supp. 496 (N.D. Ga. 1985) (decided under former § 14-2-331).

**Substantial compliance with registration requirement.** — Trial court erred in granting a motion to dismiss for failure to have a certificate of authority at the time the complaint was filed since the plaintiff substantially complied with the registration requirements for a foreign corporation by obtaining a certificate of authority later. *Health Horizons, Inc. v. State Farm Mut. Auto. Ins. Co.*, 239 Ga. App. 440, 521 S.E.2d 383 (1999).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 240 et seq., 260 et seq.

**C.J.S.** — 19 C.J.S., Corporations, §§ 919-921.

**ALR.** — Mode of proving authority of foreign corporation to do business within state, 2 ALR 1235.

Applicability of provisions explicitly invalidating contracts made by foreign corporation not licensed to do business in state, to contracts made out of the state, 81 ALR 1134.

Failure of foreign corporation to comply or delay in complying with conditions of its right to do business as affecting its right to assert mechanics' lien, 95 ALR 367.

Rule that in general inhibits foreign corporation which has failed to comply with conditions of doing or continuing business in state, or domestic corporation which has forfeited its charter, from maintaining action, as applicable to action at law to vindicate

corporation's property rights against tort-feasor, 136 ALR 1160.

Effect of execution of foreign corporation's contract which, while executory, was unenforceable because of noncompliance with conditions of doing business in state, 7 ALR2d 256.

Rights of assignee or subsequent holder of negotiable paper executed to a foreign corporation doing business in state without compliance with local requirements, 80 ALR2d 465.

Construction work by foreign corporation as doing business for purposes of statute requiring foreign corporation to qualify as condition of access to local courts, 90 ALR3d 937.

Application of statute denying access to courts or invalidating contracts where corporation fails to comply with regulatory statute as affected by compliance after commencement of action, 23 ALR5th 744.

### 14-2-1503. Application for certificate of authority.

(a) A foreign corporation may apply for a certificate of authority to transact business in this state by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation or, if its name is unavailable for use in this state, a corporate name that satisfies the requirements of Code Section 14-2-1506;

(2) The name of the state or country under whose law it is incorporated;

(3) Its date of incorporation;

(4) The mailing address of its principal office;

(5) The address of its registered office in this state and the name of its registered agent at that office; and

(6) The names and respective business addresses of its chief executive officer, chief financial officer, and secretary, or individuals holding similar positions.

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the secretary of state or other official having custody of corporate records in the state or country under whose law it is incorporated. (Code 1981, § 14-2-1503, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2002, p. 989, § 6.)

**The 2002 amendment**, effective July 1, 2002, in subsection (a), deleted “and period of duration” following “incorporation” at the end of paragraph (a)(3) and substituted the present provisions of paragraph (a)(6) for the former provisions which read: “The names and usual business addresses of its

current directors and officers.”

**Law reviews.** — For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service therein, see 21 Mercer L. Rev. 457 (1970).

#### COMMENT

Source: Model Act, § 15.03. This replaces provisions of former §§ 14-2-314 & 14-2-315.

Section 14-2-1503 provides that a foreign corporation seeking a certificate of authority to transact business in the state must file an application that contains the information set forth in this section. These disclosure requirements are supplemented by the requirements of other sections in this Article — § 14-2-1504, 14-2-1508, and 14-2-1509 — which require amended or supplemental filings in certain circumstances, and by Section 14-2-1622, which requires every qualified foreign corporation to file annual an registration containing specified information.

Subsection (a) is parallel to former § 14-2-314, but former law required more detail, including a statement of corporate purposes, a statement of stated capital, the date when the corporation commenced business in the state. None of them serve any useful purpose under the Code.

Subsection (b) requires submission of a certificate of existence, formerly required by § 14-2-315.

#### Cross-References

Amended certificate of authority, see § 14-2-1504. Annual registration with Secretary of State, see § 14-2-1622. Application of Code to existing qualified foreign corporation, see § 14-2-1702. Certificate of existence, see § 14-2-128. Corporate name, see § 14-2-1506 & Article 4. Corporate purposes, see § 14-2-301. “Deliver” includes mail, see § 14-2-140. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Forms, see § 14-2-121. “Principal office”: defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Registered office and agent, see §§ 14-2-202, 14-2-501, & 14-2-1507.



**Administrative rules and regulations.** — Georgia, Office of Secretary of State, Commissioner of Corporations, Chapter 590-7-9. Service of Process, Official Compilation of the Rules and Regulations of the State of

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under Art. 4 of former Ch. 2 of Title 14, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Appointment of agent does not subject foreign corporation to suit.** — The mere

appointment by a foreign corporation of a statutory agent to receive service of process, without more, does not subject the corporation to suit in Georgia. *Riordan v. W.J. Bremer, Inc.*, 466 F. Supp. 411 (S.D. Ga. 1979) (decided under former Code 1933, § 22-1405).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 220, 221.

**C.J.S.** — 19 C.J.S., Corporations, §§ 901, 903.

**ALR.** — Mode of proving authority of foreign corporation to do business within state, 2 ALR 1235.

### 14-2-1504. Amended certificate of authority.

(a) A foreign corporation authorized to transact business in this state must obtain an amended certificate of authority from the Secretary of State if it changes:

- (1) Its corporate name;
- (2) The period of its duration; or
- (3) The state or country of its incorporation.

(b) The requirements of Code Section 14-2-1503 for obtaining an original certificate of authority apply to obtaining an amended certificate under this Code section. (Code 1981, § 14-2-1504, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 15.04. This replaces provisions formerly contained in §§ 14-2-313 and 14-2-320 — 14-2-322.

Section 14-2-1504 requires a foreign corporation to obtain an amended certificate of authority if it changes its corporate name, its duration, or the state or country of its incorporation. An amendment is not necessary to reflect changes in its principal office address or in its current officers or directors since that information is supplied in the annual registration. In addition, Section 14-2-1507 requires an immediate filing if the foreign corporation changes its registered office or registered agent within the state.

Similar requirements under former law appeared at § 14-2-313 and 14-2-322.

Formerly foreign corporations were limited in the rights and privileges available, but were able to obtain certain rights through domestication. The position of domesticated foreign corporations is preserved in Article 17.

**Cross-References**

Annual registration, see § 14-2-1622. Certificate of authority: application for, see § 14-2-1503; effect of, see § 14-2-1505. Change of registered office or agent, see § 14-2-1508. Corporate name, see § 14-2-1506 & Article 4. Domesticated foreign corporation, see Article 17. Duration, see § 14-2-302. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Forms, see § 14-2-121. Resignation of registered agent, see § 14-2-1509.

**14-2-1505. Effect of certificate of authority.**

(a) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the state to revoke the certificate as provided in this chapter.

(b) A foreign corporation with a valid certificate of authority has the same but no greater rights under this chapter and has the same but no greater privileges under this chapter as, and except as otherwise provided by this chapter is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(c) This chapter does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state. (Code 1981, § 14-2-1505, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Act, § 15.05 This replaces provisions formerly contained in §§ 14-2-311 & 14-2-316.

Subsection (a) provides that a certificate of authority authorizes a foreign corporation to transact business in the state subject to the right of the state to revoke the certificate. The privileges of this status are defined in Section 14-2-1505(b): a qualified foreign corporation has the same privileges under this Code as (but no greater than) a domestic corporation. These sections parallel former § 14-2-311. They do not prohibit differential treatment for tax or other purposes.

Section 14-2-1505(c) preserves the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states. This was formerly covered in § 14-2-310(a).

**Cross-References**

Corporate powers, see § 14-2-302. Corporate purposes, see § 14-2-301. Revocation of certificate of authority, see § 14-2-1530 et seq. Withdrawal of foreign corporations, see § 14-2-1520.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-1402 and former Code Section 14-2-311, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Certified foreign corporation treated**



**same as domestic corporation.** — A certified foreign corporation has the right to insist that its Georgia directors abide by the same statutory standards of conduct as are required of directors of Georgia corporations and the right to legally enforce those standards. After all, a foreign corporation was entitled to the same rights and privileges as a domestic corporation and was subject to the same legal duties and penalties. *Miller & Meier & Assocs. v. Diedrich*, 174 Ga. App. 249, 329 S.E.2d 918 (1985), *aff'd* in part and *rev'd* in part, 254 Ga. 734, 334 S.E.2d 308 (1985) (decided under former § 14-2-311).

**Section does not domesticate foreign corporation.** — Former § 14-2-311 did not serve to domesticate a foreign corporation; it merely gave the foreign corporation an equal status generally, but a foreign corporation with a certificate of authority was not entirely equivalent to a domestic corporation. *George C. Carroll Constr. Co. v. Langford Constr. Co.*, 182 Ga. App. 258, 355 S.E.2d 756 (1987), *overruled* on other grounds, *Clover Cable of Ohio, Inc. v. Heywood*, 260 Ga. 341, 392 S.E.2d 855 (1990) (decided under former § 14-2-311).

**No right to maintain suit if transacting business without certificate.** — A foreign corporation shall have the right to maintain a suit and make loans and create or acquire evidence of debt in this state without being considered as transacting business in this state, although if it was found to be transacting business in this state without a certificate of authority it shall not be permitted to maintain any action, suit or proceeding in any court of this state. *Tankersley v. Security Nat'l Corp.*, 122 Ga. App. 129, 176 S.E.2d 274 (1970) (decided under former Code 1933, § 22-1402).

**No legislative grant of immunities from taxation or regulation.** — The legislative grant of rights and privileges to a foreign corporation does not include the immunities from taxation or regulation enjoyed by domestic corporations. *Roberts v. Lipson*,

231 Ga. 142, 200 S.E.2d 722 (1973) (decided under former Code 1933, § 22-1402).

**Corporation qualified to do business not exempt from tax.** — The General Assembly did not intend to grant to undomesticated foreign corporations which qualified to do business in this state an exemption of its stock from intangible tax. *Roberts v. Lipson*, 231 Ga. 142, 200 S.E.2d 722 (1973) (decided under former Code 1933, § 22-1402).

The grant of "rights and privileges" to undomesticated foreign corporations qualified to do business in this state does not include the exemption of their stock from the Georgia intangible tax. *Roberts v. Lipson*, 231 Ga. 142, 200 S.E.2d 722 (1973) (decided under former Code 1933, § 22-1402).

**Nonresident contractors required to register despite possession of certificate.** — Since the amendment of the Nonresident Contractor Act, O.C.G.A. § 48-13-30 *et seq.*, in 1972, a nonresident contractor is required to register in order to maintain an action to recover payment for performance of a contract in the courts of this state although it has a certificate of authority to do business in this state. *George C. Carroll Constr. Co. v. Langford Constr. Co.*, 182 Ga. App. 258, 355 S.E.2d 756 (1987) (decided under former § 14-2-311).

**Veil-piercing claim subject to foreign law.** — In light of O.C.G.A. § 14-2-1505(c), applying Texas law in determining whether veil-piercing claim was the property of a debtor in bankruptcy was not against the public policy of Georgia where an internal affair was at issue. *Realmark Inv. Co. v. American Fin. Corp.*, 171 Bankr. 692 (N.D. Ga. 1994).

Cited in *Orkin Exterminating Co. v. Gilland*, 130 Ga. App. 788, 204 S.E.2d 469 (1974); *Image Mills, Inc. v. Vora*, 146 Ga. App. 196, 245 S.E.2d 882 (1978); *Diedrich v. Miller & Meier & Assocs.*, 254 Ga. 734, 334 S.E.2d 308 (1985).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, an opinion under former Code 1933, § 22-1402 and former Code Section 14-2-311, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is

included in the annotations for this Code section.

**Foreign corporation's stock is exempt from state intangible property tax** provided the corporation pays all taxes it would be

required by the laws of this state to pay if it were a domestic corporation. 1969 Op. Att'y

Gen. No. 69-458 (decided under former Code 1933, § 22-1402).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 17, 18, 45 et seq., 235 et seq., 369 et seq.

**C.J.S.** — 19 C.J.S., Corporations, §§ 903, 905, 906.

**ALR.** — Applicability to foreign corporations of statute precluding defense of want of legal organization, 73 ALR 1202.

Payment of fees or taxes imposed as condition of foreign corporation doing business

within state as exempting it from other taxes, 82 ALR 1437.

State excise, privilege, or franchise tax upon foreign corporation as affected by commerce clause, 105 ALR 11; 139 ALR 950.

Rescission or annulment of forfeiture of license of foreign corporation to do business in the state as affecting previous contracts or transactions of corporation, 172 ALR 493.

#### 14-2-1506. Corporate name of foreign corporation.

(a) If the corporate name of a foreign corporation does not satisfy the requirements of Code Section 14-2-401, the foreign corporation to obtain or maintain a certificate of authority to transact business in this state:

(1) May add the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," or the name of its state of incorporation to its corporate name for use in this state; or

(2) May use a fictitious or trade name to transact business in this state if its real name is unavailable and it delivers to the Secretary of State for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious or trade name.

(b) Except as authorized by subsections (c) and (d) of this Code section, a corporate name (including a fictitious name) of a foreign corporation must be distinguishable upon the records of the Secretary of State from:

(1) The corporate name of a corporation incorporated or authorized to transact business in this state;

(2) A corporate name reserved or registered under Code Section 14-2-402 or 14-2-403;

(3) The fictitious name adopted by a foreign corporation authorized to transact business in this state because its real name is unavailable;

(4) The corporate name of a nonprofit corporation incorporated or authorized to transact business in this state; and

(5) The name of a limited partnership or professional association filed with the Secretary of State.

(c) A foreign corporation may apply to the Secretary of State for authorization to use in this state the name of another corporation (incor-



porated or authorized to transact business in this state) that is not distinguishable upon his records from the name applied for. The Secretary of State shall authorize use of the name applied for if the other corporation files with the Secretary of State articles of amendment to its articles of incorporation changing its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applying corporation.

(d) A foreign corporation may use the name (including the fictitious name) of another domestic or foreign corporation that is used in this state if the other corporation is incorporated or authorized to transact business in this state and:

(1) The foreign corporation has merged with the other corporation;

(2) The foreign corporation has been formed by reorganization of the other corporation; or

(3) The other domestic or foreign corporation has taken the steps required by this chapter to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the foreign corporation applying to use its former name.

(e) If a foreign corporation authorized to transact business in this state changes its corporate name to one that does not satisfy the requirements of Code Section 14-2-401, it may not transact business in this state under the changed name until it adopts a name satisfying the requirements of Code Section 14-2-401 and obtains an amended certificate of authority under Code Section 14-2-1504. (Code 1981, § 14-2-1506, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 15.06. This replaces provisions formerly contained in § 14-2-312.

The purpose of Section 14-2-1506, like that of Section 14-2-401 relating to the name of a domestic corporation, is to ensure that names are distinguishable from one another upon the records of the Secretary of State. Like Section 14-2-401, it does not impose upon the Secretary of State the responsibility of deciding issues of unfair competition or commercial similarity of names.

A foreign corporation applying for a certificate of authority must apply under its true corporate name if that name qualifies under subsections (a) or (c). If the true corporate name qualifies except that it does not contain one of the words of corporateness set forth in Section 14-2-1506(a), the corporation may simply add one of those words to its true corporate name and apply under that name as modified. Subsection (a)(1). If the true corporate name is unavailable because it is indistinguishable upon the records of the Secretary of State from a name already in use or reserved, the corporation may use a fictitious name (if available) under subsection (a)(2) simply by delivering to the Secretary of State for filing, together with its application for a certificate of authority, a certified copy of a resolution of its board of directors authorizing the use of the fictitious name in the state. Finally, the otherwise unavailable name of a foreign corporation may be augmented by the name of the state of its incorporation so as to make it

distinguishable upon the records of the Secretary of State. For example, a Delaware corporation, "Utopian Products, Inc." which finds that a domestic corporation is using that name, may qualify under the name "Utopian Products, Inc. (Delaware)," under subsection (a)(1).

Subsection (b) parallels Section 14-2-401(b), in describing the names in the records of the Secretary of State from which a foreign corporation's name must be distinguishable. Subsection (b)(5) is a Georgia addition to the Model Act, reflecting the addition of records concerning limited partnerships and professional associations to the files of the Secretary of State.

Subsection (c) follows the pattern of Section 14-2-401(c), and varies from the Model Act approach. The purpose is to make certain that only one corporation is listed under a single name at any one time. Thus, in a sale of a business where the buyer wishes to use the seller's name, the seller must also file articles of amendment to its articles of incorporation changing its name to one distinguishable upon the records of the Secretary of State from the name which the buyer wishes to use. See the Comment to Section 14-2-401(d). This preserves the approach of former § 14-2-312(c).

Subsection (d) permits a foreign corporation that is the surviving corporation in a merger to use the other corporation's name (subsection (d)(1)), and provides similar treatment for corporations formed by reorganization (subsection (d)(2)). Subsection (d)(3) departs from the Model Act, which permits a foreign corporation to use the name of a domestic or other foreign corporation when it has purchased its assets, including the corporate name. The Code only permits such use when the other corporation has changed its name on the records of the Secretary of State. This prevents two corporations from having the same name registered with the Secretary of State.

#### Cross-References

Amended certificate of authority, see § 14-2-1504. Corporate names generally, see Article 4. "Deliver" includes mail, see § 14-2-140. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-123. Registered name, see § 14-2-403. Reserved name, see § 14-2-402.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 163 et seq.

**C.J.S.** — 19 C.J.S., Corporations, § 889.

**ALR.** — Validity and construction of constitutional or statutory provisions which prohibit the use by a corporation or partnership, as a part of its name, of certain described words giving the impression that it is subject to governmental control, 63 ALR 1049.

Rights and remedies as between originator of uncopyrighted advertising plan or slogan, or his assignee, and another who uses or infringes the same, 157 ALR 1436.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 44 ALR2d 1156.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

#### 14-2-1507. Registered office and registered agent of foreign corporation.

Each foreign corporation authorized to transact business in this state must continuously maintain in this state:

- (1) A registered office that may be the same as any of its places of business; and



(2) A registered agent, who may be:

(A) An individual who resides in this state and whose business office is identical with the registered office;

(B) A domestic corporation or nonprofit domestic corporation whose business office is identical with the registered office; or

(C) A foreign corporation or foreign nonprofit corporation authorized to transact business in this state whose business office is identical with the registered office. (Code 1981, § 14-2-1507, enacted by Ga. L. 1988, p. 1070, § 1.)

**Law reviews.** — For note advocating the adoption of a statute incorporating the doctrine of forum non conveniens, see 7 Ga. L. Rev. 744 (1973).

### COMMENT

Source: Model Act, § 15.07. This replaces provisions formerly contained in § 14-2-317.

A foreign corporation that obtains a certificate of authority in a state thereby agrees that it is amenable to suit in the state. Section 14-2-1507 requires every such corporation continuously to maintain a registered office and registered agent within the state upon whom service of process may be made. As is the case with a domestic corporation, the registered office may, but need not be, a business office of the foreign corporation.

Section 14-2-1507 is patterned after Section 14-2-501, relating to the registered office and registered agent of a domestic corporation. For a fuller description of the policies underlying Section 14-2-1507, see the Comment to Section 14-2-501.

### Cross-References

Changing registered office or agent, see § 14-2-1508. Registered office and agent generally, see Article 5. Resignation of registered agent, see § 14-2-1509. Revocation of certificate of authority does not affect authority of registered agent, see § 14-2-1531. Revocation of certificate of authority for failure to appoint and maintain registered office and agent, see § 14-2-1530. Service on foreign corporation, see §§ 14-2-1510, 14-2-1520, & 14-2-1531.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-317, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

Cited in *Ticor Constr. Co. v. Brown*, 255 Ga. 547, 340 S.E.2d 923 (1986); *Mullinax v. McNabb-Wadsworth Truck Co.*, 117 F.R.D. 694 (N.D. Ga. 1987).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, an opinion under former Code Section 14-2-317, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, is included in the annotations for this Code section.

**Requirements of RICO Act.** — The Georgia Racketeer Influenced and Corrupt Orga-

nizations Act, O.C.G.A. § 16-14-1 et seq., requires foreign alien corporations to comply with registration requirements when they desire to acquire or maintain of record any

real property in this state. 1982 Op. Att'y Gen. No. 82-89 (decided under former § 14-2-317).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 229, 233.

**C.J.S.** — 19 C.J.S., Corporations, § 902.

**ALR.** — Cessation by foreign corporation

of business within state as affecting designation of agent for service of process, 45 ALR 1447.

### 14-2-1508. Change of registered office or registered agent of foreign corporation.

(a) A foreign corporation authorized to transact business in this state may change its registered office or registered agent by delivering to the Secretary of State for filing an amendment to its annual registration that sets forth:

(1) Its name;

(2) The street address of its current registered office;

(3) If the current registered office is to be changed, the street address of its new registered office;

(4) The name of its current registered agent; and

(5) That after the change or changes are made, the street addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the street address of his business office, he may change the street address of the registered office of any foreign corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Secretary of State for filing an amendment to the annual registration that complies with the requirements of subsection (a) of this Code section. (Code 1981, § 14-2-1508, enacted by Ga. L. 1988, p. 1070, § 1.)

### COMMENT

Source: Model Act, § 15.08. This replaces provisions formerly contained in § 14-2-318.

A foreign corporation that changes its registered agent or registered office, or both, must file an amendment of its annual registration with the Secretary of State containing the information set forth in Subsection (a). A registered agent, typically a corporation service company, that changes the street address of its business office (and thereby the street address of the registered office of all corporations for which it serves as registered agent) may notify the Secretary of State by complying with Subsection (b) rather than with Subsection (a). Model Act provisions, and the requirement of former § 14-2-318(a)(5), requiring the consent of the registered agent to appointment were omitted. As a practical matter, a corporation would fail to obtain consent at its own risk,



since it needs to assure that the appointed registered agent is aware of the responsibilities of such an agent, to notify the corporation of service of process and other documents when received.

This section is patterned after Section 14-2-502, relating to changes of registered office or registered agent of a domestic corporation. For a fuller description of the policies underlying Section 14-2-1508, see the Comment to Section 14-2-502.

#### Cross-References

"Deliver" includes mail, see § 14-2-140. Effective date of notice, see § 14-2-141. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Notice to corporation, see § 14-2-141. Resignation of registered agent, see § 14-2-1509. Revocation of certificate of authority for failure to file notice of change of registered office or agent, see § 14-2-1530.

#### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-318, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1,

1989, is included in the annotations for this Code section.

Cited in *Spiegel, Inc. v. Odum*, 153 Ga. App. 380, 265 S.E.2d 297 (1980).

#### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, an opinion under former Code Section 14-2-318, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Requirements of RICO Act.** — The Georgia Racketeer Influenced and Corrupt Orga-

nizations Act, O.C.G.A. § 16-14-1 et seq., requires foreign alien corporations to comply with registration requirements when they desire to acquire or maintain of record any real property in this state. 1982 Op. Att'y Gen. No. 82-89 (decided under former § 14-2-318).

#### 14-2-1509. Resignation of registered agent of foreign corporation.

(a) The registered agent of a foreign corporation may resign his agency appointment by signing and delivering to the Secretary of State for filing a statement of resignation. The statement may include a statement that the registered office is also discontinued.

(b) On or before the date of filing of the statement of resignation, the registered agent shall deliver or mail a written notice of the agent's intention to resign to the chief executive officer, chief financial officer, or secretary of the corporation, or a person holding a position comparable to any of the foregoing, as named, and at the address shown in the annual registration, or in the articles of incorporation if no annual registration has been filed.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the earlier of the filing by the corporation of an amendment to its annual registration designating a new registered agent and registered office if also discontinued or the thirty-first day after

the date on which the statement was filed. (Code 1981, § 14-2-1509, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 24.)

#### COMMENT

Source: Model Act, § 15.09. This replaces provisions formerly contained in § 14-2-318(c).

Section 14-2-1509 permits the registered agent of a foreign corporation to resign by following the procedure set forth in the section, which is designed to maximize the probabilities that the corporation is advised of the resignation of the agent. This section is principally used by compensated registered agents who are corporation service companies and who desire to resign as registered agent as a result of nonpayment of fees. Section 14-2-1509 is patterned after Section 14-2-503, relating to the resignation of a registered agent of a domestic corporation. For a fuller description of the policies underlying Section 14-2-1509, see the Comment to Section 14-2-503.

Subsection (b) of the Model Act shifted the burden of notification to the Secretary of State, who was required to mail a copy to the registered office and a copy to the principal office of the corporation. The Code requires the resigning registered agent to notify an officer of the corporation.

Subsection (c) terminates the agency appointment 31 days after filing. It eliminates the requirement of former § 14-2-318(c) that the notice of resignation must be accompanied by an affidavit that the corporation had been notified at least 10 days before the agent's filing with the Secretary of State. The Code contemplates a mailing of a notice to the corporation contemporaneously with the filing with the Secretary of State.

#### Note to 1993 Amendment

The 1993 amendment alters the timing of effectiveness of a change in a foreign corporation's registered agent so that it is effective on filing with the Georgia Secretary of State, which conforms this provision to the law applicable to domestic corporations.

#### Cross-References

Annual registration, see § 14-2-1622. Change of registered agent, see § 14-2-1508. "Deliver" includes mail, see § 14-2-140. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622.

### 14-2-1510. Service on foreign corporation.

(a) The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation.

(b) If a foreign corporation has no registered agent or its registered agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the chief executive officer, chief financial officer, or secretary of the foreign corporation, or a person holding a position comparable to any of the foregoing, at its principal office shown in the later of its application for a certificate of authority or its most recent



annual registration. Any party that serves a foreign corporation in accordance with this subsection shall also serve a copy of the process upon the Secretary of State and shall pay a \$10.00 filing fee.

(c) Service is perfected under subsection (b) of this Code section at the earliest of:

(1) The date the foreign corporation receives the mail;

(2) The date shown on the return receipt, if signed on behalf of the foreign corporation; or

(3) Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed.

(d) This Code section does not prescribe the only means, or necessarily the required means, of serving a foreign corporation. (Code 1981, § 14-2-1510, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1990, p. 257, § 27; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 989, § 7.)

**The 2002 amendment**, effective July 1, 2002, added "and shall pay a \$10.00 filing fee" at the end of the last sentence in subsection (b).

**Cross references.** — Service of process generally, § 9-11-4.

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly,

provides that the amendment to this Code section was applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For article summarizing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service therein, see 21 Mercer L. Rev. 457 (1970).

### COMMENT

Source: Model Act, § 15.10. This parallels former § 14-2-319.

Service on the registered agent is the typical method of service of process on a qualified foreign corporation. Subsection (a). But if the corporation does not have a registered agent, or if the agent cannot be found at the registered office, subsection (b) authorizes service on the chief executive officer, chief financial officer, or the secretary of the corporation at its principal office as shown in its certificate of authority or most recent annual registration. Service may be effected in the same way on a corporation which has withdrawn from the state or whose certificate of authority has been revoked. Service on the Secretary of State as agent of the corporation has been added to the Model Act provisions to restore the procedure of former § 14-2-319(b), which authorized service on the Secretary of State, who in turn was required to mail a copy of the documents served on to the principal office of the corporation. Rather than require the Secretary of State to mail the process to the corporation, the Model Act approach of requiring the litigant to undertake the mailing directly is retained.

Subsection (c) establishes the date on which service is effective under subsection (b), while subsection (d) makes clear that the method of service provided by this section does not preclude the use of other means of effecting service of process. Service of process may also be effected, for example, under a "long-arm" statute or under other special statutes authorizing service in some other manner.

Section 14-2-1510 is patterned after Section 14-2-504, relating to service of process on domestic corporations. For a fuller description of the policies underlying Section 14-2-1510, see the Comment to Section 14-2-504.

**Note to 1990 Amendment**

The 1990 amendment amended paragraph (b) to delete the concept of service of process on the Secretary of State as agent for the foreign corporation. Although the Secretary of State must still be provided a copy of the process, deletion of the agency relationship eliminated the burden of the Secretary of State forwarding an additional copy of process to the foreign corporation.

**Cross-References**

Annual registration, see § 14-2-1622. Application for certificate of authority, see § 14-2-1503. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Registered office and registered agent, see § 14-2-1507. Revocation of certificate of authority does not revoke authority of registered agent, see § 14-2-1531. Service on foreign corporation with revoked certificate of authority, see § 14-2-1531. Service on withdrawn foreign corporation, see § 14-2-1520.

**JUDICIAL DECISIONS**

**Editor's notes.**— In light of the similarity of the provisions, decisions under former Code 1933, § 22-1410 and former Code Section 14-2-319, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Former Code 1933, § 22-1410 applied only to qualified foreign corporations** (corporations authorized to transact business), including (impliedly) those foreign corporations which should be qualified but failed either to obtain a certificate to transact business or to appoint registered agents for service as required by law. *Spiegel, Inc. v. Odum*, 153 Ga. App. 380, 265 S.E.2d 297 (1980) (decided under former Code 1933, § 22-1410).

A foreign corporation can be served pursuant to former Code 1933, § 22-1410 only if it is a corporation that qualified, or should have qualified, to transact business in accordance with former Code 1933, § 22-1410 (see now O.C.G.A. § 14-2-1501). *Al & Dick, Inc. v. Cuisinarts, Inc.*, 528 F. Supp. 633 (N.D. Ga. 1981) (decided under former Code 1933, § 22-1410).

**Domestic corporations not denied equal protection.**— The statutory scheme provid-

ing different procedures for handling service upon foreign and domestic corporations does not deny domestic corporations equal protection under the state and federal constitutions. *Ticor Constr. Co. v. Brown*, 255 Ga. 547, 340 S.E.2d 923 (1986) (decided under former § 14-2-319).

**Requirement for service on specified officers.**— Process mailed by the plaintiff to a corporation was not properly served because it was not directed to any of the officers specified in O.C.G.A. § 14-2-1510(b). *Hester v. Human*, 211 Ga. App. 351, 439 S.E.2d 50 (1993).

**Cited in** *Burton v. National Indem. Co.*, 123 Ga. App. 402, 181 S.E.2d 107 (1971); *Castleberry v. Gold Agency, Inc.*, 124 Ga. App. 694, 185 S.E.2d 557 (1971); *American Photocopy Equip. Co. v. Lew Deadmore & Assocs.*, 127 Ga. App. 207, 193 S.E.2d 275 (1972); *Fulghum Indus., Inc. v. Walterboro Forest Prods., Inc.*, 345 F. Supp. 296 (S.D. Ga. 1972); *Manton v. California Sports, Inc.*, 493 F. Supp. 496 (N.D. Ga. 1980); *McPhaul v. Hindle Son & Co.*, 158 Ga. App. 650, 281 S.E.2d 636 (1981); *Howard v. Technosystems Consol. Corp.*, 244 Ga. App. 767, 536 S.E.2d 753 (2000).

**RESEARCH REFERENCES**

**Am. Jur. 2d.**— 36 Am. Jur. 2d, Foreign Corporations, §§ 228 et seq., 471 et seq., 493 et seq.

**C.J.S.**— 19 C.J.S., Corporations, §§ 902, 952-955, 957-961.

**ALR.**— Service of process upon actual agent of foreign corporation in action based on transactions outside of state, 30 ALR 255; 96 ALR 366.

Foreign corporations: soliciting subscrip-



tions to or selling corporate stock as doing business within state, 35 ALR 625.

Foreign railway corporation as subject to service of process in state in which it merely solicits interstate business, 46 ALR 570; 95 ALR 1478.

Solicitation within state of orders for goods to be shipped from other state as doing business within state within statutes prescribing conditions of doing business or providing for service of process, 60 ALR 994; 101 ALR 126; 146 ALR 941.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communication to corporation of fact of service, 89 ALR 658.

Jurisdiction of actions or proceedings involving internal affairs of foreign corporations, 89 ALR 736; 155 ALR 1231; 72 ALR2d 1211.

Effect of agreement by foreign corporation to install article within the state to bring transaction within state control, 101 ALR 356.

Who, other than public official, may be served with process in action against foreign corporation doing business in state, 113 ALR 9.

Requisites of service upon, or delivery to,

designated public official, as a condition of substituted service of process on him, 148 ALR 975.

Statute providing for service of process upon designated state official in actions against foreign corporation as applicable to action based on transaction outside state, 162 ALR 1424.

Power of state to subject foreign corporation to jurisdiction of its courts on sole ground that corporation committed tort within state, 25 ALR2d 1202.

Foreign insurance company as subject to service of process in action on policy, 44 ALR2d 416.

Manner of service of process upon foreign corporation which has withdrawn from state, 86 ALR2d 1000.

Federal or state law as controlling, in diversity action, whether foreign corporation is amenable to service of process in state, 6 ALR3d 1103.

Who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on such agent, 17 ALR3d 625.

Validity, construction, and application of "fiduciary shield" doctrine — modern cases, 79 ALR5th 587.

## PART 2

### WITHDRAWAL

#### 14-2-1520. Withdrawal of foreign corporation.

(a) A foreign corporation authorized to transact business in this state may not withdraw from this state until it obtains a certificate of withdrawal from the Secretary of State. A foreign corporation authorized to transact business in this state that merges with and into a domestic corporation pursuant to Code Section 14-2-1107 and is not the surviving corporation in such merger need not obtain a certificate of withdrawal from the Secretary of State.

(b) A foreign corporation authorized to transact business in this state may apply for a certificate of withdrawal by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) That it is not transacting business in this state and that it surrenders its authority to transact business in this state;

(3) That it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state;

(4) A mailing address to which a copy of any process served on him under paragraph (3) of this subsection may be mailed under subsection (c) of this Code section; and

(5) A commitment to notify the Secretary of State in the future of any change in its mailing address.

(c) After the withdrawal of the corporation is effective, service of process on the Secretary of State under this Code section is service on the foreign corporation. Any party that serves process upon the Secretary of State in accordance with this subsection shall also mail a copy of the process to the chief executive officer, chief financial officer, the secretary of the foreign corporation, or a person holding a comparable position, at the mailing address set forth under subsection (b) of this Code section. (Code 1981, § 14-2-1520, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1995, p. 482, § 8.)

#### COMMENT

Source: Model Act, § 15.20. This replaces provisions formerly contained in §§ 14-2-319(b), 14-2-323 & 14-2-324.

A foreign corporation that ceases to transact business within a state may withdraw from the state only by obtaining a certificate of withdrawal. A foreign corporation that ceases to transact business in the state but fails to obtain a certificate of withdrawal will continue to be (1) subject to service of process on its registered agent or on its secretary pursuant to Section 14-2-1510 and (2) liable for franchise and other taxes under other statutes.

Subsection (b) requires the application for certification of withdrawal to appoint the Secretary of State as the withdrawing corporation's agent for service of process in any proceeding based on a cause of action which arose during the time it was authorized to transact business in the state. The application must also set forth a mailing address to which the any process mailed under subsection (c), and the corporation must agree to notify the Secretary of State of any change in that address. There is no time limit on the obligation to advise the Secretary of State of changes of mailing address. To ensure that the appointment of the Secretary of State is unqualified and meets the precise requirements of this section, the Secretary of State may require that an application for certificate of withdrawal be on a form prescribed by him. See Section 14-2-421.

Service of process on the Secretary of State pursuant to the statements in the application for certificate of withdrawal effects service on the corporation under subsection (c). The Model Act, like former § 14-2-323, requires the Secretary of State to mail the process to the corporation at the mailing address specified in the application or in a subsequent communication to the Secretary of State advising him of a change in mailing address. The Code places the burden of such mailing on the party serving the Secretary of State.

#### Cross-References

"Deliver" includes mail, see § 14-2-140. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Forms, see



§ 14-2-121. Registered agent, see § 14-2-1507. Service of process on foreign corporation, see § 14-2-1510. Transacting business, see § 14-2-1501.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-323, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Cited in** *Maelstrom Properties, Inc. v. Holden*, 158 Ga. App. 345, 280 S.E.2d 383 (1981).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 278.

**ALR.** — Withdrawal of foreign corporation from state as affecting conditions under

which it may be readmitted to do business in state and its rights and duties if readmitted, 110 ALR 528.

## PART 3

### REVOCATION OF CERTIFICATE OF AUTHORITY

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 189 et seq., 415 et seq.

**C.J.S.** — 19 C.J.S., Corporations, §§ 897, 919, 920.

### 14-2-1530. Grounds for revocation.

The Secretary of State may commence a proceeding under Code Section 14-2-1531 to revoke the certificate of authority of a foreign corporation authorized to transact business in this state if:

(1) The foreign corporation does not deliver its annual registration to the Secretary of State within 60 days after it is due;

(2) The foreign corporation does not pay within 60 days after they are due any fees, taxes, or penalties imposed by this chapter or other law;

(3) The foreign corporation is without a registered agent or registered office in this state for 60 days or more;

(4) The foreign corporation does not inform the Secretary of State under Code Section 14-2-1508 or 14-2-1509 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;

(5) An incorporator, director, officer, or agent of the foreign corporation signed a document he knew was false in any material respect with

intent that the document be delivered to the Secretary of State for filing;  
or

(6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger. (Code 1981, § 14-2-1530, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 15.30. This replaces provisions formerly contained in §§ 14-2-325 & 14-2-326.

Section 14-2-1530 authorizes the administrative revocation of the certificate of authority of a foreign corporation on the grounds specified. Similar provisions were formerly found in § 14-2-326. Administrative revocation is effective only upon compliance with the procedure specified in Section 14-2-1531. A foreign corporation that believes the administrative revocation is unwarranted may obtain judicial review of the Secretary of State's determination pursuant to Section 14-2-1532.

If a qualified foreign corporation has dissolved or merged into another corporation, the Secretary of State may proceed to revoke its certificate of authority to transact business solely on the basis of a certificate from the Secretary of State or other official of the state of incorporation. Section 14-2-1530(6). Formerly this was treated separately in § 14-2-325. This subdivision provides a simple and inexpensive method to eliminate the names of corporations that are no longer in existence from the records of the Secretary of State, thereby making available the corporate names for use by other entities.

Section 14-2-1530 is patterned after Section 14-2-1420, relating to the administrative dissolution of domestic corporations. See the Comment to Section 14-2-1420 for a fuller description of the policies underlying Section 14-2-1530.

#### Cross-References

Annual registration, see § 14-2-1622. Appeal from revocation, see § 14-2-1532. "Deliver" includes mail, see § 14-2-140. Delivery of false document to Secretary of State, see § 14-2-129. Procedure for revocation, see § 14-2-1531. Registered office and agent, see §§ 14-2-1507 & 14-2-1508.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign corporation domiciled in another state, 19 Corporations, §§ 189 et seq., 415 et seq. ALR3d 1279.  
**ALR.** — Dissolving or winding up affairs of

#### 14-2-1531. Procedure for and effect of revocation.

(a) If the Secretary of State determines that one or more grounds exist under Code Section 14-2-1530 for revocation of a certificate of authority, he shall provide the foreign corporation with written notice of his determination by mailing a copy of the notice, first-class mail, to the foreign



corporation at the last known address of its principal office or to the registered agent.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is provided to the corporation, the Secretary of State may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date.

(c) The authority of a foreign corporation to transact business in this state ceases on the date shown on the certificate revoking its certificate of authority.

(d) The Secretary of State's revocation of a foreign corporation's certificate of authority appoints the Secretary of State as the foreign corporation's agent for service of process in any proceeding based on a cause of action which arose during the time the foreign corporation was authorized to transact business in this state. Service of process on the Secretary of State under this subsection is service on the foreign corporation. Any party that serves process upon the Secretary of State shall also mail a copy of the process to the chief executive officer, chief financial officer, or the secretary of the foreign corporation, or a person holding a comparable position, at its principal office shown in its most recent annual registration or in any subsequent communication received by the Secretary of State from the corporation stating the current mailing address of its principal office, or, if none is on file, in its application for a certificate of authority.

(e) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation. (Code 1981, § 14-2-1531, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 15.31. Procedures for revocation of a certificate of authority formerly appeared in §§ 14-2-326 — 14-2-328.

The procedure for revocation of a certificate of authority in Section 14-2-1531 establishes a simple method of completing the revocation while at the same time ensuring that the foreign corporation is advised of the contemplated action and has an opportunity to contest it in appropriate situations.

Sections § 14-2-1531(a) and (b) provide for an opportunity to cure grounds for revocation within 60 days after notice from the Secretary of State. This is substantially the same as former § 14-2-326(b).

Sections § 14-2-1531(b) and (c) require the Secretary of State to issue a certificate of revocation, which terminates the authority of the foreign corporation to transact business. This is substantially the same as former § 14-2-328.

Subsection (d) provides that after revocation, the Secretary of State is appointed the foreign corporation's agent for service of process; upon receipt of service, the Model Act required the Secretary of State to forward the process to the foreign corporation's

principal address, as last reflected in his records. There was no express provision for this in former law, except in § 14-2-325(c), for dissolved foreign corporations. The Code simplifies the process by requiring the litigant to mail process directly to a corporate officer in the manner specified in subsection (d).

Subsection (e) makes it clear that revocation does not of itself terminate the authority of the foreign corporation's registered agent, so that process served on that agent by a third person who was unaware of the revocation may be effective.

Section 14-2-1531 is patterned after Section 14-2-1421, relating to the administrative dissolution of a domestic corporation. See the Comment to Section 14-2-1421 for a fuller statement of the policies underlying Section 14-2-1531.

#### **Cross-References**

Annual registration, see § 14-2-1622. Appeal from revocation, see § 14-2-1532. Grounds for revocation, see § 14-2-1530. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Service on foreign corporation, see § 14-2-1510.

### **OPINIONS OF THE ATTORNEY GENERAL**

**Law applicable to reinstatement.** — A foreign or domestic business corporation which was dissolved or whose certificate was revoked under the law in effect prior to July 1, 1989, may be reinstated in accordance with the prior law in effect at the time of the revocation or dissolution. 1990 Op. Att'y Gen. No. 90-39.

**Penalty for operating without certificate of incorporation.** — Where a foreign business corporation had its certificate of author-

ity revoked under the former corporation code and sought reinstatement after July 1, 1989, the civil penalty of \$500.00 per year or part thereof for operation without a certificate of authority should be assessed for the period of time between revocation and reinstatement, if the foreign corporation continued to transact business in Georgia without a certificate of authority. 1990 Op. Att'y Gen. No. 90-39.

#### **14-2-1532. Appeal from revocation.**

(a) A foreign corporation may appeal the Secretary of State's revocation of its certificate of authority to the Superior Court of Fulton County within 30 days after service of the certificate of revocation is perfected under Code Section 14-2-1510. The foreign corporation appeals by petitioning the court to set aside the revocation and attaching to the petition copies of its certificate of authority and the Secretary of State's certificate of revocation.

(b) The court may summarily order the Secretary of State to reinstate the certificate of authority or may take any other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (Code 1981, § 14-2-1532, enacted by Ga. L. 1988, p. 1070, § 1.)

#### **COMMENT**

Source: Model Act, § 15.32.

A corporation whose certificate of authority is revoked may obtain judicial review of the revocation decision. In the review proceeding the court may summarily order the



Secretary of State to reinstate the corporation or take other action it deems appropriate. This section generally parallels former § 14-2-393, except that § 14-2-393(a) granted 40 days for an appeal, and § 14-2-393(b) provided that an appeal would be tried de novo without a jury. Nothing in this section is intended to change the general rules concerning judicial review of administrative actions.

#### **Cross-References**

Effective date of service, see § 14-2-1510. Grounds for revocation, see § 14-2-1530. Procedure for revocation, see § 14-2-1531.

#### **RESEARCH REFERENCES**

**ALR.** — Rescission or annulment of foreign contracts or transactions of corporation, 172 ALR 493.  
 forfeiture of license of foreign corporation to do business in the state as affecting previous

### **PART 4**

#### **DOMESTICATION**

#### **14-2-1540. Application of chapter to foreign corporations domesticated under prior law.**

(a) A foreign corporation which prior to April 1, 1969, has domesticated in this state under the procedure available prior to that date and which is a domesticated foreign corporation on that date shall have perpetual duration as a domesticated foreign corporation of this state unless its existence is terminated in its jurisdiction of incorporation or its domesticated status is dissolved in accordance with the provisions of this chapter relating to involuntary dissolution or until such time as it withdraws from this state in the manner provided in this chapter. Such domesticated foreign corporations and the shareholders thereof shall have all the rights, privileges, and immunities, and be subject to all the duties, liabilities, and disabilities applicable to similar corporations organized under the laws of this state and applicable to the shareholders thereof, except as may be provided with respect to such domesticated foreign corporations by any of the laws of this state existing on April 1, 1969, or coming into existence thereafter.

(b) Whenever the term "foreign corporation authorized to transact business in this state" is used in this chapter, it shall be deemed to include domesticated foreign corporations except where the context or this chapter otherwise requires. (Code 1981, § 14-2-1540, enacted by Ga. L. 1988, p. 1070, § 1.)

#### **COMMENT**

Source: Former § 14-2-330. This section has no counterpart in the Model Act.

Subsection (a) is intended to preserve all rights which any foreign corporations and their shareholders may have by virtue of former § 14-2-330, and Ga. Code Ann. 1933, Ch. 22-16, or by virtue of any other laws of this state relating to domesticated foreign

corporations. For example, it is intended that the stock of domesticated foreign corporations would continue to be exempt from the intangible property tax as provided in prior Ga. Code Ann. §§ 92-17.2 and 92-162, subject, of course, to future amendments by the legislature. After April 1, 1969, under the former Corporation Code, it was no longer possible for a foreign corporation to become a domesticated foreign corporation. Rather, the alternatives available to a foreign corporation are either to qualify by obtaining a certificate of authority under Section 14-2-1503 or to remain unqualified. In general, foreign corporations domesticated under the prior law would be subject to all the provisions of this Code to which qualified foreign corporations are subject. See subsection (b).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-1601, as it existed prior to the enactment of Ga. L. 1968, p. 565, and former Code Section 14-2-330, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Domesticated corporations not corporations created anew.** — The domestication statute of 1920, Ga. L. 1920, p. 151, as amended, codified as former Code 1933, § 22-1601 et seq., while conferring upon domesticated foreign corporations "the same powers, privileges, and immunities of similar corporations created under the laws of this state" and subjecting them to "the same obligations, duties, liabilities, and disabilities as if originally created under the laws of this state," did not have the effect of creating such corporation anew as corporations incorporated under the laws of Georgia. *Forrester v. Continental Gin Co.*, 67 Ga. App. 119, 19 S.E.2d 807 (1942) (decided under former Code 1933, § 22-1601).

**Foreign corporation domesticated under Georgia law remains foreign corporation,** but, by virtue of such domestication, is invested with certain powers, privileges, and immunities that it did not theretofore have. *Mitchell v. Union Bag & Paper Corp.*, 75 Ga. App. 15, 42 S.E.2d 137 (1947) (decided under former Code 1933, § 22-1601).

**Effect of becoming domesticated corporation.** — There is no merit in the contention that a cooperative, nonprofit, membership corporation, which has been incorporated in a sister state for the purpose of engaging in rural electrification, and which has been subsequently domesticated in Georgia for the conduct of its corporate purpose here, is not entitled to tax immunity. After being

duly domesticated in Georgia such a corporation and its stockholders have the same powers, privileges, and immunities as a similar corporation created under the laws of Georgia, and it, and its stockholders, are subject to the same obligations, duties, liabilities, and disabilities as that of a corporation originally created in Georgia. *City of McCaysville v. Tri-State Elec. Coop.*, 211 Ga. 5, 83 S.E.2d 598 (1954) (decided under former Code 1933, § 22-1601).

**Domesticated corporation incorporated in another state subject to tax.** — Under Ga. L. 1929, p. 84, Ga. L. 1931, Ex. Sess., p. 76, and Ga. L. 1935, p. 11, providing for the payment by corporations "incorporated under the laws of Georgia" of an occupational tax (corporation net worth tax) based on the "issued capital stock" and for the payment by corporations "incorporated or organized under the laws of any other state," etc., of an occupational tax based on the "capital stock and surplus employed in this state," a foreign corporation incorporated under the laws of another state, though "domesticated" in Georgia, was not subject to payment of such tax on the same basis as a domestic corporation, a corporation "incorporated under the laws of Georgia," but on the basis of a corporation "incorporated or organized under the laws of" another state. *Forrester v. Continental Gin Co.*, 67 Ga. App. 119, 19 S.E.2d 807 (1942) (decided under former Code 1933, § 22-1601).

**But not where express terms of statute did not impose tax.** — The provisions of former Code 1933, § 22-1601, authorizing the domestication of foreign corporation and stating that a domesticated foreign corporation was "subject to the same obligations, duties, liabilities, and disabilities as if originally created under the laws of this state," could not



properly be construed as rendering a foreign corporation domesticated under such Act subject to the same tax imposed on a domestic corporation as provided in former Code 1933, § 92-2401 (now §§ 48-13-72, 48-13-74 through 48-13-76), where the provisions of that statute did not at the time (1932 through 1935) in express terms impose any tax on a domesticated foreign corporation. *National Manufacture & Stores Corp. v. Head*, 67 Ga. App. 114, 19 S.E.2d 566 (1942) (decided under former Code 1933, § 22-1601).

**Only domesticated corporations can exercise right of eminent domain.** — A foreign corporation owning or controlling water power in this state, when domesticated under the laws of Georgia, can exercise the right of eminent domain in this state for the purposes mentioned in former Code 1933, § 36-801 (now § 22-3-20). A foreign corporation not so domesticated has no such right. *Head v. Rich*, 61 Ga. App. 293, 6 S.E.2d 73 (1939), *aff'd*, 190 Ga. 680, 10 S.E.2d 183 (1940) (decided under former Code 1933, § 22-1601).

**Right of domesticated electric corporations to condemn land.** — A corporation chartered in another state with the right to own and operate an electric plant and engage in the business of generating, transmitting, and selling electricity for commercial and domestic use, and later domesticated in this state by appropriate proceedings, has the right to condemn the land of others for the purpose of running its lines of wires over the land and using and maintaining poles and appliances thereon in order to distribute electric current to the public from its plant. *Perry v. Folkston Power Co.*, 181 Ga. 527, 183 S.E. 58 (1935) (decided under former Code 1933, § 22-1601).

**Domesticated corporation liable to attachment as domestic corporation.** — Where a foreign corporation has become fully domes-

ticated by or under the laws of another state, it is not liable to attachment as a nonresident of such state, though, of course, it is liable to attachment for any of those causes for which a domestic corporation would be liable to attachment. *Mitchell v. Union Bag & Paper Corp.*, 75 Ga. App. 15, 42 S.E.2d 137 (1947) (decided under former Code 1933, § 22-1601).

**Domesticated corporation is to be regarded as domestic for purposes of suit in the courts of the domesticating state.** It is the general rule that a foreign corporation which has become domesticated is a domestic corporation of the adopting state for all suit purposes in the state courts, but that it remains a citizen of the state of its creation for purposes of jurisdiction, removal, and venue in the federal courts. *Mitchell v. Union Bag & Paper Corp.*, 75 Ga. App. 15, 42 S.E.2d 137 (1947) (decided under former Code 1933, § 22-1601).

**Constitutional considerations.** — To construe the constitutional exemption of property owned by a Georgia corporation and to deny its application to the same class or species of property when owned by a domesticated foreign corporation, would violate state constitutional requirements which require that protection to person and property be impartial and complete, and that all taxation be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and would also violate that provision of the fourteenth amendment of the Constitution of the United States which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. *Redwine v. Southern Co.*, 206 Ga. 377, 57 S.E.2d 194 (1950) (decided under former Code 1933, § 22-1601).

*Cited in Roberts v. Lipson*, 231 Ga. 142, 200 S.E.2d 722 (1973).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 353, 355.

**C.J.S.** — 19 C.J.S., Corporations, § 887.

**ALR.** — Effect of domestication of foreign corporations, 126 ALR 1503.

## ARTICLE 16

## RECORDS AND REPORTS

**Administrative rules and regulations.** — Certification of Documents, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Commissioner of Corporations, Chapter 590-7-6.

**Law reviews.** — For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988).

## PART 1

## RECORDS

**14-2-1601. Corporate records.**

(a) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, executed consents evidencing all actions taken by the shareholders or board of directors without a meeting, a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation, and waivers of notice of all meetings of the board of directors and its committees.

(b) A corporation shall maintain appropriate accounting records.

(c) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.

(d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time. (Code 1981, § 14-2-1601, enacted by Ga. L. 1988, p. 1070, § 1.)

**COMMENT**

Source: Model Act, § 16.01. This supersedes former § 14-2-122(a), and provides more specific guidance than the former provision, which only required the corporation to "keep correct and complete books and records of account and ... minutes of proceedings...."

Subsection (a) requires a corporation to "keep" as permanent records the minutes of meetings of its shareholders and board of directors. Where the Model Act required the corporation to keep only a "record" of actions taken by unanimous consent by its shareholders or board of directors, the Code requires retention of the written consents. In addition, each corporation must "keep" a record of all actions taken by a committee of the board of directors when acting on behalf of the board of directors for the corporation. Subsection (a) does not require a record of actions taken by a committee when the committee is not acting in place of the board of directors, e.g., when the committee is discussing policy and formulating recommendations for action by the board of directors. Also, it does not require either minutes or a record of committee



deliberations under any circumstances. Committee meetings are preserved as forums for open and frank discussion and discussion of sensitive corporate data without fear of recordation or disclosure.

Subsections (b) and (c) require the corporation to "maintain" appropriate accounting and shareholder records. The word "maintain" is used to denote current records only and does not require the corporation to keep on hand as permanent records, data, or information of historical interest only; the periods for which these records, data, or information should be kept is not addressed by the Code.

Subsection (b) relates to accounting records. The word "appropriate" is used to indicate that the nature of the financial records to be kept is dependent to some extent on the nature of the corporation's business. "Appropriate" records are generally records that permit financial statements to be prepared which fairly present the financial position and transactions of the corporation. In some very small businesses operating on a cash basis, however, "appropriate" accounting records may consist only of a check register, vouchers, and receipts.

Subsection (c) requires the corporation to maintain such records of its shareholders as will permit it to compile a list of shareholders when required. These records may consist of stubs from which certificates have been detached in the case of corporations with a few shareholders or of elaborate electronic data retrievable only by modern technology in the case of large, publicly held corporations. The record may be retained by the corporation or an agent, who traditionally is the transfer agent but may be another agent.

Subsection (d) generally authorizes corporations to retain records on microfilm, microfiche, computer memory or disc, or any other method that is convenient or appropriate under the circumstances. The basic requirement is that the method chosen must be capable of reduction to written form within a reasonable time. In addition, in the case of the record of shareholders, the method must permit the development of an alphabetical list of shareholders of record as required by Section 14-2-1601(c).

Model Act subsection (e) now appears as Code Section 14-2-1602(a).

#### Cross-References

Articles of incorporation, see § 14-2-202. Board of directors' meeting, see § 14-2-820. Committees of board of directors, see § 14-2-825. "Deliver" includes mail, see § 14-2-140. Directors' action without meeting, see § 14-2-821. Inspection of corporate records, see § 14-2-1602 et seq. Officers, see § 14-2-840. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Reports of corporation, see § 14-2-1620 et seq. Restatement of articles of incorporation, see § 14-2-1007. Series of shares, see § 14-2-602. Shareholders' action without meeting, see § 14-2-704. Shareholders' meeting, see § 14-2-701 et seq. Shareholders' voting list, see § 14-2-720.

#### RESEARCH REFERENCES

<p><b>Am. Jur. 2d.</b> — 18A Am. Jur. 2d, Corporations, §§ 333-338, 715, 951, 1029, 1030. 18B Am. Jur. 2d, Corporations, §§ 1459, 1479, 1512.</p>	<p><b>C.J.S.</b> — 18 C.J.S., Corporations, §§ 110, 277, 290. 19 C.J.S., Corporations, §§ 464, 467.</p>
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#### 14-2-1602. Inspection of records by shareholders.

(a) A corporation shall keep a copy of the following records:

(1) Its articles or restated articles of incorporation and all amendments to them currently in effect;

(2) Its bylaws or restated bylaws and all amendments to them currently in effect;

(3) Resolutions adopted by either its shareholders or board of directors increasing or decreasing the number of directors, the classification of directors, if any, and the names and residence addresses of all members of the board of directors;

(4) Resolutions adopted by its board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding and any resolutions adopted by the board of directors that affect the size of the board of directors;

(5) The minutes of all shareholders' meetings, executed waivers of notice of meetings, and executed written consents evidencing all action taken by shareholders without a meeting, for the past three years;

(6) All written communications to shareholders generally within the past three years, including the financial statements furnished for the past three years under Code Section 14-2-1620;

(7) A list of the names and business addresses of its current directors and officers; and

(8) Its most recent annual registration delivered to the Secretary of State under Code Section 14-2-1622.

(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in subsection (a) of this Code section if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.

(c) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (d) of this Code section and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:

(1) Excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under subsection (a) of this Code section;

(2) Accounting records of the corporation; and

(3) The record of shareholders.



(d) A shareholder may inspect and copy the records described in subsection (c) of this Code section only if:

(1) His demand is made in good faith and for a proper purpose that is reasonably relevant to his legitimate interest as a shareholder;

(2) He describes with reasonable particularity his purpose and the records he desires to inspect;

(3) The records are directly connected with his purpose; and

(4) The records are to be used only for the stated purpose.

(e) The right of inspection granted by this Code section may not be abolished or limited by a corporation's articles of incorporation or bylaws. However, the right to inspection enumerated in subsection (c) of this Code section may be limited by a corporation's articles of incorporation or bylaws for shareholders owning 2 percent or less of the shares outstanding.

(f) This Code section does not affect:

(1) The right of a shareholder to inspect records under Code Section 14-2-720 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant; or

(2) The power of a court, independently of this chapter, to compel the production of corporate records for examination.

(g) For purposes of this Code section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf. (Code 1981, § 14-2-1602, enacted by Ga. L. 1988, p. 1070, § 1.)

**Cross references.** — Right of members of public to inspect state, county, and municipal records, § 50-18-70 et seq.

#### COMMENT

Source: Model Act § 16.01(e) & 16.02. This replaces former § 14-2-122.

Subsection (a) appeared as Section 14-2-1601(e) of the Model Act. It requires certain basic records to be kept by the corporation, including minutes of shareholders' meetings for the preceding three years and records of shareholder action taken without a meeting during the same period. The Model Act requirement that these records be kept at the principal office of the corporation was deleted as too restrictive, since in many cases persons performing services for a corporation may keep some of these records. It is only important that shareholders be able to inspect these records at the principal office. The Model Act provisions were expanded to include in subparagraph (a)(3) any resolutions adopted by the board that affect the size of the board, and in subparagraph (a)(4) waivers of notices of meetings. Board resolutions affecting the size of the board are just as important to shareholders as information in bylaws setting the size of the board, and waivers of notices of recent meetings may be critical to determining the validity of corporate actions.

Subsection (b) provides that every shareholder is entitled to examine upon written request at the principal office of the corporation all documents described in subsection (a).

Subsection (c) grants a shareholder who meets the requirements of subsection (d) the right to inspect three classes of corporate records: (1) excerpts from minutes of meetings of the board of directors; excerpts from records of action of committees of the board of directors when acting in place of the board on behalf of the corporation; excerpts from minutes of meetings of shareholders; and excerpts from records of either directors' or shareholders' actions taken without a meeting; (2) the accounting records of the corporation; and (3) the record of shareholders, subject to Section 14-2-1603(e). This right is independent of the right to inspect a shareholders' list immediately before a meeting under Section 14-2-720. See Subsection (f). The Code followed the Model Act in granting inspection rights only as to "excerpts from" minutes of meetings and other records; former § 14-2-122(c) granted the right to inspect "its books and records of account, minutes...."

Subsection (d) follows former § 14-2-122(b)-(d) and permits inspection of the records described in subsection (c) by a shareholder only if his demand is made in good faith and for a "proper purpose." A "proper purpose" means a purpose that is reasonably relevant to the demanding shareholder's legitimate interest as a shareholder. This excludes interests related to personal interests, such as those as a competitor, which are not addressed directly to his interests as an investor. Subsection (d) attempts to require more meaningful statements of purpose, if feasible, than former law, by requiring that a shareholder designate "with reasonable particularity" his purpose and the records he desires to inspect; the records demanded must also be "directly connected" with that purpose.

Subsection (e), taken from the Model Act, states that the inspection rights granted by this article are inherent rights of shareholders and may not be generally abolished or limited by the articles of incorporation or bylaw; the subsection is based on Cal. Corp. Code Ann. § 1600(d) (West 1977). The Code eliminates the requirement of former law that a requesting shareholder must either have held stock for at least six months or own at least five percent of the corporation's stock. The Model Act provision was amended in the Code to permit limitation of inspection rights, except with respect to shareholders owning two percent or more of a company's shares. The reference to "limits" in the second sentence should be contrasted with the absolute preclusion of "abolition" in the first sentence. No inference of any kind should be drawn from this subsection as to whether other, unrelated sections of the Code may be modified by provisions in the articles of incorporation or bylaws. As indicated in other comments to the Code, each section is intended to have independent legal significance.

Consistent with the "independent legal significance" approach of the Code, subsection (f) provides that the right of inspection granted by Section 14-2-1602 is an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist (1) under Section 14-2-720, to inspect the shareholders' list at a meeting; (2) as part of a right of discovery that exists in connection with litigation; and (3) as a "common law" right of inspection, if any is found to exist by a court, to examine corporate records. Subsection (f) simply preserves whatever independent right of inspection exists under these sources and does not create or recognize any rights, either expressly or by implication.

Subsection (g) extends the inspection rights provided by Section 14-2-1602 to beneficial owners of shares by a nominee or in a voting trust. No such right existed under former Georgia law.



### Cross-References

Board of directors' meeting, see § 14-2-820. Bylaws, see § 14-2-206 and Article 10, Part 2. Committees of board of directors, see § 14-2-825. Corporate records required, see §§ 14-2-1601 & 14-2-1602. Court-ordered inspection, see § 14-2-1604. "Deliver" includes mail, see § 14-2-140. Directors' action without meeting, see § 14-2-821. Effective date of notice, see § 14-2-141. "Notice" defined, see § 14-2-141. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. "Shareholder" defined, see § 14-2-140. Shareholders' action without meeting, see § 14-2-704. Shareholders' list inspection, see § 14-2-720. Shareholders' meeting, see § 14-2-701 et seq. Waivers of notice of shareholders' meetings, see § 14-2-706.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-613 and former Code Section 14-2-122, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Right to inspect must come either from statute or common law.** *Master Mtg. Corp. v. Craven*, 127 Ga. App. 367, 193 S.E.2d 567 (1972) (decided under former Code 1933, § 22-613).

**Common-law right to examine in good faith for specific honest purpose.** — The common-law rule as recognized and applied in Georgia and summarized in *Winter v. Southern Secs. Co.*, 155 Ga. 590, 118 S.E. 412 (1923), is that a bona fide stockholder has the legal right to inspect the books and records of the company, where the examination is asked for in good faith for a specific and honest purpose, and not to gratify curiosity, or for speculating or for vexatious purposes, and provided, further, that the purpose of the stockholder desiring to make the examination is germane to the person's interest as a stockholder, proper and lawful in character, and not inimical to the interests of the corporation itself, and the inspection is made during reasonable business hours. *Master Mtg. Corp. v. Craven*, 127 Ga. App. 367, 193 S.E.2d 567 (1972) (decided under former Code 1933, § 22-613).

**Right to inspect at reasonable times and places for proper purposes.** — The common-law rule as to a shareholder's right of inspection is that every shareholder has the right, by reason of the person's interest therein, to inspect the books and papers of a corporation at reasonable times and places and for proper purposes. It is thus seen that

this right is not an absolute one but rather a qualified one. *Master Mtg. Corp. v. Craven*, 127 Ga. App. 367, 193 S.E.2d 567 (1972) (decided under former Code 1933, § 22-613).

**Right is not absolute.** — Where done in good faith to protect the shareholder's interest or to inform the shareholder of the financial condition of the company and the value of stock, the minutes, ledgers, and shareholders lists are to be made available under either the statutory or common-law rule, but the common-law right to inspect records is not absolute and the purpose should be relevant and material to the applicant's interests as a shareholder. *Master Mtg. Corp. v. Craven*, 127 Ga. App. 367, 193 S.E.2d 567 (1972) (decided under former Code 1933, § 22-613).

**Former Code 1933, § 22-613 (see O.C.G.A. § 14-2-1602) placed much discretion in trial judge** to determine whether the purpose named was a proper one, whether the request was vexatious or arising from idle curiosity, whether the documents called for were relevant, material, and not overburdensome, whether granting the requests would violate principles of confidentiality, lead to legal difficulties with federal agencies, or give an unfair advantage to the petitioning stockholders. *Riser v. Genuine Parts Co.*, 150 Ga. App. 502, 258 S.E.2d 184 (1979) (decided under former Code 1933, § 22-613).

**Burden on plaintiff to show proper purpose.** — The burden of showing a proper purpose as to specific materials is on the plaintiff and this burden should become somewhat heavier as the information sought becomes increasingly remote from the statutory objects of "books and records of ac-

count, minutes, and record of shareholders." *Riser v. Genuine Parts Co.*, 150 Ga. App. 502, 258 S.E.2d 184 (1979) (decided under former Code 1933, § 22-613).

**What constitutes proper purpose.** — To determine whether proper records are being kept, the performance of management and the condition of the company constitutes a proper purpose for seeking the "books and records of account, minutes, and record of shareholders" which may be available to shareholders on demand. *Riser v. Genuine Parts Co.*, 150 Ga. App. 502, 258 S.E.2d 184 (1979) (decided under former Code 1933, § 22-613).

**Shareholder status does not provide unrestricted access.** — Although shareholders have some rights to corporate information not available to the general public, shareholder status does not in and of itself entitle an individual to unfettered access to corporate confidences and secrets. *Riser v. Genuine Parts Co.*, 150 Ga. App. 502, 258 S.E.2d 184 (1979) (decided under former Code 1933, § 22-613).

**Though right extends to sources of information for protection of interest.** — Generally speaking, the right of a stockholder extends to all books, papers, contracts, minutes, or other instruments from which he can derive any information that will enable him to protect his interest. *Master Mtg. Corp. v. Craven*, 127 Ga. App. 367, 193 S.E.2d 567 (1972) (decided under former Code 1933, § 22-613).

**Term "books and records of account" does not apply to file on proposed merger.** *Riser v. Genuine Parts Co.*, 150 Ga. App. 502, 258 S.E.2d 184 (1979) (decided under former Code 1933, § 22-613).

**Right to balance sheet and profit and loss statement.** — A request under former Code 1933, § 22-613 for a copy of the corporation's most recent balance sheet and profit and loss statement was completely indepen-

dent from the stockholder's right under former subsection (b) to inspect the books and records. No question of good-faith could be raised under former Code 1933, § 22-613 to defeat a stockholder's unbridled right to this information. *Shelters, Inc. v. Reeve*, 131 Ga. App. 18, 205 S.E.2d 108 (1974) (decided under former Code 1933, § 22-613).

**Specificity of request.** — Request should be specific enough in demands to relate documents sought to questions at issue. *Master Mtg. Corp. v. Craven*, 127 Ga. App. 367, 193 S.E.2d 567 (1972) (decided under former Code 1933, § 22-613).

**Relevance or pertinence determines whether order is to be entered.** — While admissibility is a matter to be determined when records, documents, etc., are tendered in evidence and is not a test for determining whether an order requiring production should be entered, pertinence or relevance is. *Master Mtg. Corp. v. Craven*, 127 Ga. App. 367, 193 S.E.2d 567 (1972) (decided under former Code 1933, § 22-613).

No court should impose upon the opposite party the onerous task of producing great quantities of records which have no relevancy. *Master Mtg. Corp. v. Craven*, 127 Ga. App. 367, 193 S.E.2d 567 (1972) (decided under former Code 1933, § 22-613).

**Whether stockholder is entitled to stock is inappropriate question.** — Whether a stockholder was entitled to the stock upon which the demand for inspection was based was not an appropriate question for adjudication in an action pursuant to former § 14-2-122. *Wholesome Foods, Inc. v. Cook*, 141 Ga. App. 34, 232 S.E.2d 380 (1977) (decided under former Code 1933, § 22-613).

*Cited in* *Vohs v. Dickson*, 495 F.2d 607 (5th Cir. 1974); *G.I.R. Sys. v. Lance*, 219 Ga. App. 829, 466 S.E.2d 597 (1995); *Parker v. Clary Lakes Recreation Ass'n*, 243 Ga. App. 681, 534 S.E.2d 154 (2000).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 348-405.

**C.J.S.** — 18 C.J.S., Corporations, §§ 332-339.

**ALR.** — Stockholders' right to inspect books and records of corporation, 22 ALR

24; 43 ALR 783; 59 ALR 1373; 80 ALR 1502; 174 ALR 262; 15 ALR2d 11.

Power to compel production of corporate books to aid in assessing holder of stock or his estate, 23 ALR 1351.

Creditor's right to inspect books and



records under constitutional or statutory provision relating specifically to corporations, 35 ALR 752.

Right of stockholder or creditor to inspect books or papers of corporation in hands of receiver, 92 ALR 1047.

Stockholder's right to inspect books and records of foreign corporation, 19 ALR3d 869.

Right of stockholder to have corporate books inspected by attorney, accountant, or other agent without stockholder's presence, 48 ALR3d 1072.

Right of stockholder to inspect corporate books or records in pursuit of social or political interest, as distinguished from financial interest, 50 ALR3d 1056.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 ALR3d 636; 87 ALR Fed. 177.

What corporate documents are subject to shareholder's right to inspection, 88 ALR3d 663.

### 14-2-1603. Scope of inspection right.

(a) A shareholder's agent or attorney has the same inspection and copying rights as the shareholder he represents.

(b) The right to copy records under Code Section 14-2-1602 includes, if reasonable, the right to receive copies made by photographic, xerographic, or other means.

(c) The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the shareholder. The charge may not exceed the estimated cost of production or reproduction of the records.

(d) A corporation shall convert into written form without charge any record of shareholders not in written form, upon written request of a person entitled to inspect them.

(e) The corporation may comply with a shareholder's demand to inspect the record of shareholders under paragraph (3) of subsection (b) of Code Section 14-2-1602 by providing him with a list of its shareholders that was compiled no earlier than the date of the shareholder's demand. (Code 1981, § 14-2-1603, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 16.03. There was no comparable provision in former law. Formerly § 14-2-122(b) merely provided that shareholders could "make extracts from" the records they had a right to inspect.

Subsection (a) extends the right of inspection to an agent or attorney of a shareholder as well as the shareholder himself.

Subsection (b) recognizes that the right of inspection set forth in Section 14-2-1602 includes the general right to copy the documents inspected. This assures that a right to copy means more than a right to copy by longhand and extends to the right to receive, if reasonable, copies made by the modern technology of copying machines with the cost of reproduction being paid by the shareholder.

Subsection (c) authorizes the corporation to charge a reasonable fee based on reproduction costs (including labor and materials) for providing a copy of any document. The phrase "estimated cost of production or reproduction of the records"

refers to the cost of assembling information and data to meet a demand as well as the cost of reproducing documents that are already in existence.

Subsection (d) is new, and is based on Mich. Stat. Ann. § 21.200(485). It requires conversion of computerized records into paper copy where requested, without charge.

Subsection (e) is designed to give the corporation the option of providing a reasonably current list of its shareholders instead of granting the right of inspection; a "reasonably current" list is defined in subsection (d) as one compiled no earlier than the date of the written demand, which under Section 14-2-1602(c) must provide at least five days' notice.

### Cross-References

Corporate records, see §§ 14-2-1601 & 14-2-1602. Court-ordered inspection, see § 14-2-1604. Inspection right generally, see § 14-2-1602. Shareholders' list inspection, see § 14-2-720.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 360, 402-405.

**C.J.S.** — 18 C.J.S., Corporations, §§ 335, 336.

**ALR.** — Right of stockholder to have corporate books inspected by attorney, accountant, or other agent without stockholder's presence, 48 ALR3d 1072.

### 14-2-1604. Court-ordered inspection.

(a) If a corporation does not allow a shareholder who complies with subsection (b) of Code Section 14-2-1602 to inspect and copy any records required by that subsection to be available for inspection, the superior court of the county where the corporation's registered office is located may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the shareholder.

(b) If a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with subsections (c) and (d) of Code Section 14-2-1602 may apply to the superior court in the county where the corporation's registered office is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(c) If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs (including reasonable attorneys' fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.

(d) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder. (Code 1981, § 14-2-1604, enacted by Ga. L. 1988, p. 1070, § 1.)



## COMMENT

Source: Model Act, § 16.04. This replaces former § 14-2-122(d) & (e).

Section 14-2-1604 provides a judicial remedy if a corporation refuses to grant the right of inspection provided by Section 14-2-1602.

Subsection (a) provides for judicial enforcement of the shareholders' right of inspection under Section 14-2-1602(b). As to these records, no showing of proper purpose need be made.

Subsection (b) provides, by contrast, that if inspection is demanded under Section 14-2-1602(c) and (d), the shareholder's good faith and purpose may be in issue; in this situation subsection (b) directs the court to handle the proceeding "on an expedited basis." The purpose of this phrase is to discourage dilatory tactics to avoid or delay inspection without requiring the court to resolve these issues on a summary basis.

While subsection (a) provides that the corporation shall bear the costs of inspection and copying of the records covered therein, subsection (c) does not address who should bear the cost of reproducing other records ordered by the court; this is a matter for the courts to decide in light of the policy of the Code that costs of reproduction are generally the responsibility of the requesting shareholder and should be assessed against him. The principal sanction against unreasonable delay or refusal to grant inspection is provided by subsection (c), which imposes on the corporation that plaintiff's costs, including attorneys' fees, unless the corporation can establish that it acted reasonably. The corporation may avoid these costs by showing that the corporation refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded. The phrase "in good faith because if had a reasonable basis for doubt" establishes a partially objective standard, in that the corporation must be able to point to some objective basis for its doubt that the shareholder was acting in good faith or had a purpose that was proper.

Subsection (d) authorizes the court to enter such protective orders as it shall deem necessary on the use or distribution of records to be produced for a shareholder.

**Cross-References**

Corporate records, see §§ 14-2-1601 & 14-2-1602. "Principal office": defined, see § 14-2-140; designated in annual registration, see § 14-2-1622. Registered office: designated in annual registration, see § 14-2-1622; required, see §§ 14-2-202 & 14-2-501. Service on corporation, see § 14-2-504. Shareholders' list inspection, see § 14-2-720. Voluntary inspection, see § 14-2-1602.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-613 and former Code Section 14-2-122, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Shareholders protected from arbitrary denial of right to inspect corporate books** by former Code 1933, § 22-613 (see O.C.G.A. § 14-2-1604), which provided, in effect, for judicial review of a refusal by a corporation to allow inspection. The order for inspection

may be restricted or limited as the court may see fit. *Master Mtg. Corp. v. Craven*, 132 Ga. App. 404, 208 S.E.2d 158 (1974) (decided under former Code 1933, § 22-613).

**Shareholder inspection of invoices authorized.** — The court did not abuse its discretion by determining that a shareholder was allowed to look at the corporation's invoices with only the name and address of the customer redacted. *G.I.R. Sys. v. Lance*, 228 Ga. App. 329, 491 S.E.2d 530 (1997).

**Corporation not liable for costs of inspection by shareholder's accountant.** — Trial

court erred in ordering a corporation to split with its shareholder the cost of having the shareholder's accountant inspect corporate records since the costs assessed to the corporation were not costs incurred by the shareholder in obtaining the inspection order and the corporation had acted in good faith when it denied the shareholder's inspection application. *G.I.R. Sys. v. Lance*, 219 Ga. App. 829, 466 S.E.2d 597 (1995).

**Party who contracted to sell stock is still shareholder of record.** — The fact that a plaintiff has entered into a contract for the sale of plaintiff's shares was of no concern to the corporation and plaintiff was "a shareholder of record" for the purposes of former Code 1933, § 22-613 (see O.C.G.A. § 14-2-1620). *Shelters, Inc. v. Mankin*, 130 Ga. App. 859, 204 S.E.2d 810 (1974) (decided under former Code 1933, § 22-613).

**Direct appeal.** — Even though the amount of attorney fees awarded by a trial court was

less than \$10,000, a petition for inspection and copying of records was not an action for damages necessitating a discretionary appeal under O.C.G.A. § 5-6-35(a)(6). *Motor Whse., Inc. v. Richard*, 235 Ga. App. 835, 510 S.E.2d 600 (1998).

Where attorney fees were awarded as costs under O.C.G.A. § 14-2-1604(c), and not damages under O.C.G.A. § 13-6-11, the award was directly appealable. *Motor Whse., Inc. v. Richard*, 235 Ga. App. 835, 510 S.E.2d 600 (1998).

**Attorney's fees.** — A pro se litigant who was not an attorney could not recover attorney fees under O.C.G.A. § 14-2-1604 because of the lack of any meaningful standard for calculating the amount of the award. *JarAllah v. American Culinary Fed'n, Inc.*, 242 Ga. App. 595, 529 S.E.2d 919 (2000).

Cited in *Parker v. Clary Lakes Recreation Ass'n*, 243 Ga. App. 681, 534 S.E.2d 154 (2000).

## PART 2

### REPORTS

#### 14-2-1620. Financial statements for shareholders.

(a) Not later than four months after the close of each fiscal year and in any case prior to the annual meeting of shareholders, each corporation shall prepare (1) a balance sheet showing in reasonable detail the financial condition of the corporation as of the close of its fiscal year, and (2) a profit and loss statement showing the results of its operation during its fiscal year. Upon written request, the corporation promptly shall mail to any shareholder of record a copy of the most recent balance sheet and profit and loss statement. If prepared for other purposes, the corporation shall also furnish upon written request a statement of sources and applications of funds and a statement of changes in shareholders' equity for the fiscal year. If financial statements are prepared by the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared, and disclose that they are prepared, on that basis. If financial statements are prepared otherwise than on the basis of generally accepted accounting principles, they must so disclose and must be prepared on the same basis as other reports or statements prepared by the corporation for the use of others.

(b) If the annual financial statements are reported upon by a public accountant, his report must accompany them. If not, the statements must



be accompanied by a statement of the president or the person responsible for the corporation's accounting records:

(1) Stating his reasonable belief whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and

(2) Describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year. (Code 1981, § 14-2-1620, enacted by Ga. L. 1988, p. 1070, § 1.)

#### COMMENT

Source: Model Act, § 16.20, and former § 14-2-122(f).

The Model Act version of subsection (a) required that a corporation regularly submit financial statements to shareholders. This requirement was first added as an amendment in 1979 to the 1969 Model Act. Subsection (a) of the Code preserves the approach of former § 14-2-122(f), which required corporations to prepare balance sheets and income statements, but required that they be furnished to shareholders only if requested. A requirement that financial statements be mailed to all shareholders automatically was seen as unduly burdensome for some small corporations with small revenues, and perhaps with records kept only in the form of a check register. If the corporation's financial records are kept more formally, subsection (a) requires the income statement and balance sheet to be accompanied by a statement of sources and application of funds and a statement of changes in shareholders' equity, but only if these documents are prepared for other purposes.

Subsection (a) does not require financial statements to be prepared on the basis of generally accepted accounting principles ("GAAP"). Many small corporations have never prepared financial statements on the basis of GAAP. In light of these considerations, it would be too burdensome on some small and closely held corporations to require GAAP statements. If a corporation does prepare financial statements on a GAAP basis for any purpose for the particular year, however, it must send those statements to the shareholders as provided by subsection (a).

Subsection (b) requires an accompanying report or statement in one of two forms: (1) if the financial statements have been reported upon by a public accountant, his report must be furnished; or (2) in other cases, a statement of the president or the person responsible for the corporation's accounting records must be furnished (i) stating his reasonable belief as to whether the financial statements were prepared on the basis of generally accepted accounting principles, and, if not, describing the basis on which they were prepared, and (ii) describing any respects in which the financial statements were not prepared on a basis of accounting consistent with those prepared for the previous year. In requiring a statement by the president or person responsible for the corporation's financial affairs, it is recognized that in many cases this person will not be a professionally trained accountant and that he should not be held to the standard required of a professional. To emphasize the difference, Section 14-2-1620 requires a "statement" (rather than a "report" or "certificate") and calls for the person to express his "reasonable belief" (rather than "opinion") about whether or not the statements are prepared on the basis of GAAP or, if not, to describe the basis of presentation and any inconsistencies in the basis of the presentation as compared with the previous year. He is not required to describe any inconsistencies between the basis of presentation and GAAP. If the statements are not prepared on a GAAP basis, the description would normally follow guidelines of the accounting professional as to the reporting format considered appropriate for a presentation which departed from GAAP. (See, e.g., "Statement on Auditing Standards No. 14" of the American Institute of Certified Public Accountants.) For example, the description might state, with respect to a cash basis

statement of receipts and disbursements, that the statement was prepared on that basis and that it presents the cash receipts and disbursements of the entity for the period but does not purport to present the results of operations on the accrual basis of accounting.

Formerly § 14-2-122(g) provided a \$500 fine for refusal to furnish such reports when requested by a shareholder. This has not been preserved in the Code.

#### **Cross-References**

Inspection of records, see § 14-2-1602. "Shareholder" defined, see § 14-2-140.

### **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code Section 14-2-122, which was repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**Right to balance sheet and profit and loss statement.** — A request under this section for a copy of the corporation's most recent

balance sheet and profit and loss statement is completely independent from the stockholder's right under § 14-2-1602 to inspect the books and records. No question of good-faith can be raised under this section to defeat a stockholder's unbridled right to this information. *Shelters, Inc. v. Reeve*, 131 Ga. App. 18, 205 S.E.2d 108 (1974).

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 339.

**C.J.S.** — 18 C.J.S., Corporations, § 339.

#### **14-2-1621. Other reports to shareholders.**

If a corporation indemnifies or advances expenses to a director under Code Section 14-2-851, 14-2-852, 14-2-853, or 14-2-854 in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to the shareholders with or before the notice of the next shareholders' meeting. (Code 1981, § 14-2-1621, enacted by Ga. L. 1988, p. 1070, § 1.)

### **COMMENT**

Source: Model Act, § 16.21. This was formerly covered by § 14-2-156(h).

Section 14-2-1621 requires decisions to grant indemnification under Article 8, Part 5 to be reported to the shareholders with or before the notice of the next meeting of shareholders. This preserves the requirement of former law.

The Model Act, § 16.21(b), provided similar disclosure of decisions to issue shares to persons for promissory notes or for promises for future services under Section 14-2-621. This was omitted in the Code.

#### **Cross-References**

Indemnification of directors, see Article 8, Part 5. Notice of shareholders' meeting, see § 14-2-705. "Proceeding" defined, see § 14-2-850.



**14-2-1622. Annual registration for Secretary of State.**

(a) Each domestic corporation and each foreign corporation authorized to transact business in this state shall deliver to the Secretary of State for filing an annual registration that sets forth:

(1) The name of the corporation and the state or country under whose law it is incorporated;

(2) The street address and county of its registered office and the name of its registered agent at that office in this state;

(3) The mailing address of its principal office; and

(4) The names and respective addresses of its chief executive officer, chief financial officer, and secretary, or individuals holding similar positions.

(b) Information in the annual registration must be current as of the date the annual registration is executed on behalf of the corporation.

(c) The first annual registration must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the year following the calendar year in which a domestic corporation was incorporated or a foreign corporation was authorized to transact business. Subsequent annual registrations must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the following calendar years.

(d) The initial annual registration of a domestic corporation shall be filed within 90 days after the day its articles of incorporation are delivered to the Secretary of State for filing. However, the initial annual registration of a domestic corporation whose articles of incorporation are delivered to the Secretary of State for filing subsequent to October 1 shall be filed between January 1 and April 1 of the year next succeeding the calendar year in which its certificate of incorporation is issued by the Secretary of State.

(e) If an annual registration does not contain the information required by this Code section, the Secretary of State shall promptly notify the reporting domestic or foreign corporation in writing and return the report to it for correction. If the report is corrected to contain the information required by this Code section and delivered to the Secretary of State within 30 days after the effective date of notice, it is deemed to be timely filed. (Code 1981, § 14-2-1622, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 25; Ga. L. 1999, p. 405, § 13.)

**Administrative rules and regulations.** — the State of Georgia, Office of Secretary of Corporate Annual Registration, Official State, Commissioner of Corporations, Chapter Compilation of the Rules and Regulations of 590-7-4.

**COMMENT**

Model Act, § 16.22. This replaces former §§ 14-2-350 & 14-2-351.

The Model Act requirements relating to the annual registration that each corporation must submit to the Secretary of State have been modified in Section 14-2-1622 in an effort to make it a limited information document for use by the Secretary of State, members of the general public, and shareholders. The purpose of the annual registration is to show the location of the principal office of the corporation, and the names and residence addresses of its principal officers. Model Act requirements to disclose the identity and addresses of directors and the general nature of the corporation's business and its capital structure were eliminated, on the theory that the disclosures were designed solely to make it possible to locate the corporation. The Model Act required disclosure of business addresses of directors and principal officers, but for some corporations that may become inactive, and fail to maintain a principal office or a registered agent, this information would be of little help in locating principal officers. Thus the Code requires disclosure of the "respective" addresses of these officers, which may differ from the corporation's last known address.

The reference to "principal officers" in Section 14-2-1622(a)(4) is intended to simplify reporting requirements of corporations with very large numbers of employees who have some managerial responsibility and who, for business reasons, are designated as officers. The "principal officers" of a corporation include at least the chairman of the board of directors, the chief executive officer, and the officers performing the traditional functions performed by the corporate secretary and treasurer, no matter what their designation.

The annual registration is required of both domestic corporations and foreign corporations qualified to transact business in the state. The failure to file the annual registration, like the failure to satisfy other mandatory requirements of the Act, is a ground for administrative dissolution or revocation of the certificate of authority to transact business.

Subparagraph (c) was amended by giving the Secretary of State authority to change the dates on which annual registrations will be filed by corporations. This will permit staggered filing dates in the future, if this is deemed administratively efficient.

**Note to 1993 Amendment**

The 1993 amendment amended subparagraph (a)(1) to require submission of an employee identification number with the annual registration. The 1993 amendment also added subparagraph (d) which mandates a different filing schedule for the initial annual registration of a domestic corporation.

**Cross-References**

Annual registration form prescribed by Secretary of State, see § 14-2-121. "Deliver" includes mail, see § 14-2-140. Effective date of notice, see § 14-2-141. Effective time and date of filing, see § 14-2-123. Filing fees, see § 14-2-122. Filing requirements, see § 14-2-120. Involuntary dissolution for failure to file annual registration, see § 14-2-1420. "Notice" defined, see § 14-2-141. Notice to the corporation, see § 14-2-141. Officers, see § 14-2-840. "Principal office" defined, see § 14-2-140. Registered agent, see §§ 14-2-501 & 14-2-1507. Registered office, see §§ 14-2-501 & 14-2-1507. Revocation of certificate of authority for failure to file annual registration, see § 14-2-1530.



## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Sections 14-2-350 and 14-2-351, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Failure to amend corporate registry.** — Where the defendant admitted that the defendant's name was left on the corporate registry, merely asserting that the failure to remove defendant was due to the "negligence of the corporation," because defendant had "received assurances" that defendant's name would be removed, the trial

court correctly determined that there was no genuine issue of material fact as to the defendant's status as a corporate officer during all periods relevant to the suit. *Speir v. Krieger*, 235 Ga. App. 392, 509 S.E.2d 684 (1998).

Cited in *In re Carmichael Enters., Inc.*, 334 F. Supp. 94 (N.D. Ga. 1971); *Hallmark Properties, Inc. v. Slater*, 229 Ga. 432, 192 S.E.2d 157 (1972); *Lukas v. Pittman Hwy. Contracting Co.*, 134 Ga. App. 305, 214 S.E.2d 398 (1975); *Due W. Assocs. v. Renfro Mining & Grading Co.*, 194 Ga. App. 397, 391 S.E.2d 13 (1990).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 339. 36 Am. Jur. 2d, Foreign Corporations, § 222.

**C.J.S.** — 19 C.J.S., Corporations, §§ 583, 904.

## ARTICLE 17

## TRANSITION PROVISIONS

**Law reviews.** — For article, "Georgia's New Business Corporation Code," see 24 Ga. St. B.J. 158 (1988). For article, "Changes in

Corporate Practice under Georgia's New Business Corporation Code," see 40 Mercer L. Rev. 655 (1989).

**14-2-1701. Application of chapter.**

(a) Subject to the limitations of subsection (b) of this Code section, this chapter shall apply:

(1) To all corporations for profit, existing on or formed after July 1, 1989, including corporations for profit organized under or subject to any prior general corporation law of this state;

(2) To all corporations for profit created by special Act of the General Assembly as to which power has been reserved to withdraw the franchise;

(3) To any corporation, organization, professional association, or association, to the extent that the former general corporation law of this state or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to the corporation, organization, professional association, or association; and

(4) To any corporation organized under any statute of this state or if it were originally created by special Act of the General Assembly without reservation of power to withdraw the franchise, if under any prior general corporation law of this state the corporation either has amended its

charter or has been a party to a merger or a consolidation, and also to any corporation which after July 1, 1989, in an amendment to its articles of incorporation or restatement of its articles of incorporation or in a merger, elects to be subject to this chapter. Any corporation to which this chapter applies by reason of this paragraph shall have all the rights, privileges, franchises, immunities, and powers and shall be subject to all the duties, liabilities, and disabilities of a corporation to which this chapter applies as well as of the statute or special Act by which the corporation was originally created; but in the event of a conflict between the statute or special Act and this chapter, the statute or special Act shall govern.

(b) This chapter shall not apply:

(1) To corporations organized under a statute of this state other than either this chapter or any prior general corporation law, except to the extent that the former general corporation law or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to those corporations;

(2) To any corporation originally created by special Act of the General Assembly as to which power has not been reserved to withdraw the franchise, except as otherwise provided in subsection (a) of this Code section;

(3) To any corporation originally created by an Act of the General Assembly as to which power has been reserved to withdraw the franchise, if the purpose of the corporation would require its organization to take place under a statute other than this chapter if it were being organized after July 1, 1989, except to the extent that the former general corporation law of this state or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to corporations organized for that purpose;

(4) To any public authority created by an Act of the General Assembly, except to the extent that the former general corporation law of this state or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to the public authority; or

(5) To corporations of any class, to the extent that the class is specifically exempted from this chapter or any of its provisions.

(c) This chapter shall not impair the existence of any corporation existing on July 1, 1989. Any existing corporation to which this chapter is applicable and its shareholders, directors, and officers shall have the same rights and be subject to the same limitations, restrictions, liabilities, and penalties as a corporation formed under this chapter and its shareholders, directors, and officers.

(d) If the articles of incorporation, charter, or bylaws of a corporation in existence on July 1, 1989, contain any provisions that were not authorized



or permitted by the prior general corporation law of this state but which are authorized or permitted by this chapter, the provisions of the articles of incorporation, charter, or bylaws shall be valid on and from that date, and action may be taken on and from that date in reliance on those provisions. If the articles of incorporation, charter, or bylaws of a corporation in existence on July 1, 1989, contain any provisions that were authorized or permitted by the prior general corporation law of this state, that were validly adopted under the law in effect at the time of their adoption, and that are authorized or permitted by this chapter, the provisions of the articles of incorporation, charter, or bylaws shall continue to be valid on and from that date, whether or not this chapter imposes requirements for the adoption of such provisions that are different from those in effect at the time the provisions were adopted.

(e) This chapter shall apply to commerce with foreign nations and among the several states only insofar as the application may be permitted under the Constitution and laws of the United States. (Code 1981, § 14-2-1701, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 26.)

**Law reviews.** — For article, "Comparison of Features of Old and New Business Corporation Laws Relating to Domestic Corporations," see 5 Ga. St. B.J. 13 (1968). For article discussing the consolidation of laws

dealing with various types of financial organizations into the Financial Institutions Code of Georgia (Title 7), see 11 Ga. St. B.J. 225 (1975).

#### COMMENT

Source: Present § 14-2-3(a), (b), (c), (d), & (f). The language of present Georgia law was preserved in its entirety, in place of the Model Act provision, § 17.01.

The fundamental principle underlying Section 14-2-1701 is that the Code should ultimately be made fully applicable to all existing business corporations as well as to all new business corporations formed after the effective date of the new statute. It is undesirable to "grandfather" existing corporations under earlier statutes since that results in the permanent coexistence of two different and overlapping systems of corporation law, with resulting confusion. This is particularly true of the Code, which builds directly on the experience of many years with existing corporation statutes and contains few major substantive changes.

Section 14-2-1701 applies this basic principle in its broadest sense by making the Code applicable as of its "effective date" (prescribed in Section 14-2-1706) to all domestic corporations formed under general statutes for corporations for profit. This includes all prior general business corporation acts, but not statutes providing for not-for-profit corporations or associations, or corporations formed for the purpose of engaging in a business for which the state has provided a separate incorporation procedure.

Subsection (b) preserves the language of prior law, recognizing that the Code cannot constitutionally apply to certain corporations. Article III, Sec. VII, Para. XVII of the Georgia Constitution of 1945, which provision was ratified in substantially its present form in 1982, permitted charters to banking, trust, insurance, railroad, canal, navigation, express and telegraph companies to be granted only by the Secretary of State. Accordingly, in this state the incorporation procedures for the special-purpose or so-called "Secretary of State" corporations are separate and distinct from the incorpo-

ration procedures for general business corporations, with the various "Secretary of State" corporations being organized under, and in varying degrees governed by, special statutes applicable only to corporations of a particular class. This Code does not, and indeed could not, without a constitutional amendment, alter this established pattern. Instead, it seeks merely to clarify the existing law, and to set forth, with a minimum of ambiguity, the full range of this exception to the Code. It should be noted that it does not exempt these corporations to the extent that this Code or a former general corporation law has been or shall be made applicable to any of those corporations. This flexibility will allow corporations of those special classes to consider whether they wish to secure special legislative action to permit this Code to apply to them.

Subsection (a)(4) recognizes that Secretary of State and other corporations may be permitted voluntarily to become subject to this Code. Where the provisions of the special law governing a class of "Secretary of State" corporations do not prohibit the joint application of this Code through a charter amendment, the Code provides a rule for resolving potential conflicts between special Acts and the Code: the provisions of the special Act shall govern.

Section 14-2-1701 applies the Code to all corporations to which that application is constitutionally permissible. In view of the adoption of a "reservation of power" clause in 1863, there are very few active business corporations to which this Code will not be applicable under this section.

Subsection (e) makes clear that the exercise of the General Assembly's power is intended to extend only as far as is constitutionally permissible, both in terms of interstate commerce and the contracts clause.

#### **Note to 1993 Amendment**

The 1993 amendment added the second sentence of subparagraph (d) to include a general savings provision to the effect that any provision in a corporation's articles of incorporation or bylaws which was valid and properly adopted under the prior Georgia corporate law and which is permissible under current law remains valid even if current law requires a different manner of adoption.

#### **Cross-References**

Application to previously qualified foreign corporations, see § 14-2-1702. Banks, see Title 7. Canal & navigation companies, see Title 52. Credit unions, see Title 7. Express companies, see Title 46. Foreign corporations, generally see Article 15 of this title. Insurance companies, see Title 33. Railroads, see Title 46. Reservation of power to amend or repeal Code, see § 14-2-102. Secretary of State corporations, see Ch. 4 of this title. Telegraph companies, see Title 46.

### **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-103 and former Code Section 14-2-3, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, are included in the annotations for this Code section.

**Phrase "corporations engaged in any business" in former Code 1933, § 114-101 (see O.C.G.A. § 34-9-1)** included only those cor-

porations governed by the Georgia Business Corporation Code, former Code 1933, § 22-2101 et seq. Hospital authorities are not governed by Georgia Business Corporation Code, but are expressly exempted therefrom. *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978) (decided under former Code 1933, § 22-103).

**Cited in** *Short v. State*, 235 Ga. 394, 219 S.E.2d 728 (1975).



## RESEARCH REFERENCES

**ALR.** — Power of corporation after expiration or forfeiture of its charter, 47 ALR 1288; 97 ALR 477.

**14-2-1702. Application to qualified foreign corporations.**

A foreign corporation authorized to transact business in this state on July 1, 1989, is subject to this chapter but is not required to obtain a new certificate of authority to transact business under this chapter. (Code 1981, § 14-2-1702, enacted by Ga. L. 1988, p. 1070, § 1.)

## COMMENT

Source: Model Act Section 14-2-1702. This replaces present § 14-2-329.

Section 14-2-1702 makes the Code applicable on its effective date to all foreign corporations that are qualified to transact business in the state on that date. But these corporations need not refile and obtain new certificates of authority under the Code.

**Cross-References**

Application to interstate and foreign commerce, see § 14-2-1701. Domesticated foreign corporations, see § 14-2-1540. Foreign corporations generally, see Article 15.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code 1933, § 22-419 and former Code Section 14-2-329, which were repealed by Ga. L. 1988, p. 1070, § 1, effective July 1, 1989, is included in the annotations for this Code section.

**No legislative grant of immunities from taxation or regulation.** — The legislative grant of rights and privileges to a foreign corporation does not include the immunities from taxation or regulation enjoyed by domestic corporations. *Roberts v. Lipson*, 231 Ga. 142, 200 S.E.2d 722 (1973) (decided under former Code 1933, § 22-419).

**No exemption from intangible tax in-**

**cluded in grant of rights and privileges.** — The grant of "rights and privileges" to undomesticated foreign corporations qualified to do business in this state does not include the exemption of their stock from the Georgia intangible tax. *Roberts v. Lipson*, 231 Ga. 142, 200 S.E.2d 722 (1973) (decided under former Code 1933, § 22-419).

The General Assembly did not intend to grant to undomesticated foreign corporations which qualified to do business in this state an exemption of its stock from intangible tax. *Roberts v. Lipson*, 231 Ga. 142, 200 S.E.2d 722 (1973) (decided under former Code 1933, § 22-419).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 186 et seq.

**C.J.S.** — 19 C.J.S., Corporations, §§ 897, 898.

**14-2-1703. Saving provisions.**

(a) Except as provided in subsection (b) of this Code section, the amendment or repeal of a statute by this chapter does not affect:

(1) The operation of the statute or any action taken under it before its repeal;

(2) Any ratification, right, remedy, privilege, obligation, cause of action, liability, penalty, or action or special proceeding acquired, accrued, or incurred under the statute before its repeal except as provided in subsection (f) of Code Section 14-2-630 and Code Section 14-2-1332; but the same, as well as actions that are pending on July 1, 1989, may be asserted, enforced, prosecuted, or defended as if the prior statute has not been repealed;

(3) Any violation of the statute, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal;

(4) Transactions validly entered into before July 1, 1989, and the rights, duties, and interests flowing from them shall remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by any statute repealed by this chapter as though the repeal had not occurred;

(5) Any proceeding, reorganization, or dissolution commenced under the statute before its repeal, and the proceeding, reorganization, or dissolution may be completed in accordance with the statute as if it had not been repealed; or

(6) Any provision of the articles of incorporation, charter, or bylaws of a corporation in existence on July 1, 1989, that was authorized or permitted by the prior general corporation law of this state, that was validly adopted under the law in effect at the time of its adoption, and that is authorized or permitted by this chapter.

(b) If a penalty or punishment imposed for violation of a statute repealed by this chapter is reduced by this chapter, the penalty or punishment if not already imposed shall be imposed in accordance with this chapter. (Code 1981, § 14-2-1703, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1993, p. 1231, § 27.)

**Code Commission notes.** — Pursuant to deleted following “Code Section 14-2-630” Code Section 28-9-5, in 1993, a comma was in paragraph (a)(2).

#### COMMENT

The saving provisions of Section 14-2-1703 are derived from section 25 of the Uniform Statutory Construction Act, which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1965. They have been supplemented by subsections (a)(3) and (a)(4), which draw upon present § 14-2-3(e). An exception has been made for the limitations imposed on actions for violations of preemptive rights, dissenters' rights, and claims against dissolved corporations by the Code, which is intended to limit actions for violations of preemptive rights that occurred prior to as well as after adoption of the Code.



**Note to 1993 Amendment**

The 1993 amendment deleted reference to Code Section 14-2-1407, which dealt with statutes of limitations against dissolved corporations. The drafters never intended for § 14-2-1407 to be applied retroactively to corporations that were previously dissolved under former § 14-2-293. Since corporations dissolved prior to the effective date of the new Code (July 1, 1989) could not have published the newspaper notice required by § 14-2-1407, and in many cases lacked the power to engage in a later publication, because they were fully wound up, the effect of this subsection could have been read to extend liability for all corporations dissolving prior to July 1, 1989 indefinitely for contingent claims and claims arising after dissolution. Because there was no intent to extend the periods of limitation, the deletion of the exception has the effect of ensuring that corporations dissolved prior to July 1, 1989 are entitled to the limitation periods afforded under the former law.

The 1993 amendment also added subparagraph (6) to include a general savings provision to the effect that any provision in a corporation's articles of incorporation or bylaws which was valid and properly adopted under the prior Georgia corporate law and which is permissible under current law remains valid even if current law requires a different manner of adoption.

**OPINIONS OF THE ATTORNEY GENERAL**

**Effect of repeal on reinstatement of corporation.** — A foreign or domestic business corporation which was dissolved or revoked under the law in effect prior to July 1, 1989, may be reinstated in accordance with the prior law in effect at the time of the revocation or dissolution. 1990 Op. Att'y Gen. No. 90-39.

**Effect of repeal on civil penalty provisions.** — Where a foreign business corporation had its certificate of authority revoked

under the former corporation code and sought reinstatement after July 1, 1989, the civil penalty of \$500.00 per year or part thereof for operation without a certificate of authority should be assessed for the period of time between revocation and reinstatement, if the foreign corporation continued to transact business in Georgia without a certificate of authority. 1990 Op. Att'y Gen. No. 90-39.

## CHAPTER 3

## NONPROFIT CORPORATIONS

Article 1		Sec.	
General Provisions			over unlawful assignment of corporate assets; dissolution of corporation; investigative and subpoena powers.
PART 1			
SHORT TITLE; LEGISLATIVE POWER			
Sec.			PART 7
14-3-101.	Short title.		
14-3-102.	Reservation of power of General Assembly.		RELIGIOUS CORPORATIONS DOCTRINE
	PART 2	14-3-180.	Construction of chapter when religious doctrine inconsistent.
	DOCUMENTS		
14-3-120.	Filing of documents.		Article 2
14-3-121.	Forms.		Incorporation
14-3-122.	Filing fees.		
14-3-123.	Effective time and date of document.	14-3-201.	Who may incorporate.
14-3-124.	Correcting filed document.	14-3-202.	Articles of incorporation.
14-3-125.	Duty of Secretary of State to file documents; effect of filing or refusing to do so.	14-3-202.1.	Publication of notice of intent to file articles of incorporation.
14-3-126.	Appeal from Secretary of State's refusal to file document.	14-3-203.	Effect of filing articles of incorporation.
14-3-127.	Evidence of filing.	14-3-204.	Liability for reincorporation transactions.
14-3-128.	Certificate of existence or authorization.	14-3-205.	Organizational meeting.
14-3-129.	Penalty for signing false document.	14-3-206.	Bylaws.
		14-3-207.	Emergency bylaws.
	PART 3		Article 3
	SECRETARY OF STATE		Purposes and Powers
14-3-130.	Powers of Secretary of State.	14-3-301.	Purposes of corporation.
	PART 4	14-3-302.	Duration and powers of corporation.
	DEFINITIONS; NOTICE	14-3-303.	Emergency powers.
14-3-140.	Definitions.	14-3-304.	Ultra vires.
14-3-141.	Notice.	14-3-305.	Nonprofit defined; rights; director's role; reporting.
	PART 5		Article 4
	COURT-ORDERED MEETINGS		Corporate Name
14-3-160.	Authority of court to order meetings; notice; validity of meeting or vote.	14-3-401.	Corporate name.
	PART 6	14-3-402.	Reservation of corporate name.
	POWERS OF ATTORNEY GENERAL	14-3-403.	Registered name of foreign corporation [Repealed].
14-3-170.	Powers of Attorney General		



## NONPROFIT CORPORATIONS

### Article 5

#### Registered Office and Registered Agent

#### PART 1

#### GENERAL PROVISIONS

Sec.

- 14-3-501. Registered office and registered agent.
- 14-3-502. Change of registered office or registered agent.
- 14-3-503. Resignation of registered agent.
- 14-3-504. Service of process on corporation.

#### PART 2

#### VENUE

- 14-3-510. Venue — Applicable laws; where corporation deemed to reside; corporations with principal office under prior law.

### Article 6

#### Membership

#### PART 1

#### GENERAL PROVISIONS

- 14-3-601. Authority to establish criteria or procedures for membership.
- 14-3-602. Consideration for membership in corporation.
- 14-3-603. Membership not required.

#### PART 2

#### RIGHTS AND LIABILITIES OF MEMBERS

- 14-3-610. Voting rights.
- 14-3-611. Limitation on members' liability.
- 14-3-612. Liability for dues, assessments, or fees.
- 14-3-613. Remedies of creditors of corporation against members.

#### PART 3

#### TERMINATION OF MEMBERSHIP

- 14-3-620. Resignation by member and effect thereof.
- 14-3-621. Involuntary termination of membership; procedures;

Sec.

statute of limitations for challenging involuntary termination; liability for dues, assessments, or fees.

#### PART 4

#### DELEGATES

- 14-3-630. Authority to provide for delegates.

### Article 7

#### Meetings

#### PART 1

#### GENERAL PROVISIONS

- 14-3-701. Annual meeting.
- 14-3-702. Special meetings.
- 14-3-703. Court-ordered meetings.
- 14-3-704. Approval of action without meeting.
- 14-3-705. Notice of meeting.
- 14-3-706. Waiver of notice.
- 14-3-707. Record date.
- 14-3-708. Action taken without meeting.

#### PART 2

#### VOTING

- 14-3-720. Membership list for meeting.
- 14-3-721. Number of votes to which member entitled; effect of membership in names of two or more persons.
- 14-3-722. Quorum.
- 14-3-723. Majority of votes constitutes act of membership.
- 14-3-724. Proxies.
- 14-3-725. Voting requirements for election of directors; cumulative voting.
- 14-3-726. Election of directors by category.
- 14-3-727. Validity of signature on proxy.

#### PART 3

#### VOTING AGREEMENTS

- 14-3-730. Agreements among members.

#### PART 4

#### DERIVATIVE PROCEEDINGS

- 14-3-740. Definitions.

## CORPORATIONS, PARTNERSHIPS, ETC.

Sec.

- 14-3-741. Standing.
- 14-3-742. Demand for suitable action by corporation required.
- 14-3-743. Stay of proceeding.
- 14-3-744. Dismissal of proceeding.
- 14-3-745. Discontinuance or settlement of proceeding prohibited without court approval.
- 14-3-746. Payment of expenses of proceeding.
- 14-3-747. Applicability to foreign corporations.

### Article 8

#### Directors and Officers

##### PART 1

##### BOARD OF DIRECTORS

- 14-3-801. Requirement for and duties of board of directors.
- 14-3-802. Qualifications of directors.
- 14-3-803. Number of directors.
- 14-3-804. Election of directors.
- 14-3-805. Terms of directors.
- 14-3-806. Staggered terms for directors.
- 14-3-807. Resignation of directors.
- 14-3-808. Removal of directors.
- 14-3-809. Procedure for removing directors.
- 14-3-810. Removal of director by court.
- 14-3-811. Vacancies.
- 14-3-812. Compensation of directors.
- 14-3-813. Appointment of provisional director in case of deadlock.

##### PART 2

##### MEETINGS AND ACTION OF THE BOARD

- 14-3-820. Meetings of directors.
- 14-3-821. Action taken without meeting.
- 14-3-822. Notice.
- 14-3-823. Waiver of notice.
- 14-3-824. Quorum; when director deemed to assent to action.
- 14-3-825. Committees.

##### PART 3

##### STANDARDS OF CONDUCT

- 14-3-830. Standards of conduct for directors.
- 14-3-831. Liability for unlawful distribution.

### PART 4

#### OFFICERS

Sec.

- 14-3-840. Officers are as described in articles or bylaws or as appointed; minutes and records; holding more than one office; titles; signing of documents.
- 14-3-841. Duties of officers.
- 14-3-842. Standards of conduct for officers.
- 14-3-843. Resignation and removal of officers.
- 14-3-844. Contract rights of officers.
- 14-3-845. Authority of officer to sign documents; validity of document.
- 14-3-846. Effect of corporate seal on document.

### PART 5

#### INDEMNIFICATION

- 14-3-850. Definitions.
- 14-3-851. Authority to indemnify director involved in legal proceeding.
- 14-3-852. Indemnification for reasonable expenses of successful defense.
- 14-3-853. Advance or reimbursement of litigation expenses.
- 14-3-854. Court ordered indemnification and payment of expenses.
- 14-3-855. Determination of right and authorization for payment of indemnification required.
- 14-3-856. Indemnification of officers, employees, and agents.
- 14-3-857. Insurance.
- 14-3-858. Applicability of indemnification provisions.

### PART 6

#### CONFLICTING INTEREST TRANSACTIONS

- 14-3-860. Definitions.
- 14-3-861. Transactions not subject to being enjoined, set aside, or other sanctions.
- 14-3-862. Directors' action after disclosure of conflict or abstention by interested director.



## NONPROFIT CORPORATIONS

Sec.		Sec.	
14-3-863.	Members' action following disclosure of conflict.		operate as for profit corporation.
14-3-864.	Effect of court approval of transaction.	14-3-1041.	Procedure for amendment.
14-3-865.	Voidability of conflicting interest transaction.	14-3-1042.	Applicability of Business Corporation Code.
<b>Article 9</b>		<b>Article 11</b>	
<b>Reserved</b>		<b>Merger</b>	
<b>Article 10</b>		14-3-1101.	Definitions; plan of merger.
<b>Amendment of Articles of Incorporation and Bylaws</b>		14-3-1102.	Merger without court approval; notice to Attorney General; receipt or retention by member of anything resulting from merger.
<b>PART 1</b>		14-3-1103.	Approval of plan of merger by members or directors; abandonment of plan.
<b>AMENDMENT OF ARTICLES OF INCORPORATION</b>		14-3-1104.	Articles of merger; publication of notice of merger.
14-3-1001.	Authority of corporation to amend.	14-3-1105.	Effect of merger.
14-3-1002.	Amendment where corporation has no members or members not entitled to vote.	14-3-1106.	Merger with foreign corporation.
14-3-1003.	Amendment where vote of members required.	14-3-1107.	Effect of merger on bequest, devise, or other transfer of property.
14-3-1004.	Voting on amendments by classes of members.	<b>Article 12</b>	
14-3-1005.	Articles of amendment.	<b>Sale, Encumbrance, or Other Disposition of Assets</b>	
14-3-1005.1.	Notice of intent to change corporate name.	14-3-1201.	Sale or other disposal of assets in usual course of activities; mortgage or other encumbrance of assets.
14-3-1006.	Restated articles of incorporation.	14-3-1202.	Sale or other disposition of assets other than in usual course of activities.
14-3-1007.	Amendment of articles pursuant to court order.	<b>Article 13</b>	
14-3-1008.	Effect of amendment on existing cause of action.	<b>Distributions</b>	
<b>PART 2</b>		14-3-1301.	Distributions prohibited.
<b>AMENDMENT OF BYLAWS</b>		14-3-1302.	Exceptions to prohibition against distributions.
14-3-1020.	Amendment where corporation has no members or members not entitled to vote.	<b>Article 14</b>	
14-3-1021.	Amendment where vote of members required.	<b>Dissolution</b>	
14-3-1022.	Voting by classes of members.	<b>PART 1</b>	
<b>PART 3</b>		<b>VOLUNTARY DISSOLUTION</b>	
<b>APPROVAL OF AMENDMENTS</b>		14-3-1401.	Dissolution by incorporators or initial directors.
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<b>AMENDMENT TO OPERATE FOR PROFIT</b>			
14-3-1040.	Authority to amend articles to		

## CORPORATIONS, PARTNERSHIPS, ETC.

Sec.		Sec.	
14-3-1402.	Proposal of dissolution and approval thereof.	14-3-1502.	Transacting business without certificate of authority.
14-3-1403.	Plan of dissolution.	14-3-1503.	Application for certificate of authority.
14-3-1404.	Notice of intent to dissolve.	14-3-1504.	When amended certificate of authority required.
14-3-1404.1.	Publication of notice of intent to dissolve.	14-3-1505.	Effect of certificate of authority.
14-3-1405.	Revocation of dissolution proceedings.	14-3-1506.	Corporate name of foreign corporation.
14-3-1406.	Effect of notice of intent to dissolve.	14-3-1507.	Registered office and registered agent of foreign corporation.
14-3-1407.	Disposition of known claims against corporation.	14-3-1508.	Change of registered office or registered agent of foreign corporation.
14-3-1408.	Request for presentation of claims; enforcement of claims; when claims barred.	14-3-1509.	Resignation of registered agent of foreign corporation.
14-3-1409.	Articles of dissolution.	14-3-1510.	Service of process on foreign corporation.
14-3-1410.	Revival of corporation after dissolution by expiration of period of duration.		

### PART 2

#### ADMINISTRATIVE DISSOLUTION

14-3-1420.	Grounds for administrative dissolution.
14-3-1421.	Procedure for and effect of administrative dissolution.
14-3-1422.	Reinstatement following administrative dissolution.
14-3-1423.	Appeal from denial of reinstatement.

### PART 3

#### JUDICIAL DISSOLUTION

14-3-1430.	Grounds for judicial dissolution.
14-3-1431.	Procedure for judicial dissolution.
14-3-1432.	Authority to appoint receiver or custodian; powers and duties of receiver or custodian.
14-3-1433.	Decree of dissolution.

### PART 4

#### ASSETS OF DISSOLVED CORPORATION

14-3-1440.	Deposit of assets with Office of Treasury and Fiscal Services.
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### Article 15

#### Foreign Corporations

### PART 1

#### CERTIFICATE OF AUTHORITY

14-3-1501.	Certificate of authority to transact business required.
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14-3-1502.	Transacting business without certificate of authority.
14-3-1503.	Application for certificate of authority.
14-3-1504.	When amended certificate of authority required.
14-3-1505.	Effect of certificate of authority.
14-3-1506.	Corporate name of foreign corporation.
14-3-1507.	Registered office and registered agent of foreign corporation.
14-3-1508.	Change of registered office or registered agent of foreign corporation.
14-3-1509.	Resignation of registered agent of foreign corporation.
14-3-1510.	Service of process on foreign corporation.

### PART 2

#### CERTIFICATE OF WITHDRAWAL

14-3-1520.	Withdrawal of foreign corporation from state.
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### PART 3

#### REVOCATION OF CERTIFICATE OF AUTHORITY

14-3-1530.	Grounds for revocation.
14-3-1531.	Procedure for and effect of revocation.
14-3-1532.	Appeal from revocation.

### PART 4

#### DOMESTICATION UNDER PRIOR LAW

14-3-1540.	Applicability of chapter to foreign corporations domesticated under prior law.
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### Article 16

#### Records and Reports

### PART 1

#### RECORDS

14-3-1601.	Required corporate records.
14-3-1602.	Members' right to copy and inspect records.
14-3-1603.	Scope of inspection right.
14-3-1604.	Court-ordered inspection.
14-3-1605.	Use of membership list.



PART 2		Sec.	
REPORTS			
Sec.			chapter applicable and as to which not applicable; corporations existing on July 1, 1991; foreign and interstate commerce.
14-3-1620.	Furnishing financial statements to members.		
14-3-1621.	Report to members of indemnification or advance of expenses.	14-3-1702.	Applicability to qualified foreign corporations.
14-3-1622.	Annual registration of corporation.	14-3-1703.	Saving provisions.
<b>Article 17</b>			
<b>Applicability</b>			
14-3-1701.	Corporations as to which		

### CODE REVISION COMMISSION NOTE ON COMMENTS

The comments appearing in this chapter were prepared under the supervision of the Georgia Nonprofit Corporation Code Revision Committee, an ad hoc committee of the Fiduciary and Corporate and Banking Law Sections of the State Bar of Georgia. These comments are included in the Official Code of Georgia Annotated at the request of the Committee. Neither the General Assembly of Georgia nor the Code Revision Commission of the State of Georgia participated in the drafting of these comments or reviewed the comments for content. The comments should not be considered to constitute a statement of legislative intention by the General Assembly of Georgia, nor do they have the force of statutory law.

**Cross references.** — Management of funds held by organizations for eleemosynary purposes, § 44-15-1 et seq.

**Editor's notes.** — Ga. L. 1991, p. 465, effective July 1, 1991, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter consisted of Code Sections 14-3-1 through 14-3-3, 14-3-3.1, 14-3-4 through 14-3-6, 14-3-6.1, 14-3-7 (Article 1); 14-3-20 through 14-3-23 (Article 2); 14-3-40, 14-3-41 (Article 3); 14-3-60, 14-3-61, 14-3-61.1, 14-3-62, 14-3-63 (Article 4); 14-3-80 through 14-3-83 (Article 5); 14-3-100 through 14-3-113.1 (Article 6); 14-3-130 through 14-3-136 (Article 7); 14-3-150 through 14-3-155 (Article 8); 14-3-170 through 14-3-175 (Article 9); 14-3-190, 14-3-191 (Article 10); 14-3-210 through 14-3-230 (Article 11); 14-3-240 through 14-3-248, 14-3-248.1, 14-3-249 through

14-3-260 (Article 12); 14-3-270, 14-3-271 (Article 13); 14-3-290 through 14-3-293 (Article 14); 14-3-310 through 14-3-313 (Article 15); and 14-3-330 through 14-3-332 (Article 16); and was based on Ga. L. 1968, p. 565, § 1; Ga. L. 1969, p. 152, §§ 1, 54-68, 75, 83; Ga. L. 1970, p. 605, §§ 3, 4; Ga. L. 1972, p. 433, §§ 4, 5; Ga. L. 1975, p. 583, §§ 29-42; Ga. L. 1975, p. 778, § 2; Ga. L. 1976, p. 1102, §§ 21-32; Ga. L. 1976, p. 1576, § 5; Ga. L. 1977, p. 324, §§ 12-16; Ga. L. 1980, p. 603, §§ 5-7; Ga. L. 1980, p. 623, §§ 15-18; Ga. L. 1981, p. 1425, § 1; Ga. L. 1982, p. 3, § 14; Ga. L. 1982, p. 886, §§ 6, 12; Ga. L. 1983, p. 3, § 11; Ga. L. 1983, p. 1479, §§ 19-28; Ga. L. 1984, p. 22, § 14; Ga. L. 1987, p. 537, § 6; Ga. L. 1987, p. 849, §§ 4, 5; Ga. L. 1987, p. 1448, §§ 4, 5; Ga. L. 1988, p. 157, § 2; Ga. L. 1988, p. 303, §§ 3, 4; Ga. L. 1989, p. 946, §§ 77-102; Ga. L. 1989, p. 1027, §§ 1-24, 26-30; and Ga. L. 1990, p. 257, §§ 28-31.

**Law reviews.** — For article, "1975 Amendments to the Georgia Business and Nonprofit Corporation Codes," see 12 Ga. St. B.J. 81 (1975). For article, "The Development of Nonprofit Corporation Law and an

Agenda for Reform," see 34 Emory L.J. 617 (1985).

For note on 1999 amendments to sections in this chapter, see 16 Ga. St. U.L. Rev. 27 (1999).

### Comments to Georgia Nonprofit Corporation Code

#### NOTE AS TO DRAFTING COMMITTEE

The Georgia Nonprofit Corporation Code was completely recodified by enactment in 1991 of House Bill 226, which was based on a draft prepared by the Georgia Nonprofit Corporation Code Revision Committee, an ad hoc committee of two sections of the State Bar of Georgia. The Committee, operating under the auspices of the Fiduciary and Corporate and Banking Law Sections, was composed of the following individuals:

George H. Lanier, Chairman

Patricia T. Morgan, Reporter  
(Associate Professor, Georgia State University College of Law)

Judith M. Becker

Larry V. McLeod

Joseph W. Crooks

Robert J. B. Petmecky

David N. Dorough

Mary F. Radford

John C. Joyner

Tobin N. Watt

Joseph B. Kennedy

Benjamin T. White

James H. Landon

The following individuals provided special assistance to the Committee:

Representative Mary Margaret Oliver

Senator C. Donald Johnson, Jr.

Verley J. Spivey, Deputy Secretary of State

Warren Rary, Special Assistant and Legislation Coordinator, Office of the Secretary of State

Janet K. Jackson, Deputy Director, Business Services and Regulation, Office of the Secretary of State

H. Perry Michael, Executive Assistant, Attorney General

Mark H. Cohen, Senior Assistant Attorney General

Terry A. McKenzie, Deputy Legislative Counsel

George E. Hibbs, Assistant General Counsel, State Bar of Georgia

#### NOTES AS TO COMMENTS

The Notes to 1982 and 1983 Amendments included in the Comments in this chapter were prepared by Nat G. Slaughter, III, Chairman, and Mitchell M. Purvis, Secretary, of the Corporation Code Revision Committee of the Corporate and Banking Law Section of the State Bar of Georgia. The Notes to 1984 and 1986 Amendments were prepared by William E. Eason, Jr., Chairman, and Mitchell M. Purvis, Secretary, of that Committee. The Notes to the 1985 Amendments were prepared by William E. Eason, Jr., Chairman, Mitchell M. Purvis, Secretary, and members William S. Jacobs and Michael J. Egan, III of that



Committee. The Notes to 1987 Amendments were prepared by Mitchell M. Purvis, Chairman, and member William S. Jacobs of that Committee. Mitchell M. Purvis, Chairman of that Committee, prepared the Notes to 1988 Amendments.

The comments in Chapter 3 of Title 14 were not amended to reflect 1989 amendments to this chapter. The 1989 amendments largely conformed procedures for nonprofit corporations to those for business corporations. In large part these changes involve changes in cross references to the revised Georgia Business Corporation Code that became effective July 1, 1989. As a result, references to Chapter 2 in the comments may be outdated, and readers should refer to the sections of Chapter 2 contained in the statute, where they differ from the references contained in the comments.

The comments in Chapter 3 of Title 14 were prepared by Patricia T. Morgan, Reporter to the Georgia Nonprofit Corporation Code Revision Committee (the "Committee"), an ad hoc committee of the Fiduciary and Corporate and Banking Law Sections of the State Bar of Georgia. The comments were reviewed by the Committee, which was chaired by George H. Lanier.

### RESEARCH REFERENCES

- Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 1 et seq. 18 Am. Jur. 2d, Corporations, §§ 32, 33.      between local church and parent church body: modern view, 52 ALR3d 324.
- C.J.S.** — 7 C.J.S., Associations, §§ 2-5.      Right of member of nonprofit association or corporation to possession, inspection, or use of membership list, 37 ALR4th 1206.
- ALR.** — Determination of property rights

## ARTICLE 1

### GENERAL PROVISIONS

- Cross references.** — Incorporation of condominium associations, § 44-3-100 et seq. Electric membership corporations, § 46-3-170 et seq. Rural telephone cooperatives, § 46-5-60 et seq. Monitoring of activities of nonprofit contractors who contract with state, § 50-20-1 et seq.

## PART 1

### SHORT TITLE; LEGISLATIVE POWER

#### 14-3-101. Short title.

This chapter shall be known and may be cited as the "Georgia Nonprofit Corporation Code." (Code 1981, § 14-3-101, enacted by Ga. L. 1991, p. 465, § 1.)

- Law reviews.** — For annual survey of law of business associations, see 43 Mercer L. Rev. 85 (1991).      gious Corporations? A Proposal for Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act," see 42 Emory L.J. 721 (1993).
- For comment, "Must God Regulate Religious Corporations?"

### COMMENT

Source: Model Act § 18.

This Code was drawn principally from the Georgia Business Corporation Code (referred to throughout the comments hereto as the "Business Code"), enacted by Ga. L. 1988, p. 1070, § 1, and adheres to its nomenclature and its structure when appropriate. The former Georgia Nonprofit Corporation Code was adopted in 1968 and was patterned on the Model Nonprofit Corporation Act. The former Code was amended periodically to reflect changes made to the Georgia Business Corporation Code. Although a Revised Model Nonprofit Corporation Act (the "Model Act") was approved in 1987 and published in 1988, its general approach of categorizing nonprofit corporations into three groups was not followed.

Because of the desire to conform this Code to the Business Code whenever possible and appropriate, separate comments on similar or identical provisions were deemed unnecessary. Accordingly, the comments to this Code seek to illuminate only those provisions that differ from their Business Code counterparts. Comments to some provisions based on the Model Act are based on comments to the Model Act, with permission of the American Bar Association and the publisher, Prentice Hall Law and Business.

### JUDICIAL DECISIONS

**Removal of board of directors of church was secular issue.** — Trial court erred in granting summary judgment for a former board of directors of a church for want of jurisdiction as the issues of removal of the former board of directors under the Georgia Nonprofit Corporation Code, O.C.G.A.

§ 14-3-101 et seq., and disposition of church property were secular in nature and capable of judicial review without considering ecclesiastical matters. *Members of Calvary Missionary Baptist Church v. Jackson*, 259 Ga. App. 647, 578 S.E.2d 275 (2003).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1349-1352, 1362, 1363, 1434-1438. 66 Am. Jur. 2d, Religious Societies, § 8.

**C.J.S.** — 19 C.J.S., Corporations, §§ 433-435.

**ALR.** — Removal by court of director or officer of private corporation, 124 ALR 364.

Construction and effect of corporate by-laws or articles relating to change in number of directors, 3 ALR3d 623.

Validity of agreement in conjunction with sale of corporate shares that majority of directors will be replaced by purchaser's designees, 13 ALR3d 361.

### 14-3-102. Reservation of power of General Assembly.

The General Assembly has power to amend or repeal all or part of this chapter at any time and all domestic and foreign corporations subject to this chapter are governed by the amendment or repeal. (Code 1981, § 14-3-102, enacted by Ga. L. 1991, p. 465, § 1.)



## PART 2

## DOCUMENTS

**14-3-120. Filing of documents.**

(a) A document must satisfy the requirements of this Code section and of any other Code section that adds to or varies these requirements to be entitled to filing by the Secretary of State.

(b) This chapter must require or permit filing the document in the office of the Secretary of State.

(c) The document must contain the information required by this chapter. It may contain other information as well.

(d) The document must be typewritten or printed.

(e) The document must be in the English language. However, a corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

(f) The document must be executed:

(1) By the chairperson of the board of directors of a domestic or foreign corporation, its president, or by another of its officers;

(2) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(3) If the corporation is in the hands of a receiver, trustee, or other court appointed fiduciary, by that fiduciary;

provided, however, the person executing the document may do so as an attorney in fact. Powers of attorney relating to the execution of the document do not need to be shown to or filed with the Secretary of State.

(g) The person executing a document shall sign it and state beneath or opposite the signature his or her name and the capacity in which he or she signs; provided, however, that if the document is electronically transmitted, the electronic version of such person's name may be used in lieu of a signature. The document may, but need not, contain:

(1) The corporate seal;

(2) An attestation by the secretary or an assistant secretary; or

(3) An acknowledgment, verification, or proof.

(h) The document must be delivered to the office of the Secretary of State for filing and must be accompanied by one exact or conformed copy

(except as provided in Code Sections 14-3-503 and 14-3-1509), the correct filing fee, any certificate required by this chapter, and any penalty required by this chapter or other law.

(i) Notwithstanding the provisions of this chapter, the Secretary of State may authorize the filing of documents by electronic transmission, following the provisions of Chapter 12 of Title 10, the "Georgia Electronic Records and Signatures Act," and the Secretary of State shall be authorized to promulgate such rules and regulations as are necessary to implement electronic filing procedures. (Code 1981, § 14-3-120, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1999, p. 405, § 14.)

**Cross references.** — Fees and charges to be collected by Secretary of State under chapter, § 14-3-290 et seq.

#### COMMENT

Subsection (h) refers broadly to "any certificate required by this chapter," unlike Section 14-2-120(h), which refers to certificates required under specific Business Code provisions.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 208-211, 246.

#### 14-3-121. Forms.

The Secretary of State may prescribe and furnish on request, forms for:

- (1) An application for a certificate of existence;
- (2) A foreign corporation's application for a certificate of authority to conduct affairs in this state;
- (3) A foreign corporation's application for a certificate of withdrawal;
- (4) The annual registration; and
- (5) Such other forms not in conflict with this chapter as may be prescribed by the Secretary of State. (Code 1981, § 14-3-121, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

Subsection (2) refers to a "certificate of authority to conduct affairs." The phrase "to conduct affairs" has the same meaning as "to transact business" in this Code.



**14-3-122. Filing fees.**

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered for filing:

<u>Document</u>	<u>Fee</u>
(1) Articles of incorporation .....	\$ 100.00
(2) Application for certificate of authority .....	225.00
(3) Annual registration .....	30.00
(4) Agent's statement of resignation .....	No fee
(5) Certificate of judicial dissolution .....	No fee
(6) Application for reservation of a corporate name .....	25.00
(7) Statement of change of address of registered agent.... \$5.00 per corporation but not less than .....	20.00
(8) Application for reinstatement .....	20.00
(9) Any other document required or permitted to be filed by this chapter .....	20.00

(b) Each corporation, domestic or foreign, that fails or refuses to file its annual report for any year shall not be required to pay any penalty for so failing or refusing to file its annual report, but such corporation may be subject to administrative dissolution as provided in Code Section 14-3-1420. (Code 1981, § 14-3-122, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 12; Ga. L. 1999, p. 405, § 15; Ga. L. 2003, p. 883, § 3.)

**The 2003 amendment**, effective July 1, 2003, substituted "\$100.00" for "\$60.00" in paragraph (1), substituted "225.00" for "70.00" in paragraph (2), substituted "30.00" for "15.00" in paragraph (3), and substituted "25.00" for "No fee" in paragraph (6).

**COMMENT**

Unlike the Business Code, this Code imposes no penalty on foreign nonprofit corporations that fail or refuse to obtain a certificate of authority to transact business in this state. Subsection (b) clarifies the absence of a penalty for late filing of annual reports. There is no counterpart in the Business Code, which simply eliminated the late filing penalty by a 1989 amendment to Section 14-2-122.

**14-3-123. Effective time and date of document.**

(a) Except as provided in subsection (b) of this Code section and

subsection (c) of Code Section 14-3-124, a document is effective:

(1) At the time of filing on the date it is filed, as evidenced by the Secretary of State's endorsement on the original document; or

(2) At any later time specified in the document as its effective time on the date it is filed.

(b) A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at the close of business on that date. A delayed effective date for a document may not be later than the ninetieth day after the date filed.

(c) If a document is determined by the Secretary of State to be incomplete and inappropriate for filing, the Secretary of State may return the document to the person or corporation filing it, together with a brief written explanation of the reason for the refusal to file, in accordance with subsection (c) of Code Section 14-3-125 and, if the applicant returns the document with corrections in accordance with the rules and regulations of the Secretary of State, the filing date of the document will be the filing date that would have been applied had the original document not been deficient. (Code 1981, § 14-3-123, enacted by Ga. L. 1991, p. 465, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1991, "Section" was substituted for "section" in subsection (a).

#### COMMENT

Subsection (a)(2) refers to an effective filing time of a document as "At any later time specified," as opposed to the Business Code reference to "At the time specified." This change is intended to clarify that the effective time cannot be earlier than the actual filing time.

#### 14-3-124. Correcting filed document.

(a) A domestic or foreign corporation may correct a document filed by the Secretary of State if the document:

(1) Contains an incorrect statement; or

(2) Was defectively executed, attested, sealed, verified, or acknowledged.

(b) A document is corrected:

(1) By preparing articles of correction that:

(A) Describe the document (including its filing date);

(B) Specify the incorrect statement and the reason it is incorrect or the manner in which the execution was defective; and

(C) Correct the incorrect statement or defective execution; and



(2) By delivering the articles of correction to the Secretary of State for filing.

(c) Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed. (Code 1981, § 14-3-124, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2002, p. 989, § 8.)

**The 2002 amendment**, effective July 1, 2002, deleted “or attach a copy of it to the articles” following “filing date)” in subparagraph (b)(1)(A).

#### COMMENT

Subsection (b)(2) refers to “delivering the articles of correction,” while the Business Code refers only to “delivering the articles.” This change is intended to clarify the reference to “articles of correction” in this section and is necessitated by the Code’s use of the term “articles” as synonymous with “articles of incorporation.” See Section 14-3-140(1).

#### **14-3-125. Duty of Secretary of State to file documents; effect of filing or refusing to do so.**

(a) If a document delivered to the office of the Secretary of State for filing satisfies the requirements of Code Section 14-3-120, the Secretary of State shall file it.

(b) The Secretary of State files a document by stamping or otherwise endorsing his official title and the date and time of receipt on both the original and the document copy. After filing a document, except as provided in Code Sections 14-3-503 and 14-3-1510, the Secretary of State shall deliver the document copy to the domestic or foreign corporation or its representative.

(c) If the Secretary of State refuses to file a document, he shall return it to the domestic or foreign corporation or its representative within ten days after the document was delivered, together with a brief, written explanation of the reason for his refusal.

(d) The Secretary of State’s duty to file documents under this Code section is ministerial. Filing or refusing to file a document does not:

- (1) Affect the validity or invalidity of the document in whole or in part;
- (2) Relate to the correctness or incorrectness of information contained in the document; or
- (3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect. (Code 1981, § 14-3-125, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-126. Appeal from Secretary of State's refusal to file document.**

(a) If the Secretary of State refuses to file a document delivered to his office for filing, the domestic or foreign corporation may appeal the refusal within 30 days after the return of the document to the superior court. The appeal is commenced by petitioning the court to compel filing of the document and by attaching to the petition the document and the Secretary of State's explanation of his refusal to file.

(b) The matter shall promptly be tried de novo by the court without a jury. The court may summarily order the Secretary of State to file the document or take other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (Code 1981, § 14-3-126, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

Section 14-3-140(29) defines "superior court" for purposes of the Code. Thus, the reference in Section 14-3-126(a) is to the "superior court," while the reference in the Business Code is to "the superior court of the county where the corporation's registered office is or will be."

**14-3-127. Evidence of filing.**

A certificate attached to a copy of a document or electronic transmission filed by the Secretary of State, bearing his or her signature, which may be in facsimile, and the printed or embossed seal of this state, or its electronic equivalent, is prima-facie evidence that the original document has been filed with the Secretary of State. (Code 1981, § 14-3-127, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1999, p. 405, § 16.)

**14-3-128. Certificate of existence or authorization.**

(a) Any person may apply to the Secretary of State to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(b) A certificate of existence or authorization sets forth:

(1) The domestic corporation's corporate name or the foreign corporation's corporate name used in this state;

(2) That the domestic corporation is duly incorporated under the law of this state and the date of its incorporation, or that the foreign corporation is authorized to transact business in this state;

(3) That its most recent annual registration required by Code Section 14-3-1622 has been delivered to the Secretary of State; and

(4) That articles of dissolution have not been filed.



(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as prima-facie evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state. (Code 1981, § 14-3-128, enacted by Ga. L. 1991, p. 465, § 1.)

#### **14-3-129. Penalty for signing false document.**

A person who signs a document he knows is false in any material respect with intent that the document be delivered to the Secretary of State for filing shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed \$500.00. (Code 1981, § 14-3-129, enacted by Ga. L. 1991, p. 465, § 1.)

### **PART 3**

#### **SECRETARY OF STATE**

#### **RESEARCH REFERENCES**

**ALR.** — Organization sought to be incorporated under an unconstitutional statute as a de facto corporation, 136 ALR 187.

Enforceability in another jurisdiction of

personal liability of stockholders for debts of corporation whose organization is incomplete or defective, 42 ALR2d 659.

#### **14-3-130. Powers of Secretary of State.**

The Secretary of State has the power reasonably necessary to perform the duties required of him by this chapter. (Code 1981, § 14-3-130, enacted by Ga. L. 1991, p. 465, § 1.)

#### **COMMENT**

This section is identical to § 14-2-170. See Comment following § 14-2-170.

#### **OPINIONS OF THE ATTORNEY GENERAL**

**Editor's notes.** — Some of the cases cited below were decided under former Code 1933, § 22-2701.

**Apparently school board incorporation or membership in nonprofit corporation excluded.** — While county boards of education were vested with broad powers respecting the management and control of the school systems they administer under former Code 1933, § 32-909 (see now O.C.G.A. § 20-2-520), the general laws pertaining to

the creation of nonprofit corporations, former Code 1933, § 22-2501 (see now O.C.G.A. § 14-3-80) and former Code 1933, § 22-2701, appeared to exclude the possibility of school boards incorporating or being members of nonprofit corporations as a county board of education was not a corporation, partnership, association or other "person." 1978 Op. Att'y Gen. No. 78-4 (decided under former Code 1933, § 22-2701).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 5. 18 Am. Jur. 2d, Corporations, § 35.

**C.J.S.** — 7 C.J.S., Associations, § 5. 18A C.J.S., Corporations, §§ 189, 190.

**ALR.** — Liability of officers, directors, or members of defectively organized corpora-

tion to one of their number for advances, commissions, etc., 115 ALR 658.

Constitutionality, construction, and application of statutes which forbid or otherwise regulate compensation for organizing corporation, procuring subscription for stock, or selling its securities, 115 ALR 1362.

## PART 4

## DEFINITIONS; NOTICE

## 14-3-140. Definitions.

As used in this chapter, the term:

(1) “Articles of incorporation” or “articles” includes amended and restated articles of incorporation and articles of merger.

(2) “Board of directors” or “board” means the person or persons vested with the authority to manage the affairs of the corporation, irrespective of the name by which such group is designated, but shall not include any person solely by virtue of powers delegated to him by Code Section 14-3-801.

(3) “Bylaws” means the code of rules (other than the articles) adopted pursuant to this chapter for the regulation or management of the affairs of the corporation, irrespective of the name or names by which such rules are designated.

(4) “Class” refers to a group of memberships which have the same rights with respect to voting, dissolution, redemption, and transfer. For the purpose of this Code section, rights shall be considered the same if they are determined by a formula applied uniformly.

(5) “Conspicuous” means written in such a manner that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color or typing in capitals or underlined is conspicuous.

(6) “Corporation” means a nonprofit corporation, other than a foreign corporation, organized under or subject to this chapter.

(7) “Delegate” means a person elected or appointed to vote in a representative assembly for the election of a director or on other matters.

(8) “Deliver” includes mail.

(9) “Distribution” means the payment of a dividend or any part of the income or profit of a corporation to its members, directors, or officers.



Payment of indemnification or reasonable compensation, fees, or expenses incurred in the performance of duties on behalf of the corporation is not a distribution.

(10) "Domestic corporation" means a corporation.

(11) "Effective date of notice" is defined in Code Section 14-3-141.

(11.1) "Electronic transmission" or "electronically transmitted" means any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient.

(12) "Employee" includes an officer but not a director. A director may accept duties that make him also an employee.

(13) "Entity" includes corporation and foreign corporation; business corporation and foreign business corporation; profit and nonprofit unincorporated association; business trust, estate, general partnership, limited partnership, trust, two or more persons having a joint or common economic interest; limited liability company and foreign limited liability company; limited liability partnership and foreign limited liability partnership; state, United States, and foreign government; and regional development center solely for the purpose of implementing subsection (f) of Code Section 50-8-35.

(14) "Foreign corporation" means a corporation organized under a law other than the law of this state which would be a nonprofit corporation if organized under, or subject to, this chapter.

(15) "Governmental subdivision" includes an authority, county, district, and municipality or any other political subdivision.

(16) "Includes" denotes a partial definition.

(17) "Individual" includes the estate of an incompetent or deceased individual.

(18) "Mail" includes the United States mail.

(19) "Means" denotes an exhaustive definition.

(20) "Member" means (without regard to the name by which a person is designated in the articles or bylaws) any person who is entitled to vote for the election of a director or directors pursuant to a provision of the corporation's articles or bylaws that expressly provides for or contemplates the existence of members. A person is not a member by virtue of any of the following:

(A) Any rights such person has as a delegate;

(B) Any rights such person has to designate or confirm a director or directors; or

(C) Any rights such person has as a director.

(21) "Nonprofit corporation" means a corporation which may make no distribution to its members, directors, or officers, except as reasonable compensation for services rendered, and except as otherwise provided in this chapter.

(22) "Notice" is defined in Code Section 14-3-141.

(23) "Person" includes an individual and an entity.

(24) "Principal office" means the office (in or out of this state) so designated in the annual registration where the principal executive offices of a domestic or foreign corporation are located.

(25) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

(26) "Record date" means the date established under Article 6 or 7 of this chapter on which a corporation determines the identity of its members for purposes of this chapter. The determinations shall be made as of the close of business on the record date unless another time for doing so is specified when the record date is fixed.

(27) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under subsection (b) of Code Section 14-3-840 for custody of the minutes of the meetings of the board of directors and of any members and for authenticating records of the corporation.

(28) "State," when referring to a part of the United States, includes a state, commonwealth, the District of Columbia (and their agencies and governmental subdivisions) and a territory and insular possession (and their agencies and governmental subdivisions) of the United States.

(29) "Superior court" means the superior court of the county in which the corporation's registered office is located; or, if the corporation has no registered office, the county in which the corporation's principal office is located; or, if the corporation has neither a registered office nor a principal office, then the Superior Court of Fulton County.

(30) "United States" includes district, authority, bureau, commission, department, and any other agency of the United States.

(31) "Voting power" means the total number of votes entitled to be cast for the election of directors at the time the determination of voting power is made, excluding a vote which is contingent upon the happening of a condition or event that has not occurred at the time. Where a class is entitled to vote as a class for directors, the determination of voting power of the class shall be based on the percentage of the number of directors the class is entitled to elect out of the total number of



authorized directors. (Code 1981, § 14-3-140, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1992, p. 2108, § 2; Ga. L. 1997, p. 1165, § 12.1; Ga. L. 1999, p. 405, § 17.)

**Cross references.** — Status of corporations as persons, § 1-2-1.

### COMMENT

While some Articles and Parts of the Code contain specialized definitions applicable only to those Articles and Parts, this section contains defined terms used throughout the Code. Many of these definitions are the same as their Business Code counterparts, and most of those that are not are self-explanatory.

The term “articles” is synonymous with “articles of incorporation” throughout the Code.

“Board of directors” is synonymous with “board” throughout the Code and is defined to mean the person(s) authorized to manage the corporation’s affairs, regardless of the name or title given to such person(s).

“Distribution” is a central concept of the Code and it differs from its Business Code counterpart. The term is defined to include the payment of any part of a nonprofit corporation’s income or profit to its members, directors, or officers. Distributions are generally prohibited except as permitted in section 14-3-1302. Payment by the corporation of such expenses as reasonable compensation or indemnification is not a “distribution.”

“Member” is defined as any person who is entitled to vote for the election of a director or directors pursuant to a provision in the corporation’s bylaws or articles that expressly provides for members or contemplates the existence of members. If the articles or bylaws so provide, the person with such voting right is a “member” for purposes of the Code, regardless of the name or title by which such person is designated in the corporation’s articles or bylaws.

“Superior court” is defined to cover contingencies such as the absence of a registered or principal office of a nonprofit corporation.

Source: Model Act § 2.

#### Note to 1997 Amendment

The 1997 amendment amended paragraph (13) by adding limited partnerships, limited liability companies, and limited liability partnerships to the list of entities, conforming the definition to that of the Business Corporation Code.

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 114-101, are included in the annotations for this section.

**Test for determining whether organization is nonprofit** is not whether it has an excess of income over expenses for several years. *Georgia Osteopathic Hosp. v. Strickland*, 123 Ga. App. 86, 179 S.E.2d 560 (1970) (decided under former Code 1933, § 114-101).

“Charitable” and “nonprofit” are not synonymous. *Georgia Osteopathic Hosp. v. Strickland*, 123 Ga. App. 86, 179 S.E.2d 560 (1970) (decided under former Code 1933, § 114-101).

**Workers’ Compensation Law made applicable to nonprofit business corporations.** — Prior to 1975, when § 34-9-1 read “corporation engaged in any business operated for gain or profit,” it included by definition only

the profit-making private business corporation as provided for in Ch. 2 of this title. The deletion by the 1975 amendment of the words "operated for gain or profit" broadened the coverage of the § 34-9-1 definition of employer to include private nonprofit corporations as provided for in Ch. 3 of this title. *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978) (decided under former Code 1933, § 114-101).

**Hospital authorities exempted from Business Corporation Code.** — The phrase "cor-

porations engaged in any business" in § 34-9-1 includes only those corporations governed by the Georgia Business Corporation Code. Hospital authorities are not governed by Georgia Business Corporation Code, but are expressly exempted therefrom. *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978) (decided under former Code 1933, § 114-101).

**Cited in** *Bartley v. Augusta Country Club, Inc.*, 166 Ga. App. 1, 303 S.E.2d 129 (1983).

### OPINIONS OF THE ATTORNEY GENERAL

**Regional Development Center as "entity".** — Because a Regional Development Center is a public agency and an instrumentality of the municipalities and counties in its region,

it is not an entity authorized by law to create a nonprofit corporation. 1992 Op. Att'y Gen. No. 92-1.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 32, 33.

**C.J.S.** — 10 C.J.S., Beneficial Associations, § 7.

**ALR.** — Applicability to corporations not organized for profit of statutes prescribing

conditions under which foreign corporations may do business within state, 37 ALR 1283.

Nonprofit purposes and character which warrant creation of nonprofit corporation, 16 ALR2d 1345.

### 14-3-141. Notice.

(a) Notice under this chapter shall be in writing unless oral notice is reasonable under the circumstances.

(b) Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are likely to prove impracticable in particular cases, notice may in addition be communicated by a newspaper of general circulation in the area where published or by radio, television, or other form of public broadcast communication.

(c) Written notice by a domestic or foreign corporation to its members, if in a comprehensible form, is effective when mailed, if mailed with first-class postage prepaid and correctly addressed to the member's address shown in the corporation's current record of members. If the corporation has more than 500 members of record entitled to vote at a meeting, it may utilize a class of mail other than first class if the notice of the meeting is mailed, with adequate postage prepaid, not less than 30 days before the date of the meeting.

(d) Written notice to a domestic or foreign corporation (authorized to transact business in this state) may be addressed to its registered agent at its



registered office or to the corporation or its secretary at its principal office shown in its most recent annual registration or, in the case of a foreign corporation that has not yet delivered an annual registration, in its application for a certificate of authority.

(e) Except as provided in subsection (c) of this Code section or in the articles of incorporation or bylaws, written notice, if in a comprehensible form, is effective at the earliest of the following:

(1) When received or when delivered, properly addressed, to the addressee's last known principal place of business or residence;

(2) Five days after its deposit in the mail, as evidenced by the postmark, if mailed with first-class postage prepaid and correctly addressed; or

(3) On the date shown on the return receipt, if sent by registered or certified mail or statutory overnight delivery, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(f) Oral notice is effective when communicated if communicated in a comprehensible manner.

(g) In calculating time periods for notice under this chapter, when a period of time measured in days, weeks, months, years, or other measurement of time is prescribed for the exercise of any privilege or the discharge of any duty, the first day shall not be counted but the last day shall be counted.

(h) If this chapter prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements, not inconsistent with this Code section or other provisions of this chapter, those requirements govern. (Code 1981, § 14-3-141, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

#### COMMENT

Subsection (e) contemplates the existence of a provision in a corporation's articles or bylaws that could alter the effective time of written notice. The Business Code counterpart recognizes the potential effect of a provision in the articles or bylaws only when the notice is mailed. See O.C.G.A. § 14-2-141(e)(2).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations §§ 307, 969-979. 18B Am. Jur. 2d, Corporations, §§ 1460-1463.  
**C.J.S.** — 18 C.J.S., Corporations, §§ 365-367. 19 C.J.S., Corporations, § 464.

## PART 5

## COURT-ORDERED MEETINGS

**14-3-160. Authority of court to order meetings; notice; validity of meeting or vote.**

(a) If for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its members, delegates, or directors, or otherwise obtain their consent, in the manner prescribed by its articles, bylaws, or this chapter, then upon petition of a director, officer, delegate, member, or the Attorney General, the superior court may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members, delegates, or directors be authorized, in such a manner as the court finds fair and equitable under the circumstances.

(b) The court shall, in an order issued pursuant to this Code section, provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to the articles, bylaws, or this chapter, whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. In a proceeding under this Code section the court may determine who the members or directors are.

(c) The order issued pursuant to this Code section may dispense with any requirement relating to the holding of or voting at meetings or obtaining votes, including any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles, bylaws, or this chapter.

(d) Whenever practical, any order issued pursuant to this Code section shall limit the subject matter of meetings or other forms of consent authorized to items, including amendments to the articles or bylaws, the resolution of which will or may enable the corporation to continue managing its affairs without further resort to this Code section; provided, however, that an order under this Code section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger, or sale of assets.

(e) Any meeting or other method of obtaining the vote of members, delegates, or directors conducted pursuant to an order issued under this Code section, and that complies with all the provisions of such order, is for all purposes a valid meeting or vote, as the case may be, and shall have the same force and effect as if it complied with every requirement imposed by the articles, bylaws, and this chapter. (Code 1981, § 14-3-160, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This provision is taken from the Model Act. It provides a mechanism by which a nonprofit corporation can call or conduct a meeting of its members, directors or



delegates, or obtain their consent, when it is otherwise impossible or impractical to do so.

## PART 6

### POWERS OF ATTORNEY GENERAL

#### RESEARCH REFERENCES

**ALR.** — Necessity and sufficiency of legislative authority for consolidation or merger of religious bodies, 50 ALR 118.

**14-3-170. Powers of Attorney General over unlawful assignment of corporate assets; dissolution of corporation; investigative and subpoena powers.**

(a) The Attorney General may petition the superior court:

(1) To enjoin the proposed unlawful conveyance, transfer, or assignment of assets of a corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302 in situations in which the transferee knew of its unlawfulness;

(2) To set aside the unlawful conveyance, transfer, or assignment of assets of a corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302 in situations in which the transferee knew of its unlawfulness;

(3) To dissolve a corporation that:

(A) Obtained its articles of incorporation through fraud; or

(B) Has continued to exceed or abuse the authority conferred upon it by law; or

(4) To compel accounting and restitution or other appropriate relief for violation of Code Sections 14-3-830, 14-3-842, 14-3-860 through 14-3-864, or 14-3-1301.

(b) In connection with any such proceeding or proposed proceeding, the Attorney General shall have the same power to investigate and issue subpoenas as he has with respect to investigations authorized under Code Section 45-15-17. (Code 1981, § 14-3-170, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on Model Act § 38.

This section is new. The purpose of this section is to authorize the Attorney General to investigate nonprofit corporations and to initiate judicial action in appropriate cases. Subsections (a)(1) and (2) apply only to charitable type nonprofit corporations, those

that are described in section 14-3-1302(a)(2). The Attorney General is authorized to petition the superior court to enjoin or set aside an unlawful conveyance or transfer of assets of such corporations in cases in which the transferee knows of the unlawful nature of the conveyance or proposed conveyance. Subsection (a)(3) contains the same authorization given the Attorney General under section 14-2-1430 of the Business Code to petition for dissolution of corporations. Subsection (a)(4) authorizes the Attorney General to petition the court for accounting and restitution to redress breaches of the duty of loyalty or care or unlawful distributions.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2608, 2615. 66 Am. Jur. 2d, Religious Societies, § 64.

**C.J.S.** — 19 C.J.S., Corporations, §§ 794-796.

**ALR.** — Necessity and sufficiency of legislative authority for consolidation or merger of religious bodies, 50 ALR 118.

### PART 7

#### RELIGIOUS CORPORATIONS DOCTRINE

#### 14-3-180. Construction of chapter when religious doctrine inconsistent.

If religious doctrine governing the affairs of a corporation is inconsistent with the provisions of this chapter on the same subject, the religious doctrine shall control to the extent required by the Constitution of the United States or the Constitution of this state or both. (Code 1981, § 14-3-180, enacted by Ga. L. 1991, p. 465, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1991, "Constitution" was substituted for "constitution" preceding "of this state".

#### COMMENT

This section is taken from the Model Act. In the absence of this section, some provisions of this Code might, if applied to religious corporations, conflict with the United States Constitution or the Constitution of the State of Georgia.

#### JUDICIAL DECISIONS

##### **Jurisdiction over church property dispute.**

— The first amendment did not prohibit appellate jurisdiction over an action by church members against a pastor and church seeking dissolution of the church, appointment of a receiver, an injunction against the defendant's disposing of corporate assets, and proper disposition of the assets; the dispute was capable of resolution by reference to neutral principles of law, i.e., applicable provisions of the Georgia Non-profit Corporation Code, O.C.G.A. § 14-3-101 et seq., without infringing upon

any first amendment values. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994).

##### **Inspection of church's financial records.**

— The court had subject matter jurisdiction of an action by a church trustee against a former pastor and the pastor's administrative assistant to obtain information and documents on the financial operations of the church. *Greer v. Davis*, 244 Ga. App. 317, 534 S.E.2d 853 (2000).

Order of the court requiring a former



pastor and the pastor's administrative assistant to provide a complete financial accounting and return church property in their possession was not inconsistent with the church's religious freedom to determine its own governmental rules and regulations. *Greer v. Davis*, 244 Ga. App. 317, 534 S.E.2d 853 (2000).

**Trial court's order that a church call for an annual meeting** of its membership in accordance with the provisions of O.C.G.A. § 14-3-701 constituted an unconstitutional judicial interference in the government of the church. *First Born Church of Living God, Inc. v. Hill*, 267 Ga. 633, 481 S.E.2d 221 (1997).

## ARTICLE 2 INCORPORATION

### 14-3-201. Who may incorporate.

One or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the Secretary of State for filing. (Code 1981, § 14-3-201, enacted by Ga. L. 1991, p. 465, § 1.)

### OPINIONS OF THE ATTORNEY GENERAL

**Regional Development Center as "entity".**  
— Because a Regional Development Center is a public agency and an instrumentality of the municipalities and counties in its region,

it is not an entity authorized by law to create a nonprofit corporation. 1992 Op. Att'y Gen. No. 92-1.

### 14-3-202. Articles of incorporation.

(a) The articles of incorporation must set forth:

- (1) A corporate name for the corporation that satisfies the requirements of Code Section 14-3-401;
- (2) The street address and county of the corporation's initial registered office and the name of its initial registered agent at that office;
- (3) The name and address of each incorporator;
- (4) Whether or not the corporation will have members;
- (5) The mailing address of the initial principal office of the corporation, if different from the initial registered office; and
- (6) A statement that the corporation is organized pursuant to the Georgia Nonprofit Corporation Code.

(b) The articles of incorporation may set forth:

- (1) The purpose or purposes for which the corporation is organized, which may be, either alone or in combination with other purposes, the transaction of any lawful activity;
- (2) The names and addresses of the individuals who are to serve as the initial directors;

(3) Provisions not inconsistent with law regarding:

(A) Managing and regulating the affairs of the corporation;

(B) Defining, limiting, and regulating the powers of the corporation, its board of directors, and members (or any class of members); and

(C) The characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members;

(4) A provision eliminating or limiting the liability of a director to the corporation or its members for monetary damages for any action taken, or any failure to take any action, as a director, except liability:

(A) For any appropriation, in violation of his or her duties, of any business opportunity of the corporation;

(B) For acts or omissions which involve intentional misconduct or a knowing violation of law;

(C) For the types of liability set forth in Code Sections 14-3-860 through 14-3-864; or

(D) For any transaction from which the director received an improper personal benefit,

provided that no such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective;

(5) Any provision that under this chapter is required or permitted to be set forth in the bylaws; and

(6) Provisions not inconsistent with law regarding the distribution of assets on dissolution.

(c) One or more incorporators named in the articles must sign the articles unless the filing is being signed by an attorney in fact.

(d) The articles of incorporation need not set forth any of the corporate powers enumerated in this chapter. (Code 1981, § 14-3-202, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 13; Ga. L. 1999, p. 405, § 18.)

#### COMMENT

Subsection (a)(6) continues the prior law's requirement that the articles of incorporation must state that the corporation is organized pursuant to the Georgia Nonprofit Corporation Code. This requirement makes it easier for the Secretary of State to distinguish nonprofit corporations from business corporations. Subsection (a)(4), which requires a statement of whether the corporation will have members, replaces the requirement in the former law of a statement of the manner in which directors will be elected.

Subsection (b)(4)(C) prohibits exculpation of directors for breach of the conflicting interest rules contained in section 14-3-860 through 14-3-864. The Business Code



counterpart prohibits exculpation of directors for unlawful distributions in violation of section 14-2-832. The proviso at the end of 14-3-202(b)(4)(D) is improperly placed. It should modify all of (b)(4).

#### Note to 1997 Amendment

Technical changes were made in the introductory clause of subsection (b)(4) to conform to changes in the Business Corporation Code.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 5. 18A Am. Jur. 2d, Corporations, §§ 199-207.

**C.J.S.** — 7 C.J.S., Associations, § 6. 18 C.J.S., Corporations, §§ 33-37. 77 C.J.S., Religious Societies, § 8.

**ALR.** — Conclusiveness of charter as regards character, kind, or purposes of corporation, 119 ALR 1012.

Provisions of articles or bylaws of non-profit corporation or association formed by business competitors whereby the amount of dues of respective members varies according to amount of business done by them, as contrary to public policy, 161 ALR 795.

### 14-3-202.1. Publication of notice of intent to file articles of incorporation.

Code Section 14-2-201.1 shall apply equally to the organization of corporations under this chapter, except that the notice to the publisher of the newspaper shall be in substantially the following form:

#### “NOTICE OF INTENT TO INCORPORATE

Notice is given that articles of incorporation which will incorporate \_\_\_\_\_ (name of corporation) will be delivered to the Secretary of State for filing in accordance with the Georgia Nonprofit Corporation Code. The initial registered office of the corporation will be located at \_\_\_\_\_ (address of registered office) and its initial registered agent at such address is \_\_\_\_\_.”  
(Code 1981, § 14-3-202.1, enacted by Ga. L. 1991, p. 465, § 1.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, an opinion under former Code Section 14-3-132 is included in the annotations for this Code section.

**Sample letter prior to 1990 amendment incompatible.** — The sample letter set out in

former § 14-3-132 prior to the 1990 amendment was wholly incompatible with the current procedural scheme of the Business Corporation Code. 1989 Op. Att'y Gen. No. 89-48 (decided under former Code 1933, § 14-3-132).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 5. 18A Am. Jur. 2d, Corporations, §§ 208, 209, 212, 214.

**C.J.S.** — 7 C.J.S., Associations, § 6. 18 C.J.S., Corporations, § 39.

**ALR.** — Necessity that newspaper be published in English language to satisfy requirements regarding publication of legal or official notice, 90 ALR 500.

**14-3-203. Effect of filing articles of incorporation.**

(a) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.

(b) The Secretary of State's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or administratively dissolve the corporation. (Code 1981, § 14-3-203, enacted by Ga. L. 1991, p. 465, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2234.

**C.J.S.** — 18 C.J.S., Corporations, §§ 48-50.

**14-3-204. Liability for preincorporation transactions.**

All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting. (Code 1981, § 14-3-204, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-205. Organizational meeting.**

(a) After incorporation:

(1) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting; or

(2) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:

(A) To elect directors and complete the organization of the corporation; or

(B) To elect a board of directors who shall complete the organization of the corporation.

(b) Action required or permitted by this chapter to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator.

(c) An organizational meeting may be held in or out of this state or in accordance with Code Section 14-3-821. (Code 1981, § 14-3-205, enacted by Ga. L. 1991, p. 465, § 1.)



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 5. 18A Am. Jur. 2d, Corporations, §§ 219-221.

**C.J.S.** — 7 C.J.S., Associations, § 5. 18 C.J.S., Corporations, § 40.

**14-3-206. Bylaws.**

(a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.

(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation. (Code 1981, § 14-3-206, enacted by Ga. L. 1991, p. 465, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 7, 10. 18A Am. Jur. 2d, Corporations, §§ 310-319, 327-330. 36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, § 16.

**C.J.S.** — 7 C.J.S., Associations, § 6. 10 C.J.S., Beneficial Associations, § 21 et seq. 18 C.J.S., Corporations, §§ 111-115, 119.

**ALR.** — Enforceability of invalid corporate bylaw as contract, 159 ALR 290.

Provisions of articles or bylaws of non-profit corporation or association formed by business competitors whereby the amount of dues of respective members varies according to amount of business done by them, as contrary to public policy, 161 ALR 795.

**14-3-207. Emergency bylaws.**

(a) Unless the articles provide otherwise, the directors of a corporation may adopt, amend, or repeal bylaws to be effective only in an emergency defined in subsection (d) of this Code section. The emergency bylaws, which are subject to amendment or repeal by the members, may provide special procedures necessary for managing the corporation during the emergency, including:

- (1) How to call a meeting of the board;
- (2) Quorum requirements for the meeting; and
- (3) Designation of additional or substitute directors.

(b) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(c) Corporate action taken in good faith in accordance with the emergency bylaws:

- (1) Binds the corporation; and
- (2) May not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this Code section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event. (Code 1981, § 14-3-207, enacted by Ga. L. 1991, p. 465, § 1.)

### ARTICLE 3

## PURPOSES AND POWERS

### RESEARCH REFERENCES

**ALR.** — Rights and remedies in respect of membership in, or establishment and maintenance of local post of, American Legion or other veterans' organization, 147 ALR 590. Nonprofit charitable institutions as within operation of labor statutes, 26 ALR2d 1020.

### 14-3-301. Purposes of corporation.

(a) Every corporation incorporated under this chapter has the purpose of engaging in any lawful activity unless a more limited purpose is set forth in the articles of incorporation.

(b) A corporation engaging in an activity that is subject to regulation under another statute of this state may incorporate under this chapter only if incorporation under this chapter is not prohibited by the other statute. The corporation shall be subject to all limitations of the other statute. (Code 1981, § 14-3-301, enacted by Ga. L. 1991, p. 465, § 1.)

**Cross references.** — Corporations organized for religious, fraternal, or educational purposes, § 14-5-40 et seq. Corporations exempt from state income tax, § 48-7-25.

### COMMENT

Subsection (a) follows the approach of the Business Code and the Model Act in permitting incorporation for any lawful purpose. Former law (section 14-3-20) provided a nonexclusive list of permissible purposes.

Subsection (b) is based on former section 14-3-20(b) and on the Model Act.

### JUDICIAL DECISIONS

**Cited in** *Bradfield v. Hospital Auth.*, 226 Ga. 575, 176 S.E.2d 92 (1970); *Dixon v. Georgia Indigent Legal Servs., Inc.*, 388 F. Supp. 1156 (S.D. Ga. 1974).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code Section 14-3-20, are included in the annotations for this section.

**Acquiring funds or property for donation to state agency.** — A nonprofit corporation

may be organized under Georgia law for the purpose of raising funds or acquiring property to donate to an agency or organization of Georgia state government. 1987 Op. Att'y Gen. No. 87-24 (decided under former § 14-3-20).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations & Clubs, § 3. 15 Am. Jur. 2d, Charities, § 171 et seq. 18A Am. Jur. 2d, Corporations, §§ 194, 195. 36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, § 3.

**C.J.S.** — 7 C.J.S., Associations, § 2. 10

C.J.S., Beneficial Associations, § 7. 18 C.J.S., Corporations, §§ 28, 29.

**ALR.** — Nonprofit purposes and character which warrant creation of nonprofit corporation, 16 ALR2d 1345.

**14-3-302. Duration and powers of corporation.**

Every corporation has perpetual duration and succession in its corporate name, unless its articles of incorporation adopted on or after April 1, 1969, or in the case of a corporation existing prior to or on April 1, 1969, an amendment thereto adopted on or after April 1, 1969, provides otherwise. Unless its articles of incorporation provide otherwise, every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

- (1) To sue, be sued, complain, and defend in its corporate name;
- (2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing or in any other manner reproducing it;
- (3) To make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for regulating and managing the affairs of the corporation;
- (4) To purchase, receive, lease, or otherwise acquire, own, hold, improve, use, and otherwise deal with real or personal property or any legal or equitable interest in property, wherever located;
- (5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;
- (6) To purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of, and deal in and with shares or other interests in, or obligations of, any entity;
- (7) To make contracts and guaranties, incur liabilities, borrow money, issue notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;
- (8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment, except as limited by Code Sections 14-3-860 through 14-3-864;
- (9) To be a promoter, fiduciary, shareholder, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;
- (10) To conduct its activities, locate offices, and exercise the powers granted by this chapter within or without this state;

(11) To elect or appoint directors, officers, delegates, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;

(12) To pay pensions and establish pension plans, pension trusts, and other benefit and incentive plans for any or all of its current or former directors, officers, employees, and agents;

(13) To make donations not inconsistent with law for the public welfare or for charitable, religious, scientific, or educational purposes and for other purposes that further the corporate interest;

(14) To impose dues, assessments, admission fees, and transfer fees upon its members;

(15) To provide insurance for its benefit on the life or physical or mental ability of any of its directors, officers, or employees or any other person whose death or physical or mental disability might cause financial loss to the corporation; or, pursuant to any contract obligating the corporation, as part of compensation arrangements, or pursuant to any contract obligating the corporation as guarantor or surety, on the life of the principal obligor, and for these purposes the corporation is deemed to have an insurable interest in such persons;

(16) To establish conditions for admission of members, admit members, and issue memberships;

(17) To carry on a business; and

(18) To do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation. (Code 1981, § 14-3-302, enacted by Ga. L. 1991, p. 465, § 1.)

**Cross references.** — Financing unemployment benefits paid to employees of nonprofit organizations, § 34-8-158.

restrictions upon corporate ownership of real property, see 13 Mercer L. Rev. 410 (1962).

**Law reviews.** — For note on statutory

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 2201 and 22-3-108, are included in the annotations for this section.

**Nonprofit hospital corporation subject to loss of charter.** — Failure to operate a nonprofit hospital corporation in accor-

dance with the provisions of its articles of incorporation will subject the corporation to a loss of its charter by involuntary dissolution. *Bradfield v. Hospital Auth.*, 226 Ga. 575, 176 S.E.2d 92 (1970) (decided under former Code 1933, §§ 2201 and 22-3-108).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former

Code Section 14-3-20, are included in the annotations for this section.



**Acquiring funds or property for donation to state agency.** — A nonprofit corporation may be organized under Georgia law for the purpose of raising funds or acquiring prop-

erty to donate to an agency or organization of Georgia state government. 1987 Op. Att'y Gen. No. 87-24 (decided under former § 14-3-20).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 11 et seq. 18B Am. Jur. 2d, Corporations, §§ 1990-2008, 2037-2039, 2045-2060, 2077-2103. 66 Am. Jur. 2d, Religious Societies, §§ 55, 57.

**C.J.S.** — 7 C.J.S., Associations, §§ 33-37. 10 C.J.S., Beneficial Associations, §§ 8 et seq., 21, 26 et seq. 14 C.J.S., Charities, § 64. 19 C.J.S., Corporations, §§ 554, 555, 558, 560. 76 C.J.S., Religious Societies, §§ 53 et seq., 65 et seq.

**ALR.** — Power of corporation to pass title to real property which it holds in excess of its powers, 37 ALR 204; 62 ALR 494.

Responsibility of agricultural society for tort, 52 ALR 1400.

Power of corporation organized for religious, educational, or charitable purpose, to engage in enterprise for profit, 100 ALR 579.

Statutory added liability of stockholders of bank or other corporation as affected by sale of, or other transaction in relation to, assets, 100 ALR 1276.

Construction, application, and effect of statutory provision that directors or corporation may remove officer, agent, or employee at pleasure, 111 ALR 894.

Power of corporation to change obligations to stockholders, 117 ALR 1290.

Implied power of corporation belonging to one of the three classes, religious, charitable, or educational, to promote, or to accept gifts for, objects which more appropriately pertain to the purposes of those in one of the other classes, 121 ALR 1526.

Power of corporation to enforce a contract made after taking the steps necessary to put its corporate existence beyond collateral attack, as affected by limited amount of capital subscribed or paid in, 128 ALR 874.

Nature of estate created by, and enforceability of, provision in devise or bequest to charitable, religious, or educational corporation as to particular purpose of the corpora-

tion for which it shall be used, 130 ALR 1101.

Implied obligation of purchaser of corporate stock to indemnify a vendor against future calls and assessments, 141 ALR 1351.

Insurance on life of officer for benefit of private corporation, 143 ALR 293.

Computation of fund to be provided by private employer for payment of pension or retirement allowance to employees, 153 ALR 818.

Provisions of articles or bylaws of nonprofit corporation or association formed by business competitors whereby the amount of dues of respective members varies according to amount of business done by them, as contrary to public policy, 161 ALR 795.

Power of corporation or its officers with respect to payment of bonus or pension to officers or employees, 164 ALR 1125.

Applicability of statutes regulating sale of assets or property of corporation as affected by purpose or character of corporation, 9 ALR2d 1306.

Validity of security for contemporaneous loan to corporation by officer, director, or stockholder, 31 ALR2d 663.

Leasing of real estate by foreign corporation, as lessor or lessee, as doing business within state within statutes prescribing conditions of right to do business, 59 ALR2d 1131.

Power of president of corporation to commence or to carry on arbitration proceedings, 65 ALR2d 1321.

Failure to issue stock as factor in disregard of corporate entity, 8 ALR3d 1122.

Liability of corporation for contracts of subsidiary, 38 ALR3d 1102.

Charitable contributions by public utility as part of operating expense, 59 ALR3d 941.

Power of corporation to make political contribution or expenditure under state law, 79 ALR3d 491.

**14-3-303. Emergency powers.**

(a) In anticipation of or during an emergency defined in subsection (d) of this Code section, the board of directors of a corporation may:

(1) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

(2) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(b) During an emergency defined in subsection (d) of this Code section, unless emergency bylaws provide otherwise:

(1) Notice of a meeting of the board of directors need be given only to those directors it is practicable to reach and may be given in any practicable manner, including by publication and radio; and

(2) One or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(c) Corporate action taken in good faith during an emergency under this Code section to further the ordinary affairs of the corporation:

(1) Binds the corporation; and

(2) May not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this Code section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event. (Code 1981, § 14-3-303, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-304. Ultra vires.**

(a) Except as provided in subsection (b) of this Code section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged:

(1) In a proceeding by a member against the corporation to enjoin the act;

(2) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or



(3) In a proceeding by the Attorney General under Code Section 14-2-1430.

(c) In a member's proceeding under paragraph (1) of subsection (b) of this Code section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss, other than anticipated profits, suffered by the corporation or another party because of enjoining the unauthorized act. (Code 1981, § 14-3-304, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

The reference in subsection (b)(3) should be to section 14-3-1430, rather than to section 14-2-1430.

#### JUDICIAL DECISIONS

**Cited in** Free For All Missionary Baptist Church, Inc. v. Southeastern Beverage & Ice Equip. Co., 135 Ga. App. 498, 218 S.E.2d 169 (1975).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 11. 18A Am. Jur. 2d, Corporations, §§ 2009-2036.

**C.J.S.** — 7 C.J.S., Associations, § 33. 19 C.J.S., Corporations, §§ 573, 576-579.

**ALR.** — Doctrine of ultra vires as applied to torts of private corporation, 57 ALR 302. Assumption of mortgage or lien by bank

or other corporation as ultra vires, 91 ALR 177.

Right of corporation to perform or to hold itself out as ready to perform functions in the nature of legal services, 157 ALR 282.

Power of corporation to make political contribution or expenditure under state law, 29 ALR2d 1262; 79 ALR3d 491.

#### 14-3-305. Nonprofit defined; rights; director's role; reporting.

(a) As used in this Code section, the term "nonprofit" means any nonprofit corporation organized under or subject to this chapter which is formed, created, or operated by or on behalf of a hospital authority.

(b) Nonprofits shall have all of the rights, powers, benefits, and purposes granted to other nonprofit corporations under this chapter and shall not be subject to any restrictions contained in Article 4 of Chapter 7 of Title 31, the "Hospital Authorities Law," except as provided in subsections (c) and (d) of this Code section.

(c) A director of a nonprofit shall be subject to the provisions of Code Section 31-7-74.1 with respect to conflicts of interest regarding such nonprofit and the hospital authority which formed, created, or operates such nonprofit, and Code Section 31-7-74.1 shall be deemed to apply to such nonprofit and such hospital authority only for such purpose.

(d) A nonprofit shall be subject to the provisions of Code Section 31-7-90.1 with respect to reporting community benefits provided by such

nonprofit and with respect to annual reports by such nonprofit disclosing certain transactions with the nonprofit or with the hospital authority which formed, created, or operates the nonprofit and Code Section 31-7-90.1 shall be deemed to apply to both that nonprofit and that hospital authority only for such purposes.

(e) Nothing in this Code section shall be deemed or construed to affect in any manner the provisions of Code Section 31-7-75.2, Chapter 14 of Title 50, or Article 4 of Chapter 18 of Title 50 or to change existing law as to whether such statutory provisions are applicable to nonprofits. (Code 1981, § 14-3-305, enacted by Ga. L. 1997, p. 1404, § 1.)

#### ARTICLE 4

#### CORPORATE NAME

##### **14-3-401. Corporate name.**

(a) A corporate name:

(1) Must contain the word "corporation," "incorporated," "company," or "limited," or the abbreviation "Corp.," "Inc.," "Co.," or "Ltd.," or words or abbreviations of like import in a language other than English;

(2) May not contain language stating or implying that the corporation is organized for a purpose other than that permitted by its articles of incorporation and by Code Section 14-3-301;

(3) May not contain anything which, in the reasonable judgment of the Secretary of State, is obscene; and

(4) Shall not in any instance exceed 80 characters, including spaces and punctuation.

(b) Except as authorized by subsections (c) and (d) of this Code section, a corporate name must be distinguishable upon the records of the Secretary of State from:

(1) The corporate name of an incorporated organization, whether for profit or not for profit, incorporated or authorized to transact business in this state;

(2) A corporate name reserved or registered under this chapter or Chapter 2 of this title;

(3) The fictitious name adopted by a foreign corporation authorized to transact business in this state because its real name is unavailable;

(4) The name of a limited partnership or professional association reserved or filed with the Secretary of State under Chapter 9 of this title; and



(5) The name of a limited liability company formed or authorized to transact business in this state.

(c) A corporation may apply to the Secretary of State for authorization to use a name that is not distinguishable upon his records from one or more of the names described in subsection (b) of this Code section. The Secretary of State shall authorize use of the name applied for if the other corporation consents to the use in writing and files with the Secretary of State articles of amendment to its articles of incorporation changing its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applying corporation.

(d) A corporation may use the name (including the fictitious name) of another domestic or foreign corporation that is used in this state if the other corporation is incorporated or authorized to transact business in this state and:

(1) The proposed user corporation has merged with the other corporation;

(2) The proposed user corporation has been formed by reorganization of the other corporation; or

(3) The other domestic or foreign corporation has taken the steps required by this chapter to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the foreign corporation applying to use its former name.

(e) This chapter does not control the use of fictitious or trade names. Issuance of a name under this chapter means that the name is distinguishable for filing purposes on the records of the Secretary of State pursuant to subsection (b) of this Code section. Issuance of a corporate name does not affect the commercial availability of the name. (Code 1981, § 14-3-401, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1995, p. 482, § 9.)

**Cross references.** — Registration of trade name used by corporation in lieu of corporate name, § 10-1-490 et seq.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 16. 18A Am. Jur. 2d, Corporations, §§ 273-291.

**C.J.S.** — 7 C.J.S., Associations, § 34. 18 C.J.S., Corporations, §§ 98-101. 77 C.J.S., Religious Societies, § 10.

**ALR.** — Construction and effect of statutes as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested, 45

ALR 198; 42 ALR2d 516.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 44 ALR2d 1156; 72 ALR3d 8.

Right of benevolent or fraternal society or organization to protection against use of same or similar name, insignia, or ritual by another organization, 76 ALR2d 1396.

Right to protection of corporate name, as

between domestic corporation and foreign corporation not qualified to do business in state, 26 ALR3d 994.

### 14-3-402. Reservation of corporate name.

(a) A person may apply to reserve a name for the purpose of incorporation by paying the fee specified in Code Section 14-3-122. If the Secretary of State finds that the corporate name applied for is available, he or she shall reserve the name for the applicant's use for 30 days or until articles of incorporation are filed, whichever is sooner. If the Secretary of State finds that the name applied for is not distinguishable for filing purposes upon the records of the Secretary of State, he or she shall notify the applicant who may then submit another reservation request within ten days of the date of the rejection notice without payment of an additional reservation fee.

(b) Upon expiration of a name reservation after 30 days without the filing of articles of incorporation, the name may again be reserved for another 30 day period by the same or another applicant under the same guidelines of subsection (a) of this Code section.

(c) A person who has in effect a name reservation under subsection (a) of this Code section may transfer the reservation to another person by delivering to the Secretary of State a signed notice of the transfer that states the name and address of the transferee. (Code 1981, § 14-3-402, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2003, p. 883, § 4.)

**The 2003 amendment**, effective July 1, 2003, substituted the present provisions of subsection (a) for the former provisions which read: "A person may apply to reserve the use of a corporate name, including a fictitious name for a foreign corporation whose corporate name is not available. If the Secretary of State finds that the corporate name applied for is available, he shall re-

serve the name for the applicant's use for a nonrenewable 90 day period."; added subsection (b); redesignated former subsection (b) as present subsection (c); and substituted "A person who has in effect a name reservation under subsection (a) of this Code section" for "The owner of a reserved corporate name" at the beginning of subsection (c).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, a decision under former Code 1933, § 22-202, is included in the annotations for this Code section.

**Motion to revoke incorporation because of prior use of name.** — A motion to revoke and set aside an order of incorporation, on the grounds that movant had acquired a prior use to the name used by the corporation, that the use of the name by the corporation would cause confusion in the minds of the public and a cloud on the titles of petitioners' property, and that the order of

incorporation had been improvidently granted because movant had not been given notice before the order of incorporation, and praying that the order of incorporation be set aside insofar as the use of the name claimed by movant was concerned, is not an equity case within the meaning of that term as used in Ga. Const. 1976, Art. VI, Sec. II, Para. IV (see now Ga. Const. 1983, Art. VI, Sec. VI, Para. III), defining the jurisdiction of the Supreme Court. The grounds of the motion are not such as are relievable only in equity. On the contrary, the motion is one to



set aside an order of the court on an alleged legal ground. A court of law has jurisdiction to entertain such a motion in a proper proceeding by petition, with rule nisi or

process, and to grant the relief prayed. Methodist Episcopal Church, S., Inc. v. Decell, 187 Ga. 526, 1 S.E.2d 432 (1939) (decided under former Code 1933, § 22-202).

### 14-3-403. Registered name of foreign corporation.

Repealed by Ga. L. 2002, p. 989, § 9, effective July 1, 2002.

**Editor's notes.** — This Code section was based on Code 1981, § 14-3-403, enacted by Ga. L. 1991, p. 465, § 1.

## ARTICLE 5

### REGISTERED OFFICE AND REGISTERED AGENT

#### PART 1

#### GENERAL PROVISIONS

### 14-3-501. Registered office and registered agent.

Each corporation must continuously maintain in this state:

(1) A registered office with the same address as that of the registered agent; and

(2) A registered agent, who may be:

(A) A person who resides in this state and whose office is identical with the registered office;

(B) A domestic business or nonprofit corporation formed under this chapter or under Chapter 2 of this title whose office is identical with the registered office; or

(C) A foreign business or nonprofit corporation authorized to transact business in this state whose office is identical with the registered office. (Code 1981, § 14-3-501, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1999, p. 405, § 19.)

#### COMMENT

Although the language of this section differs slightly from its Business Code counterpart, the requirements are the same. Subsection (1) clarifies that the registered office and registered agent must have the same address.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 307.

**C.J.S.** — 18 C.J.S., Corporations, § 108.

**14-3-502. Change of registered office or registered agent.**

(a) A corporation may change its registered office or registered agent by delivering to the Secretary of State for filing an amendment to its annual registration that sets forth:

- (1) The name of the corporation;
- (2) The street address of its current registered office;
- (3) If the current registered office is to be changed, the street address of the new registered office;
- (4) The name of its current registered agent;
- (5) If the current registered agent is to be changed, the name of the new registered agent; and
- (6) That after the change or changes are made, the street addresses of its registered office and the office of its registered agent will be identical.

(b) If the street address of a registered agent's office is changed, the registered agent may change the street address of the registered office of any corporation for which the registered agent is the registered agent by notifying the corporation in writing of the change and by signing (either manually or in facsimile) and delivering to the Secretary of State for filing a statement that complies with the requirements of subsection (a) of this Code section and recites that the corporation has been notified of the change. (Code 1981, § 14-3-502, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section contains a requirement that the registered agent must notify both the Secretary of State and the corporation of a change in address. Unlike the Business Code counterpart, subsection (b) requires that the registered agent's written statement to the Secretary of State concerning the change of address recite that the corporation has been notified of the change. While both this section and its Business Code counterpart require the registered agent to notify the corporation of the address change, section 14-2-502(b) does not require a statement verifying notice to the corporation to be included in the writing filed with the Secretary of State.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 308.

**C.J.S.** — 18 C.J.S., Corporations, § 108.

**14-3-503. Resignation of registered agent.**

(a) A registered agent may resign his agency appointment by signing and delivering to the Secretary of State for filing a statement of resignation. The statement may include a statement that the registered office is also discontinued.



(b) On or before the date of the filing of the statement of resignation, the registered agent shall deliver or mail a written notice of the agent's intention to resign to the chief executive officer, chief financial officer, secretary of the corporation, or a person holding a position comparable to any of the foregoing, as named and at the address shown in the annual registration, or in the articles of incorporation if no annual registration has been filed.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the earlier of the filing by the corporation of an amendment to its annual registration designating a new registered agent and registered office if also discontinued or the thirty-first day after the date on which the statement was filed. (Code 1981, § 14-3-503, enacted by Ga. L. 1991, p. 465, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 309.

#### 14-3-504. Service of process on corporation.

(a) A corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

(b) If a corporation has no registered agent, or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the secretary of the corporation at its principal office. Service is perfected under this subsection on the earliest of:

(1) The date the corporation receives the mail;

(2) The date shown on the return receipt, if signed on behalf of the corporation; or

(3) Five days after its deposit in the United States mail, if mailed postage prepaid and correctly addressed.

(c) This Code section does not prescribe the only means, or necessarily the required means, of serving a corporation. (Code 1981, § 14-3-504, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code

section is applicable with respect to notices delivered on or after July 1, 2000.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 58. 19 Am. Jur. 2d, Corporations, § 2192.

**C.J.S.** — 7 C.J.S., Associations, § 49. 19 C.J.S., Corporations, §§ 724, 725.

**ALR.** — Nonresident director or officer of domestic corporation as subject to constructive service of process in suit or proceeding to enforce duty or obligation to corporation, its stockholders or creditors, 148 ALR 1251.

## PART 2

## VENUE

**14-3-510. Venue — Applicable laws; where corporation deemed to reside; corporations with principal office under prior law.**

(a) Venue in proceedings against a corporation shall be determined in accordance with the pertinent constitutional and statutory provisions of this state in effect as of July 1, 1991, or thereafter.

(b) For the purpose of determining venue, each domestic corporation and each foreign corporation authorized to transact business in this state shall be deemed to reside:

(1) For purposes of proceedings generally, in the county where its registered office is maintained, or if the corporation fails to maintain a registered office, it shall be deemed to reside in the county in this state where its last named registered office or principal office, as shown by the records of the Secretary of State, was maintained;

(2) For purposes of proceedings based on contracts, in that county in which the contract sought to be enforced was made or is to be performed, if it has an office and transacts business in that county, and may be sued;

(3) For purposes of proceedings for damages because of torts, wrong, or injury done, in the county where the cause of action originated, if the corporation has an office and transacts business in that county; and

(4) For purposes of garnishment proceedings, in the county in which is located the corporate office or place of business where the employee who is the defendant in the main action is employed.

(c) Any residences established by this Code section shall be in addition to, and not in limitation of, any other residence that any domestic or foreign corporation may have by reason of other laws.

(d) Whenever this chapter either requires or permits a proceeding to be brought in the county where the registered office of the corporation is maintained, if the proceeding is against a corporation having a principal office as required under a prior general corporation law, the action or proceeding may be brought in the county where the principal office is located. (Code 1981, § 14-3-510, enacted by Ga. L. 1991, p. 465, § 1.)



**Cross references.** — Venue generally, Ga. Const. 1983, Art. VI, Sec. II.

**Law reviews.** — For note discussing problems with venue in Georgia, and proposing

statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

## ARTICLE 6

### MEMBERSHIP

#### PART 1

#### GENERAL PROVISIONS

#### **14-3-601. Authority to establish criteria or procedures for membership.**

(a) The articles or bylaws may establish criteria or procedures for admission of members.

(b) No person shall be admitted as a member without his consent. (Code 1981, § 14-3-601, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is taken from the Model Act. Section 14-3-302(16) permits nonprofit corporations to admit members and to establish conditions for membership. Any person (as broadly defined in section 14-3-140(23) to include both individuals and entities) may be a member. Under subsection (b), however, a person cannot become a member without that person's express or implied consent. Consent may be implied, for example, by acceptance of membership benefits knowing that the benefits are offered only to members.

#### **14-3-602. Consideration for membership in corporation.**

Except as provided in its articles or bylaws, a corporation may admit members for no consideration or for such consideration as is determined by the board. (Code 1981, § 14-3-602, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is taken from the Model Act. It affords flexibility to issue memberships for no consideration or for such consideration as is established in the corporation's articles or bylaws or by the board of directors.

Unlike stock in a business corporation, a membership in a nonprofit corporation does not necessarily have any measurable economic value. There is thus less need to regulate the consideration for memberships. Any type of consideration may be accepted, including promissory notes, intangible property and past or future services. In establishing the type and amount of consideration, and the timing of its payment, the board of directors must fulfill their obligations of care and loyalty.

#### **14-3-603. Membership not required.**

A corporation is not required to have members. (Code 1981, § 14-3-603, enacted by Ga. L. 1991, p. 465, § 1.)

## COMMENT

This section is taken from the Model Act. It is intended to clarify that nonprofit corporations may have members, but are not required to have members.

## PART 2

## RIGHTS AND LIABILITIES OF MEMBERS

**14-3-610. Voting rights.**

Members as defined in paragraph (20) of Code Section 14-3-140 shall have no voting rights, other than to elect directors, except as specifically provided in the articles or bylaws. All members shall have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws. Except for the rights specified in Code Section 14-3-630, members of any corporation existing on July 1, 1991, shall be limited to having the same voting and other rights as before such date, until changed by amendment of its articles of incorporation or bylaws. (Code 1981, § 14-3-610, enacted by Ga. L. 1991, p. 465, § 1.)

## COMMENT

This section is based on the Model Act, but differs from it in several respects. First, it clarifies that this Code does not create new rights for members of nonprofit corporations existing on the effective date of the Code, except as provided in section 14-3-630. This reference should be to sections 14-3-740 through 14-3-747, dealing with derivative actions. Solely for purposes of derivative actions, section 14-3-740(2) defines "member" broadly to include persons who may not qualify as members under section 14-3-140, but who may have special interests in the corporation that should entitle them to bring a derivative action. In addition, this section clarifies that membership status, which entitles the member to vote for the election of directors, does not confer any other voting rights except as specifically provided in the corporation's articles or bylaws.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-3-80, are included in the annotations for this section.

**Disciplinary actions taken by a private social club against its members** are not matters of constitutional law and are governed

by the by-laws, which constitute the agreement between the corporation and its members. *Bartley v. Augusta Country Club, Inc.*, 166 Ga. App. 1, 303 S.E.2d 129 (1983) (decided under former § 14-3-80).

**Cited in** *Bartley v. Augusta Country Club, Inc.*, 254 Ga. 144, 326 S.E.2d 442 (1985).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code 1933, § 22-2501 and former Code 1933, § 32-909, are included in the annotations for this section.

**School board incorporation or membership in nonprofit corporations.** — While

county boards of education are vested with broad powers respecting the management and control of the school systems they administer under former Code 1933, § 32-909 (see O.C.G.A. § 20-2-520), the general laws pertaining to the creation of nonprofit corporations, former Code 1933, § 22-2701



(see O.C.G.A. § 14-3-130) and § 22-2501 (see O.C.G.A. § 14-3-610), appear to exclude the possibility of school boards incorporating or being members of nonprofit

corporations as a county board of education is not a corporation, partnership, association or other "person." 1978 Op. Att'y Gen. No. 78-4.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 18. 18A Am. Jur. 2d, Corporations, §§ 728, 729. 66 Am. Jur. 2d, Religious Societies, § 19.

**C.J.S.** — 7 C.J.S., Associations, § 19. 10 C.J.S., Beneficial Associations, §§ 35, 36. 18

C.J.S., Corporations, § 305. 77 C.J.S., Religious Societies, § 14.

**ALR.** — Rights and liabilities arising out of contract for lifetime membership in social or fraternal club or association, 10 ALR3d 1357.

### 14-3-611. Limitation on members' liability.

A member of a corporation is not, as such, personally liable for the acts, debts, liabilities, or obligations of the corporation. (Code 1981, § 14-3-611, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is taken from the Model Act. It establishes the general rule that members have no personal liability to third parties for the corporation's acts, obligations or debts.

### 14-3-612. Liability for dues, assessments, or fees.

A member may become liable to the corporation for dues, assessments, or fees; provided, however, that an article or bylaw provision or a resolution adopted by the board authorizing or imposing dues, assessments, or fees does not, of itself, create liability. (Code 1981, § 14-3-612, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is taken from the Model Act. Unlike shareholders of business corporations, who rarely obligate themselves to make continuing payments to the corporation, members of nonprofit corporations often agree to make payments to the corporation. This section is intended to clarify that the mere existence of a bylaw provision or director resolution purporting to impose dues or assessments does not create liability for a member without that member's agreement or consent or knowing acceptance of something of value from the corporation.

Difficult factual questions concerning whether there has been consent will no doubt arise. A member's agreement to abide by the corporation's bylaws, as amended from time to time, would not evidence such consent. On the other hand, a member's agreement to pay such dues, fees or assessments as the board may from time to time establish would evidence such consent.

### 14-3-613. Remedies of creditors of corporation against members.

(a) No proceeding may be brought by a creditor to reach the liability, if any, of a member to the corporation unless final judgment has been

rendered in favor of the creditor against the corporation and execution has been returned unsatisfied in whole or in part or unless such action would be useless.

(b) All creditors of the corporation, with or without reducing their claims to judgment, may intervene in any creditor's proceeding brought under subsection (a) of this Code section to reach and apply unpaid amounts due the corporation. Any or all members who owe amounts to the corporation may be joined in such proceeding. (Code 1981, § 14-3-613, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is taken from the Model Act. It requires creditors of a nonprofit corporation to obtain a final judgment against the corporation and attempt collection before suing members to recover any amounts they may owe the corporation, unless a proceeding against the corporation would be futile. This section is not intended to foreclose other remedies available to a creditor, such as those under the Uniform Fraudulent Transfer Act.

### PART 3

#### TERMINATION OF MEMBERSHIP

#### **14-3-620. Resignation by member and effect thereof.**

(a) Unless otherwise provided by law, a member may resign from membership at any time, although the articles or bylaws may require reasonable notice before the resignation is effective.

(b) This Code section shall not relieve the resigning member from any obligation for charges incurred, services or benefits actually rendered, dues, assessments, or fees, or arising from contract, a condition to ownership of land, an obligation arising out of ownership of land, or otherwise, and this Code section shall not diminish any right of the corporation to enforce any such obligation or obtain damages for its breach. (Code 1981, § 14-3-620, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act. It sets forth the basic right of a member to resign at any time, unless such resignation is prohibited by some other law. A member who resigns may be liable to the corporation for wrongfully withdrawing in violation of a contractual or other obligation to remain as a member. Under subsection (b), a member who has resigned may remain liable for obligations incurred or commitments made prior to the resignation.

#### **14-3-621. Involuntary termination of membership; procedures; statute of limitations for challenging involuntary termination; liability for dues, assessments, or fees.**

Unless otherwise expressly provided in a corporation's articles of incorporation or bylaws or, in the case of a corporation in existence before July 1, 1991, by resolution of the directors or members adopted before that date:



(1) No member of a corporation may be expelled or suspended, and no membership or memberships in such corporations may be terminated or suspended except pursuant to a procedure that is fair and reasonable and is carried out in good faith;

(2) A procedure is fair and reasonable when either:

(A) The articles or bylaws set forth a procedure that provides:

(i) Not less than 15 days' prior written notice of the expulsion, suspension, or termination and the reasons therefor; and

(ii) An opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the expulsion, suspension, or termination by a person or persons authorized to decide that the proposed expulsion, termination, or suspension not take place; or

(B) It is fair and reasonable taking into consideration all of the relevant facts and circumstances;

(3) Any written notice given by mail must be given by first-class or certified mail or statutory overnight delivery sent to the last address of the member shown on the corporation's records;

(4) Any proceeding challenging an expulsion, suspension, or termination, including a proceeding in which defective notice is alleged, must be commenced within one year after the effective date of the expulsion, suspension, or termination; and

(5) A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made prior to or during expulsion or suspension. (Code 1981, § 14-3-621, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, section is applicable with respect to notices § 16, not codified by the General Assembly, delivered on or after July 1, 2000. provides that the amendment to this Code

#### COMMENT

This section is taken from the Model Act. It departs from prior case law in Georgia holding that sanctions and expulsions are governed solely by the nonprofit corporation's articles and bylaws. See *Bartley v. Augusta Country Club, Inc.*, 166 Ga. App. 1 (1983). This section does not address the substantive grounds for expulsion or suspension, but imposes a requirement that the procedures followed must be fair and reasonable.

Subsection (2)(A) establishes a safe harbor procedure. Subsection (2)(B) clarifies that the safe harbor procedure is not the only fair and reasonable procedure, and that failure to comply with the safe harbor does not mean that the procedure employed was not fair and reasonable under the circumstances.

Subsection (4) provides finality by requiring that a proceeding challenging a suspension or termination must be brought within one year after the effective date of the expulsion or suspension.

Courts generally have not evaluated the fairness or reasonableness of procedure used by religious corporations to expel or suspend members. See also section 14-3-180 concerning religious corporations.

### JUDICIAL DECISIONS

**Applicability of statute of limitation.** — Where plaintiff filed and dismissed a suit for wrongful expulsion, a suit based on the same claim brought three years later was barred by the one-year statute of limitation in O.C.G.A. § 14-3-621, and the renewal provision of O.C.G.A. § 9-2-61 did not apply to allow refile of the suit. *Atlanta Country Club, Inc. v. Smith*, 217 Ga. App. 515, 458 S.E.2d 136 (1995).

**Section not applicable to restriction of**

**social privileges.** — Since Moose Lodge bylaws covered the procedure for restricting social quarters privileges, and since O.C.G.A. § 14-3-621, by its terms, applies to membership expulsion or suspension, not to restrictions of social privileges, and only requires that the procedure be fair and reasonable under the circumstances, summary judgment for the defendants was affirmed. *Rose v. Zurowski*, 236 Ga. App. 157, 511 S.E.2d 265 (1999).

### PART 4

### DELEGATES

#### 14-3-630. Authority to provide for delegates.

(a) A corporation may provide in its articles or bylaws for delegates having some or all of the rights and authority of members.

(b) The articles or bylaws may set forth provisions relating to:

(1) The characteristics, qualifications, rights, limitations, and obligations of delegates, including their selection and removal;

(2) Calling, noticing, holding, and conducting meetings of delegates; and

(3) Carrying on corporate activities during and between meetings of delegates. (Code 1981, § 14-3-630, enacted by Ga. L. 1991, p. 465, § 1.)

### COMMENT

This section is taken from the Model Act. It authorizes corporations to operate with delegates rather than, or in addition to, members or a self-perpetuating board. If the corporation has a board of directors, the board is bound by the provisions of Article 8. If delegates are given some or all of the powers of members or directors, they have analogous rights, duties and obligations.



## ARTICLE 7

## MEETINGS

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 22, 23. 18A Am. Jur. 2d, Corporations, §§ 948-985. 66 Am. Jur. 2d, Religious Societies, § 31.

**C.J.S.** — 7 C.J.S., Associations, § 19. 18 C.J.S., Corporations, §§ 362-367, 370. 77 C.J.S., Religious Societies, § 19 et seq.

**ALR.** — Notice of meeting of voluntary association, 167 ALR 1233.

## PART 1

## GENERAL PROVISIONS

**14-3-701. Annual meeting.**

(a) A corporation with members shall hold a meeting of members annually at a time stated in or fixed in accordance with the bylaws.

(b) A corporation with members may hold regular meetings of members at the times stated in or fixed in accordance with the bylaws.

(c) Annual and regular meetings of members may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual and regular meetings shall be held at the corporation's principal office or other suitable place.

(d) At the annual meeting:

(1) The president and chief financial officer shall report on the activities and financial condition of the corporation; and

(2) The members shall consider and act upon such other matters as may be raised consistent with the notice requirements of Code Sections 14-3-705 and 14-3-706.

(e) At regular meetings the members shall consider and act upon such matters as may be raised consistent with the notice requirements of Code Sections 14-3-705 and 14-3-706.

(f) The failure to hold an annual or regular meeting at a time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action. (Code 1981, § 14-3-701, enacted by Ga. L. 1991, p. 465, § 1.)

## COMMENT

This section is based both on the Model Act and on its Business Code counterpart. It recognizes that some nonprofit corporations hold regular meetings of members in

addition to the required annual meeting of members. Action taken at such regular meetings must comply with the notice requirements of sections 14-3-705 and 14-3-706.

Many nonprofit corporations operate informally and may fail to hold an annual members' meeting. Such a failure neither affects the validity of corporate actions (subsection (f)) nor the status of the directors, who, under section 14-3-805(d), continue to serve until their successors are elected, despite the expiration of their terms. Thus, the corporation can continue to function and the actions taken by the board and the officers and employees will not be subject to invalidation on the basis of the failure to hold the annual members' meeting. Failure by the board to call the annual meeting, however, might constitute a breach of the duties established in section 14-3-830.

Subsection (c) permits annual and regular meetings to be held at the corporation's principal office or other suitable place. Some nonprofit corporations may not have a "principal office," and this change is designed to accommodate such situations.

### JUDICIAL DECISIONS

**Trial court's order that a church call for an annual meeting** of its membership in accordance with the provisions of O.C.G.A. § 14-3-701 constituted an unconstitutional judicial interference in the government of the church. *First Born Church of Living God, Inc. v. Hill*, 267 Ga. 633, 481 S.E.2d 221 (1997).

### 14-3-702. Special meetings.

(a) A corporation with members shall hold a special meeting of members:

(1) On call of its board or the person or persons authorized to do so by the articles or bylaws; or

(2) Except as otherwise provided in the articles or bylaws, if the holders of at least 5 percent of the voting power of any corporation sign, date, and deliver to any corporate officer one or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(b) If not otherwise fixed under Code Section 14-3-703 or Code Section 14-3-707, the record date for determining members entitled to demand a special meeting is the date the first member signs the demand.

(c) If a notice for a special meeting demanded under paragraph (2) of subsection (a) of this Code section is not given pursuant to Code Section 14-3-705 within 30 days after the date the written demand or demands are delivered to a corporate officer, regardless of the requirements of subsection (d) of this Code section, a person signing the demand or demands may set the time and place of the meeting and give notice pursuant to Code Section 14-3-705.

(d) Special meetings of members may be held in or out of this state at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office or other suitable place.



(e) Only those matters that are within the purpose or purposes described in the meeting notice required by Code Section 14-3-705 may be conducted at a special meeting of members. (Code 1981, § 14-3-702, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based both on the Model Act and on its Business Code counterpart. Subsection (a)(1) provides that a special members' meeting may be called by the board or by the person or persons designated in the articles or bylaws. Subsection (a)(2) authorizes holders of at least 5% of the voting power to call a special meeting, unless the articles or bylaws provide otherwise. The Business Code counterpart requires the holders of 25% of the voting power to call special meetings, unless the articles or bylaws provide for a greater or lesser percentage. Business corporations with 100 or fewer shareholders may not impose a greater percentage requirement than 25%, however. Section 14-2-702(a)(3).

Subsection (c) authorizes a self-help remedy for members who have demanded a special meeting which the corporation has refused to call. This provision is based on a recognition that forcing such members to resort to litigation to compel a special meeting could have the practical effect of rendering the members' right to call such meetings useless, because members will often lack the economic incentive or ability to pursue litigation. This subsection authorizes those who seek the meeting to call the meeting themselves following a wrongful refusal of the corporation to call the meeting. Access to a membership list may be critical to members seeking to call a special meeting. For rules relating to membership lists, see section 14-3-720 and Article 16. If the self-help remedy is of no avail because the membership list is wrongfully withheld, litigation expenses to obtain a court-ordered meeting may be recovered under section 14-3-703(c).

#### **14-3-703. Court-ordered meetings.**

(a) The superior court may summarily order a meeting to be held:

(1) On application of any member or other person entitled to participate in an annual meeting, or, in the case of a corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302, the Attorney General, if an annual meeting was not held within the earlier of six months after the end of a fiscal year of the corporation or 15 months after its last annual meeting; or

(2) On application of any member or other person entitled to participate in a regular meeting, or, in the case of a corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302, the Attorney General, if a regular meeting is not held within 40 days after the date it was required to be held; or

(3) On application of a member who signed a demand for a special meeting valid under Code Section 14-3-702, a person or persons entitled to call a special meeting, or, in the case of a corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302, the Attorney General, if:

(A) Notice of the special meeting was not given within 30 days after the date the demand was delivered to a corporate officer; or

(B) The special meeting was not held in accordance with the notice.

(b) After notice to the corporation, the court may fix the time and place of the meeting, specify a record date for determining members entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting (or direct that the votes represented at the meeting constitute a quorum for action on those matters) and enter other orders necessary to accomplish the purpose or purposes of the meeting.

(c) If the court orders a meeting, it may also order the corporation to pay the member's or other person's costs (including reasonable counsel fees) incurred to obtain the order. (Code 1981, § 14-3-703, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based both on the Model Act and on its Business Code counterpart. It authorizes members and those authorized to participate in an annual meeting to petition the superior court for an order compelling a meeting. In addition, the Attorney General may initiate the litigation in the case of corporations described in section 14-3-1302(a)(2) (basically charitable corporations). Unlike its Business Code counterpart, this section specifically authorizes the court to order the corporation to pay the costs of bringing the action, including attorneys' fees.

#### JUDICIAL DECISIONS

**Trial court's order that a church call for an annual meeting** of its membership in accordance with the provisions of O.C.G.A. § 14-3-701 constituted an unconstitutional judicial interference in the government of the church. *First Born Church of Living God, Inc. v. Hill*, 267 Ga. 633, 481 S.E.2d 221 (1997).

#### 14-3-704. Approval of action without meeting.

(a) Unless limited or prohibited by the articles or bylaws, or unless this chapter requires a greater number of affirmative votes, action required or permitted by this chapter to be approved by the members may be approved without a meeting of members if the action is approved by members holding at least a majority of the voting power. The action must be evidenced by one or more written consents describing the action taken, signed by those members representing at least a majority of the voting power, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) If not otherwise determined under Code Section 14-3-703 or Code Section 14-3-707, the record date for determining members entitled to take action without a meeting is the date the first member signs the consent.

(c) A consent signed under this Code section has the effect of a meeting vote and may be described as such in any document.



(d) Written notice of member approval pursuant to this Code section shall be given to all members who have not signed the written consent. If written notice is required, member approval pursuant to this Code section shall be effective ten days after such written notice is given. (Code 1981, § 14-3-704, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based both on the Model Act and on its Business Code counterpart, but it differs from each. It permits member action without a members' meeting if a majority of members approve the action in writing, unless the corporation's articles or bylaws limit or prohibit action by written consent or unless a greater number of affirmative votes is required under the Code. The Business Code counterpart requires unanimous written consent of shareholders, unless the corporation's articles permit a less-than-unanimous vote. Thus, the Business Code provides for an "opt-in" less-than-unanimous approval, while this Code provides for an "opt-out" majority approval. The Model Act provides for an "opt-out" approval by holders of at least 80% of the voting power.

Subsection (d) requires that written notice of member approval obtained under this section be given to all members who did not consent in writing to the action. This provision is intended to prevent member factions from usurping control of the corporation without the knowledge of all members and to ensure that all members be notified of member action taken without a meeting.

#### 14-3-705. Notice of meeting.

(a) A corporation shall give notice consistent with its bylaws of meetings of members in a fair and reasonable manner.

(b) Any notice that conforms to the requirements of subsection (c) of this Code section is fair and reasonable, but other means of giving notice may also be fair and reasonable when all the circumstances are considered; provided, however, that notice of matters referred to in paragraph (2) of subsection (c) of this Code section must be given as provided in subsection (c) of this Code section.

(c) Notice is fair and reasonable if:

(1) The corporation notifies its members of the place, date, and time of each annual, regular, and special meeting of members no fewer than ten days (or if notice is mailed by other than first-class or registered mail or statutory overnight delivery, 30 days) nor more than 60 days before the meeting date;

(2) Notice of an annual or regular meeting includes a description of any matter or matters that must be approved by the members under Code Section 14-3-855, 14-3-863, 14-3-1003, 14-3-1021, 14-3-1103, 14-3-1202, or 14-3-1402; and

(3) Notice of a special meeting includes a description of the matter or matters for which the meeting is called.

(d) Unless the bylaws require otherwise, if an annual, regular, or special meeting of members is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place, if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under Code Section 14-3-707, however, notice of the adjourned meeting must be given under this Code section to the members of record as of the new record date.

(e) When giving notice of an annual, regular, or special meeting of members, a corporation shall give notice of a matter a member intends to raise at the meeting if:

(1) Requested in writing to do so by a person entitled to call a special meeting; and

(2) The request is received by the secretary or president of the corporation at least ten days before the corporation gives notice of the meeting. (Code 1981, § 14-3-705, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2000, p. 1589, § 4.)

**Editor's notes.** — Ga. L. 2000, p. 1589, section is applicable with respect to notices § 16, not codified by the General Assembly, delivered on or after July 1, 2000. provides that the amendment to this Code

#### COMMENT

This provision is based on the Model Act. It requires that notice of members' meetings be given in compliance with the corporation's articles and bylaws and in a "fair and reasonable manner." Subsection (c) provides a safe harbor method of ensuring that the notice is fair and reasonable. Notice that does not conform to subsection (c) procedures may still be fair and reasonable under the circumstances, except that the requirements of subsection (c)(2) must be met. Subsection (c)(1) is intended to accommodate the practice of some nonprofit corporations that take advantage of special mailing privileges to send notice to members. In such cases, when first-class or registered mail is not used, the notice must be sent at least 30 days before the meeting date, as opposed to the normal 10-day period. This rule applies regardless of the number of members. Compare section 14-3-141(c), which permits written notice by other than first-class mail if the corporation has more than 500 members. Under this general notice provision, just as under section 14-3-705, such notice must be mailed at least 30 days prior to the meeting. Section 14-3-705(c)(1) is not limited to corporations with more than 500 members.

The safe harbor provision of subsection (c) distinguishes between annual, regular and special meetings in that notice of special meetings must include a description of the matter or matters that will be considered at the meeting. Notice of regular or annual meetings need not include a description of matters to be considered, unless a matter to be considered is governed by any of the Code sections listed in subsection (c)(2).

In determining whether notice is fair and reasonable under the circumstances, past practice is relevant but not necessarily determinative. In addition to being fair and reasonable, notice procedures must comply with the corporation's bylaws.



**14-3-706. Waiver of notice.**

(a) A member may waive any notice required by this chapter, the articles, or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the member entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A member's attendance at a meeting:

(1) Waives objection to lack of notice or defective notice of the meeting, unless the member at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; and

(2) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the member objects to considering the matter when it is presented. (Code 1981, § 14-3-706, enacted by Ga. L. 1991, p. 465, § 1.)

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-3-81, are included in the annotations for this section.

**No waiver of objections.** — Notwithstanding the waiver provisions, there is nothing in the Georgia Nonprofit Corporation Code

(see O.C.G.A. § 14-3-101 et seq.) that provides for a waiver of objections to matters voted upon at a meeting. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993) (decided under former § 14-3-81), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994).

**14-3-707. Record date.**

(a) The bylaws may fix or provide the manner of fixing the record date to determine the members entitled to notice of a members' meeting, to demand a special meeting to vote, or to take any other action. If the bylaws do not fix or provide for fixing such a record date, the board may fix a future date as such a record date.

(b) A record date fixed under this Code section may not be more than 70 days before the meeting or action requiring a determination of members.

(c) A determination of members entitled to notice of or to vote at a membership meeting is effective for any adjournment of the meeting unless the board fixes a new record date, which it must do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting.

(d) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original

record date continues in effect or it may fix a new record date. (Code 1981, § 14-3-707, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-708. Action taken without meeting.**

(a) Unless prohibited or limited by the articles or bylaws, any action that may be taken at any annual, regular, or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter.

(b) A written ballot shall:

(1) Set forth each proposed action; and

(2) Provide an opportunity to vote for or against each proposed action.

(c) Approval by written ballot pursuant to this Code section shall be valid only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(d) All solicitations for votes by written ballot shall:

(1) Indicate the number of responses needed to meet the quorum requirements;

(2) State the percentage of approvals necessary to approve each matter other than election of directors; and

(3) Specify the time by which a ballot must be received by the corporation in order to be counted.

(e) Except as otherwise provided in the articles or bylaws, a written ballot may not be revoked. (Code 1981, § 14-3-708, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based on the Model Act. It authorizes election of directors and approval of actions by written ballot. The ballots must be distributed to every member entitled to vote and provide specified information. To ease the problem of counting ballots, subsection (e) prohibits revocation of ballots unless revocation is authorized by the articles or bylaws.

**PART 2**

**VOTING**

**14-3-720. Membership list for meeting.**

(a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its members who are entitled to



notice of the meeting. The list must show the address of and number of votes each member is entitled to vote at the meeting.

(b) The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting, beginning two business days after notice is given of the meeting for which the list was prepared and continuing through the meeting, at the corporation's principal office or at a reasonable place identified in the meeting notice in the city where the meeting will be held. A member, a member's agent, or a member's attorney is entitled on written demand to inspect and, subject to the limitations of subsection (c) of Code Section 14-3-1602 and Code Section 14-3-1605, to copy the list, at a reasonable time and at the member's expense, during the period it is available for inspection.

(c) The corporation shall make the list of members available at the meeting, and any member, a member's agent, or member's attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses to allow a member, a member's agent, or a member's attorney to inspect the list of members before or at the meeting (or copy the list as permitted by subsection (b) of this Code section), the superior court, on application of the member, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(e) Refusal or failure to prepare or make available the members' list does not affect the validity of action taken at the meeting. (Code 1981, § 14-3-720, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and differs from its Business Code counterpart. The list of members must be made available both at the meeting and prior to the meeting. Prior to the meeting, the list must be available beginning two business days after notice of the meeting is given, and the list must be available either at the corporation's principal office or at a reasonable place identified in the meeting notice in the city in which the meeting will be held. The Business Code counterpart requires only that the list be available at the meeting.

Like its Business Code counterpart, this section makes the judicial remedy the only sanction for violation of its requirements. The Model Act invalidates action taken at a meeting following a refusal or failure to comply with the membership list inspection rights of this section. This section follows the Business Code approach rather than the Model Act.

#### **14-3-721. Number of votes to which member entitled; effect of membership in names of two or more persons.**

(a) Unless the articles or bylaws provide otherwise, each member is entitled to one vote on each matter voted on by the members.

(b) Unless the articles or bylaws provide otherwise, if a membership stands of record in the names of two or more persons, their acts with respect to voting shall have the following effect:

(1) If only one votes, such act binds all; and

(2) If more than one votes, the vote shall be divided on a pro rata basis. (Code 1981, § 14-3-721, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act. It sets forth the basic rule that each member is entitled to one vote on each matter voted on by the members unless the articles or bylaws provide otherwise. Subsection (b) addresses the situation of a single membership held by two or more persons. In the absence of a contrary bylaw provision, if only one person votes, that vote binds the other holders, but if more than one votes, the vote is split pro rata based on the number of persons voting.

#### 14-3-722. Quorum.

(a) Unless this chapter, the articles, or bylaws provide for a higher or lower quorum, 10 percent of the votes entitled to be cast on a matter must be represented at a meeting of members to constitute a quorum on that matter.

(b) A bylaw amendment to decrease the quorum for any member action may be approved by the members or, unless prohibited by the bylaws, by the board.

(c) A bylaw amendment to increase the quorum required for any member action must be approved by the members.

(d) Unless 20 percent or more of the voting power is present in person or by proxy, the only matters that may be voted upon at an annual or regular meeting of members are those matters that are described in the meeting notice. (Code 1981, § 14-3-722, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and differs substantially from the Business Code. Many nonprofit corporations have low member attendance at meetings and need a low quorum requirement to hold annual, regular or special meetings. In recognition of this fact, this section imposes a low threshold or lower limit of ten percent, subject to the corporation's articles and bylaws, either of which may impose a higher or lower quorum requirement. The bylaws may provide, for example, that a quorum is composed of those attending the meeting or voting on the matter. In such a case, a quorum would be present if one member attended the meeting or voted on the matter. The low quorum requirement creates the potential for a few members to take over a meeting and vote upon matters not described in the notice. Subsection (d) is designed to mitigate this problem by prohibiting members from voting on a matter not described in the meeting notice unless twenty percent of the voting power is present or represented at the meeting. At special meetings, members may vote only on matters described in the meeting notice. See section 14-3-702(e).



**14-3-723. Majority of votes constitutes act of membership.**

(a) Unless this chapter, the articles, or the bylaws require a greater vote or voting by class, if a quorum is present, the affirmative vote of a majority of the votes cast is the act of the members.

(b) A bylaw amendment to increase or decrease the vote required for any member action must be approved by the members. (Code 1981, § 14-3-723, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based on the Model Act. If a quorum is present, the affirmative vote of a majority of votes cast is sufficient to approve a matter, unless otherwise provided in the corporation's articles or bylaws or this Code.

**14-3-724. Proxies.**

(a) Unless the articles or bylaws prohibit or limit proxy voting, a member may vote in person or by proxy.

(b) A member may appoint a proxy to vote or otherwise act for the member by signing an appointment form either personally or by an attorney in fact.

(c) An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes. An appointment is valid for 11 months unless a different period is expressly provided in the appointment form.

(d) An appointment of a proxy is revocable by the member.

(e) The death or incapacity of the member appointing a proxy does not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

(f) Appointment of a proxy is revoked by the person appointing the proxy:

(1) Attending any meeting and voting in person; or

(2) Signing and delivering to the secretary or other officer or agent authorized to tabulate proxy votes either a writing stating that the appointment of the proxy is revoked or a subsequent appointment form.

(g) Subject to Code Section 14-3-727 and any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the member making the appointment. (Code 1981, § 14-3-724, enacted by Ga. L. 1991, p. 465, § 1.)

## COMMENT

This section is based on the Model Act and differs from its Business Code counterpart, section 14-2-722, in several respects. First, any proxy under this Code is revocable. The Business Code concept of irrevocable proxies "coupled with an interest" is inapposite in the nonprofit corporation context. In addition, this section makes explicit that revocation occurs by attending the meeting and voting in person, while the Business Code omitted such language "as surplusage." See Comment to section 14-2-722.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 999-1007, 1015-1022, 1048, 1049, 1069-1095. 18B Am. Jur. 2d, Corporations, §§ 1381, 1386.

**C.J.S.** — 18 C.J.S., Corporations, §§ 375-377, 385-393. 19 C.J.S., Corporations, §§ 439-442.

**ALR.** — Revocability of proxy to vote stock, 159 ALR 307.

Transfer of, and voting rights in, stock of co-operative apartment association, 99 ALR2d 236.

**14-3-725. Voting requirements for election of directors; cumulative voting.**

(a) Unless otherwise provided in the articles, directors are elected by a majority of the votes cast by the members entitled to vote in the election at a meeting at which a quorum is present.

(b) If the articles or bylaws provide for cumulative voting by members, members may so vote, by multiplying the number of votes the members are entitled to cast by the number of directors for whom they are entitled to vote, and cast the product for a single candidate or distribute the product among two or more candidates.

(c) Cumulative voting is not authorized at a particular meeting unless:

(1) The meeting notice or statement accompanying the notice states that cumulative voting will take place; or

(2) A member gives notice during the meeting and before the vote is taken of the member's intent to cumulate votes, and if one member gives this notice all other members participating in the election are entitled to cumulate their votes without giving further notice.

(d) A director elected by cumulative voting may be removed by the members without cause if the requirements of Code Section 14-3-808 are met, unless the votes cast against removal or not consenting in writing to such removal would be sufficient to elect such director if voted cumulatively at an election at which the same total number of votes were cast (or, if such action is taken by written ballot, all memberships entitled to vote were voted) and the entire number of directors authorized at the time of the director's most recent election were then being elected.

(e) Members may not cumulatively vote if the directors and members are identical. (Code 1981, § 14-3-725, enacted by Ga. L. 1991, p. 465, § 1.)



**COMMENT**

This section is based both on the Model Act and on its Business Code counterpart, section 14-2-728, but differs from each. Under the Model Act, the Business Code and the Revised Model Business Corporation Act, directors are elected by a plurality of the votes cast. This section requires a majority vote. See subsection (a). Thus, for nonprofit corporations that wish to follow the practice of election by a plurality of votes cast, an amendment to the articles is necessary.

Like the Business Code, this section permits cumulative voting on an "opt-in" basis. Unlike the Business Code, however, this section permits the use of cumulative voting if either the articles or bylaws so provide. Under the Business Code, cumulative voting must be elected in the articles. The Business Code prohibits cumulative voting unless either the meeting notice or proxy statement indicates that cumulative voting will be in effect or a shareholder notifies the corporation 48 hours in advance of an intent to cumulate the shareholder's votes. Under this Code section, the member need not give advance notice, but may merely give notice at the meeting of an intent to cumulate the member's votes, so long as the notice is given before the vote is taken.

Subsection (d) protects a minority that has elected a director from having that director removed by the majority. This subsection prohibits the removal of a director if those opposing the removal would be sufficient to elect the director by cumulative voting.

Subsection (e) is intended to prevent perpetuation in office of a director through the use of cumulative voting. If self-perpetuation is desired, it should be accomplished by some other means, such as by designation of directors. See section 14-3-804.

**14-3-726. Election of directors by category.**

A corporation may provide in its articles or bylaws for election of directors by members or delegates:

- (1) On the basis of chapter or other organizational unit;
- (2) By region or other geographic unit;
- (3) By preferential voting; or
- (4) By any other reasonable method. (Code 1981, § 14-3-726, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based on the Model Act. It permits a corporation to use any reasonable method to elect directors, so long as that method is described in the corporation's articles or bylaws.

Source: Model Act § 18.

This Code was drawn principally from the Georgia Business Corporation Code (referred to throughout the comments hereto as the "Business Code"), enacted by Ga. L. 1988, p. 1070, § 1, and adheres to its nomenclature and its structure when appropriate. The former Georgia Nonprofit Corporation Code was adopted in 1968 and was patterned on the Model Nonprofit Corporation Act. The former Code was amended periodically to reflect changes made to the Georgia Business Corporation Code. Although a Revised Model Nonprofit Corporation Act (the "Model Act") was

approved in 1987 and published in 1988, its general approach of categorizing nonprofit corporations into three groups was not followed.

Because of the desire to conform this Code to the Business Code whenever possible and appropriate, separate comments on similar or identical provisions were deemed unnecessary. Accordingly, the comments to this Code seek to illuminate only those provisions that differ from their Business Code counterparts. Comments to some provisions based on the Model Act are based on comments to the Model Act, with permission of the American Bar Association and the publisher, Prentice Hall Law and Business.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1349-1352, 1362, 1363, 1434-1438. 66 Am. Jur. 2d, Religious Societies, § 8.

**C.J.S.** — 19 C.J.S., Corporations, §§ 433-435.

**ALR.** — Removal by court of director or officer of private corporation, 124 ALR 364.

Construction and effect of corporate by-laws or articles relating to change in number of directors, 3 ALR3d 623.

Validity of agreement in conjunction with sale of corporate shares that majority of directors will be replaced by purchaser's designees, 13 ALR3d 361.

### 14-3-727. Validity of signature on proxy.

(a) If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a member, the corporation if acting in good faith is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the member.

(b) If the name signed on a vote, consent, waiver, or proxy appointment does not correspond to the record name of a member, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the member if:

(1) The member is an entity and the name signed purports to be that of an officer or agent of the entity;

(2) The name signed purports to be that of an attorney in fact of the member and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the member has been presented with respect to the vote, consent, waiver, or proxy appointment;

(3) Two or more persons hold the membership as cotenants or fiduciaries and the name signed purports to be the name of at least one of the coholders and the person signing appears to be acting on behalf of all the coholders;

(4) The name signed purports to be that of an administrator, executor, guardian, or conservator representing the member and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment; or



(5) The name signed purports to be that of a receiver or trustee in bankruptcy of the member, and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment.

(c) The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the member.

(d) The corporation and its officer or agent who accept or reject a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this Code section are not liable in damages to the member for the consequences of the acceptance or rejection.

(e) Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this Code section is valid unless a court of competent jurisdiction determines otherwise. (Code 1981, § 14-3-727, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and on its Business Code counterpart, section 14-2-724.

### PART 3

#### VOTING AGREEMENTS

#### **14-3-730. Agreements among members.**

(a) Two or more members may provide for the manner in which they will vote by signing an agreement for that purpose. Such agreements may be valid for a period of up to 20 years. For corporations described in paragraph (2) of subsection (a) of Code Section 14-3-1302, such agreements must have a reasonable purpose not inconsistent with the corporation's public or charitable purposes.

(b) A voting agreement created under this Code section is specifically enforceable. (Code 1981, § 14-3-730, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and on its Business Code counterpart, section 14-2-731. It permits written voting agreements between or among members and provides that such agreements may be valid for up to twenty years. Voting agreements among members of corporations described in section 14-3-1302(a)(2) must be for a reasonable purpose that is not inconsistent with the corporation's purposes.

## PART 4

## DERIVATIVE PROCEEDINGS

**14-3-740. Definitions.**

As used in this part, the term:

(1) "Derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in Code Section 14-3-747, in the right of a foreign corporation.

(2) "Member" includes those who are members under Code Section 14-3-140, as well as any person who is entitled to some portion of the corporation's property upon dissolution, and any person or class of persons specifically designated in the corporation's bylaws or articles of incorporation as having standing to bring a derivative proceeding. (Code 1981, § 14-3-740, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

Part 4 of article 7 of the Code is based on the Model Act and on its counterpart in the Business Code. Prior law did not address the issue of derivative actions involving nonprofit corporations. The Model Act, which was approved prior to amendments to the Revised Model Business Corporation Act concerning derivative actions, contains a single section authorizing derivative actions. This part adopts the approach taken by the Revised Model Business Corporation Act and by the Business Code, with refinements to reflect the different constituencies.

"Member" is specially defined for purposes of this part to include persons whose special interest in the corporation should give them standing to bring a derivative proceeding. Those persons include anyone entitled to some portion of the corporation's property upon dissolution and anyone specifically designated in the corporation's articles or bylaws as having standing to bring a derivative proceeding. Remote contingent interests in a corporation's property are insufficient to qualify a person as a "member" for purposes of this part.

**14-3-741. Standing.**

A derivative proceeding may be brought either by any director or by any member or members having 5 percent or more of the voting power or by 50 members, whichever is less. A director or members may not commence or maintain a derivative proceeding unless the director or members:

(1) Was a director or were members of the corporation at the time of the act or omission complained of (or became a member through transfer by operation of law from one who was a member at that time); or is a director or are members at the time the proceeding is commenced; and

(2) Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation. (Code 1981, § 14-3-741, enacted by Ga. L. 1991, p. 465, § 1.)



**COMMENT**

Following the Model Act, this section authorizes any director to bring a derivative proceeding, as well as member(s) holding 5 percent or more of the voting power or 50 members, whichever is less. The Model Act requires the director or member to be such at the time the proceeding is commenced, but not at the time of the act or omission that is the subject of the proceeding. The Business Code takes the opposite approach: the complainant must have been a shareholder at the time of the act or omission in question. This section confers standing on directors or members who satisfy either criteria.

**JUDICIAL DECISIONS**

**Cited in** *Holmes v. Peebles*, 251 Ga. App. 417, 554 S.E.2d 566 (2001).

**14-3-742. Demand for suitable action by corporation required.**

(a) No derivative proceeding may be commenced until:

(1) A written demand has been made upon the corporation to take suitable action; and

(2) Ninety days have expired from the date the demand was made unless the complainant has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90 day period.

(b) In the case of corporations described in subsection (a) of Code Section 14-3-1302, the complainant shall deliver a copy of the demand to the Attorney General within ten days of making the demand on the corporation. (Code 1981, § 14-3-742, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

Subsection (b) requires notice to the Attorney General of a demand made on a corporation described in section 14-3-1302(a)(2). The purpose of this requirement is to ensure that the Attorney General is notified of alleged improprieties involving charitable corporations.

**JUDICIAL DECISIONS**

**Procedures required must be met.** — A director and member of a nonprofit corporation were required to follow the procedures of O.C.G.A. § 14-3-742 before bringing a derivative action against directors for breach of fiduciary duties. *Dunn v. Ceccarelli*, 227 Ga. App. 505, 489 S.E.2d 563 (1997).

**14-3-743. Stay of proceeding.**

If the corporation commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative proceeding for such

period as the court deems appropriate. (Code 1981, § 14-3-743, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-744. Dismissal of proceeding.**

(a) The court may dismiss a derivative proceeding if, on motion by the corporation, the court finds that one of the groups specified in subsection (b) of this Code section has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation shall have the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation.

(b) The determination in subsection (a) of this Code section shall be made by:

(1) A majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum;

(2) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum; or

(3) A panel of one or more independent persons appointed by the court upon motion by the corporation.

(c) None of the following shall by itself cause a director to be considered not independent for purposes of subsection (b) of this Code section:

(1) The nomination or election of the director by directors who are not independent;

(2) The naming of the director as a defendant in the derivative proceeding; or

(3) The fact that the director approved the action being challenged in the derivative proceeding so long as the director did not receive a personal benefit as a result of the action. (Code 1981, § 14-3-744, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-745. Discontinuance or settlement of proceeding prohibited without court approval.**

A derivative proceeding may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's members or a class of members, the court shall direct that notice be given to the



members affected. (Code 1981, § 14-3-745, enacted by Ga. L. 1991, p. 465, § 1.)

#### **14-3-746. Payment of expenses of proceeding.**

On termination of the derivative proceeding the court may:

(1) Order the corporation to pay the plaintiff's reasonable expenses (including attorneys' fees) incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation; or

(2) Order the plaintiff to pay any defendant's reasonable expenses (including attorneys' fees) incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose. (Code 1981, § 14-3-746, enacted by Ga. L. 1991, p. 465, § 1.)

#### **14-3-747. Applicability to foreign corporations.**

In any derivative proceeding in the right of a foreign corporation, the matters covered by this part shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation except for Code Sections 14-3-743 and 14-3-745 and paragraph (2) of Code Section 14-3-746. (Code 1981, § 14-3-747, enacted by Ga. L. 1991, p. 465, § 1.)

## **ARTICLE 8**

### **DIRECTORS AND OFFICERS**

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1345, 1354-1358, 1483-1485, 1931.

66 Am. Jur. 2d, Religious Societies, § 8.

**C.J.S.** — 19 C.J.S., Corporations, §§ 447, 448, 460, 534.

**ALR.** — Liability of bank which credits paper payable to a corporation to the personal credit of corporate officer who endorsed it, and pays out the proceeds on the latter's personal checks, 9 ALR 346.

Right of court to interfere with amount of salaries voted to officers of private corporations by directors, 44 ALR 570.

Personal liability of directors as affected by terms of contract or form of signature, 51 ALR 319.

Abatement upon death, of cause of action

to enforce personal liability of corporate officer, director, or trustee, 79 ALR 1517.

Nonresident director or officer of domestic corporation as subject to constructive service of process in suit or proceeding to enforce duty or obligation to corporation, its stockholders or creditors, 148 ALR 1251.

Participation by corporate director in vote or meeting fixing compensation for his own services, 175 ALR 577.

Power of corporation or its officers with respect to payment of remuneration, bonus, and the like, to widow or family of deceased officer, 29 ALR2d 1262.

Validity of security for contemporaneous loan to corporation by officer, director, or stockholder, 31 ALR2d 663.

## PART 1

## BOARD OF DIRECTORS

**14-3-801. Requirement for and duties of board of directors.**

(a) Each corporation must have a board of directors.

(b) Except as provided in this chapter or subsection (c) of this Code section, all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board.

(c) No limitation upon the authority of the directors, whether contained in the articles of incorporation or bylaws, shall be effective against persons, other than members and directors, who are without actual knowledge of the limitation.

(d) The articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized any such person or persons shall have the duties and responsibilities of the directors, and the directors shall be relieved to that extent from such duties and responsibilities. (Code 1981, § 14-3-801, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

Boards of directors of nonprofit corporations are sometimes called boards of trustees, regents, overseers, or other names. This section applies to the group or person under whose authority corporate powers are exercised and under whose direction the affairs of the corporation are managed, regardless of the name or designation given to the person or group.

This Code allows considerable flexibility in structuring nonprofit corporations. While every nonprofit corporation must have a board, the articles of incorporation may authorize delegation of some duties of the board. The person(s) to whom such power is delegated assume the same duties and responsibilities as directors.

**14-3-802. Qualifications of directors.**

Directors shall be natural persons who are 18 years of age or older but need not be residents of this state nor members of the corporation unless the articles so require. The articles or bylaws may prescribe other qualifications for directors. (Code 1981, § 14-3-802, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-803. Number of directors.**

(a) A board of directors must consist of one or more natural persons, with the number specified in or fixed in accordance with the articles or bylaws.



(b) The articles or bylaws may authorize the members of the board of directors to fix or change the number of directors or may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If the variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the members, or if the articles or bylaws so provide, by the board of directors. (Code 1981, § 14-3-803, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section follows the Business Code, which requires only one director, rather than the Model Act, which requires at least three directors. Subsection (a) refers to "natural persons" as opposed to the reference in the Business Code counterpart to "individuals." This change is intended to clarify that estates of deceased or incompetent individuals, which are within the definition of "individual," do not qualify for service on the board. See section 14-3-140(17). The change conforms this provision to section 14-3-802 (and its Business Code counterpart), which states that directors must be natural persons.

### 14-3-804. Election of directors.

(a) If the corporation has members, all the directors (except the initial directors) shall be elected at the first annual meeting of members, and at each annual meeting thereafter, unless the articles or bylaws provide some other time or method of election, or provide that some or all of the directors are appointed by some other person or designated.

(b) If the corporation does not have members, all the directors (except the initial directors) shall be elected, appointed, or designated as provided in the articles or bylaws. If no method of designation or appointment is set forth in the articles or bylaws, the directors (other than the initial directors) shall be elected by the board. (Code 1981, § 14-3-804, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is taken from the Model Act. It provides for the method of electing, designating or appointing directors, and distinguishes between corporations with members and those that have no members. In either case, a power to confirm directors elected in accordance with these provisions does not render the confirming person or entity a "member."

*Corporations with members.* Under subsection (a), if a corporation has members, the members are entitled to elect all the directors, absent a contrary provision in the articles or bylaws. The articles or bylaws may establish a simple one-vote-per-member structure or for election by classes, chapters or other organizational or geographic groups. For rules governing initial directors, see sections 14-3-202 and 14-3-205. Even if a corporation has members, some of its directors may hold office by means other than election by members. Some directors may hold office based on designation in the corporation's articles or bylaws or by appointment by some person or entity.

*Designation* occurs when the articles or bylaws name an individual as a director or designate the holder of some office or position as a director. The individuals holding the

designated offices or positions would cease to be directors when they ceased holding the designated offices or positions.

*Appointment of directors* occurs when the articles or bylaws authorize a person or entity to appoint, rather than vote for, one or more directors. A person or entity with the power to appoint rather than vote for directors is not a "member." See section 14-3-140(20).

*Corporations without members.* Directors of corporations without members may be elected, appointed or designated in accordance with the corporation's articles or bylaws. If no method is provided in the articles or bylaws, directors shall elect their own successors on the board.

### **14-3-805. Terms of directors.**

(a) The terms of the initial directors of a corporation expire at the first meeting of members or directors for the election of directors or for such other period as may be specified in the articles of incorporation or bylaws. The articles or bylaws may specify the terms of directors. In the absence of any term specified in the articles or bylaws, the term of each director other than initial directors shall be one year. Directors may be elected for successive terms.

(b) A decrease in the number of directors or term of office does not shorten an incumbent director's term.

(c) A director elected to fill a vacancy shall be elected for the unexpired term of the director's predecessor in office.

(d) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated, or appointed and qualifies, or until there is a decrease in the number of directors. (Code 1981, § 14-3-805, enacted by Ga. L. 1991, p. 465, § 1.)

#### **COMMENT**

This section is based on the Model Act and on its Business Code counterpart, but differs from both. The Model Act requires that the articles or bylaws specify the terms of directors, while this section makes such specification permissive. Absent a specified term in the articles or bylaws, this section establishes the term at one year. The Model Act imposes a maximum term of five years, while this section imposes no maximum term.

### **14-3-806. Staggered terms for directors.**

The articles or bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups. The terms of office of the several groups need not be uniform. (Code 1981, § 14-3-806, enacted by Ga. L. 1991, p. 465, § 1.)

#### **COMMENT**

This section is based on the Model Act. Unlike its Business Code counterpart, this section does not limit the number of groups into which the directors may be divided.



**14-3-807. Resignation of directors.**

(a) A director may resign at any time by delivering written notice to the board of directors, its presiding officer, or to the president or secretary, or in such other manner as the articles or bylaws may provide.

(b) A resignation is effective when the notice is delivered unless the notice specifies a later effective date. (Code 1981, § 14-3-807, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based on the Model Act and on its Business Code counterpart. While the Business Code specifies that written notice of resignation be delivered to "the board of directors, its chairman, or to the corporation," this section follows the Model Act's designation of individuals to whom the notice of resignation may be delivered.

**JUDICIAL DECISIONS**

**Cited in** Ahn v. Lee, 221 Ga. App. 247, 471 S.E.2d 38 (1996).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1400, 1401.

**C.J.S.** — 19 C.J.S., Corporations, §§ 434, 435.

**14-3-808. Removal of directors.**

Unless the corporation's articles or bylaws provide otherwise:

(1) The members may remove, with or without cause, one or more directors elected by them;

(2) If a director is elected by a class, chapter, or other organizational unit or by region or other geographic grouping, the director may be removed only by the members of that class, chapter, unit, or grouping;

(3) Except as provided in paragraph (9) of this Code section, a director may be removed under paragraph (1) or (2) of this Code section only if the number of votes cast to remove the director would be sufficient to elect the director at a meeting to elect directors;

(4) If cumulative voting is authorized, a director may not be removed if the number of votes, or if the director was elected by a class, chapter, unit, or grouping of members, the director may not be removed if the number of votes of that class, chapter, unit, or grouping, sufficient to elect the director under cumulative voting is voted against the director's removal;

(5) A director elected by members may be removed by the members only at a meeting called for the purpose of removing the director and the

meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director;

(6) In computing whether a director is protected from removal under paragraphs (2) through (4) of this Code section, it should be assumed that the votes against removal are cast in an election for the number of directors of the class to which the director to be removed belonged on the date of that director's election;

(7) An entire board of directors may be removed under paragraphs (1) through (5) of this Code section;

(8) A director elected by the board may be removed with or without cause by the vote of two-thirds of the directors then in office; provided, however, that a director elected by the board to fill the vacancy of a director elected by the members may be removed without cause by the members, but not the board; and

(9) If, at the beginning of a director's term on the board, the articles or bylaws provide that the director may be removed for missing a specified number of board meetings, the board may remove the director for failing to attend the specified number of meetings. The director may be removed only if a majority of the directors then in office vote for the removal. (Code 1981, § 14-3-808, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and its Business Code counterpart, but differs from both. While the Model Act permits removal of directors without cause, this section follows the Business Code in permitting a corporation to limit this right by an appropriate provision in the articles or bylaws. All of the rules specified in this section are subject to the proviso that they may be altered by the corporation's articles or bylaws.

### **14-3-809. Procedure for removing directors.**

(a) A designated director may be removed by an amendment to the articles or bylaws deleting or changing the designation.

(b) Except as otherwise provided in the articles or bylaws:

(1) An appointed director may be removed without cause by the person appointing the director;

(2) The person removing the director shall do so by giving written notice of the removal to the director and either the presiding officer of the board or the corporation's president or secretary; and

(3) A removal is effective when the notice is effective unless the notice specifies a future effective date. (Code 1981, § 14-3-809, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act. There is no Business Code counterpart. Designated directors hold office not by virtue of their election by members or directors



but because of a designation clause in the articles or bylaws. Accordingly, designated directors may not be removed by vote of the members or directors. Designated directors can be removed only by deletion of or amendment to the article or bylaw provision containing the designation or in a judicial proceeding under section 14-3-810.

Any person authorized to appoint a director may remove that director, unless the articles or bylaws provide otherwise. Appointed directors may also be removed in a judicial proceeding under section 14-3-810.

### JUDICIAL DECISIONS

Cited in *Ahn v. Lee*, 221 Ga. App. 247, 471 S.E.2d 38 (1996).

#### 14-3-810. Removal of director by court.

(a) The superior court may remove any director of the corporation from office in a proceeding commenced either by the corporation, its members holding at least 10 percent of the voting power of any class, or, in the case of a corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302, the Attorney General, if the court finds that:

(1) The director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation, or a final judgment has been entered finding that the director has violated a duty set forth in Code Section 14-3-830 or 14-3-831, or the director has been subjected to sanction for participation in a "director's conflicting interest transaction" as defined in paragraph (2) of Code Section 14-3-860; and

(2) Removal is in the best interest of the corporation.

(b) The court that removes a director may bar the director from serving on the board for a period prescribed by the court.

(c) If members or the Attorney General commence a proceeding under subsection (a) of this Code section, the corporation shall be made a party defendant. (Code 1981, § 14-3-810, enacted by Ga. L. 1991, p. 465, § 1.)

### COMMENT

This section is based on the Model Act. There is no Business Code counterpart. This section authorizes members holding at least ten percent of the voting power to petition the superior court to remove a director. Members holding five percent of the voting power, but less than ten percent, may bring a derivative proceeding under part 4 of article 7 of this Code to remove a director. Directors of charitable corporations described in section 14-3-1302(a)(2) may be removed by the court upon petition of the Attorney General. The grounds for removal are specified in subsections (a)(1) and (2) and are cumulative. That is, the court must find both that the director engaged in the specified prohibited conduct and that removal of the director is in the best interest of the corporation.

#### 14-3-811. Vacancies.

(a) Unless the articles or bylaws provide otherwise, and except as provided in subsections (b) and (c) of this Code section, if a vacancy occurs

on a board of directors, including a vacancy resulting from an increase in the number of directors:

(1) The members, if any, may fill the vacancy; if the vacant office was held by a director elected by a class, chapter, or other organizational unit or by region or other geographic grouping, only members of the class, chapter, unit, or grouping are entitled to vote to fill the vacancy if it is filled by the members;

(2) The board of directors may fill the vacancy; or

(3) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(b) Unless the articles or bylaws provide otherwise, if a vacant office was held by an appointed director, only the person who appointed the director may fill the vacancy.

(c) If a vacant office was held by a designated director, the vacancy shall be filled as provided in the articles or bylaws. In the absence of an applicable article or bylaw provision, the vacancy may not be filled by the board.

(d) A vacancy that will occur at a specific later date (by reason of a resignation effective at a later date under subsection (b) of Code Section 14-3-807 or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs. (Code 1981, § 14-3-811, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and differs from its Business Code counterpart, section 14-2-810. It establishes procedures for filling vacancies of elected, appointed and designated directors and vacancies resulting from an increase in the authorized number of directors.

If a director elected by the members ceases to be a director, the vacancy may be filled either by the members or by the directors, absent a contrary provision in the corporation's articles or bylaws. A vacancy in an office held by an appointed director may only be filled by the person who appointed that director, absent a contrary provision in the articles or bylaws. The succession of ex officio (designated) directors follows the succession in the offices which entitle the holder to a position on the corporation's board.

#### **14-3-812. Compensation of directors.**

Unless the articles or bylaws provide otherwise, a board of directors may fix the compensation of directors. (Code 1981, § 14-3-812, enacted by Ga. L. 1991, p. 465, § 1.)



**14-3-813. Appointment of provisional director in case of deadlock.**

(a) If the directors of a corporation are deadlocked in the management of the corporate affairs and the members are unable to break the deadlock and if injury to the corporation is being suffered or is threatened by reason thereof, the superior court may, notwithstanding any provisions of the articles of incorporation or bylaws of the corporation to the contrary and whether or not an action is pending for an involuntary dissolution of the corporation, appoint a provisional director pursuant to this Code section.

(b) Action for such appointment may be filed by one-half of the directors or by members holding not less than one-third of all the votes entitled to be cast in an election of directors. Notice of such action shall be served upon the directors, other than those who have filed the action, and upon the corporation in the manner provided by law for service of a summons and complaint, and a hearing shall be held not less than ten days after such service is effected. At such hearing all interested persons shall be given an opportunity to be heard.

(c) The provisional director shall be an impartial person who is neither a member nor a creditor of the corporation nor related by consanguinity or affinity within the third degree, as computed according to the civil law, to any of the other directors of the corporation or to any judge of the court by which he is appointed. The provisional director shall have all the rights and powers of a director and shall be entitled to notice of the meetings of the board of directors and to vote at such meetings until he is removed by order of the court or by vote or written consent of a majority of the directors or of members holding a majority of the votes entitled to be cast in an election of directors. He shall be entitled to receive such compensation as may be agreed upon between him and the corporation; and, in the absence of such agreement, he shall be entitled to such compensation as shall be fixed by the court. (Code 1981, § 14-3-813, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section has no counterpart in either the Model Act or the Business Code. It is identical to section 14-3-102 of former law.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 4. 18 Am. Jur. 2d, Corporations, § 13.

19 Am. Jur. 2d, Corporations, § 2776.

**C.J.S.** — 7 C.J.S., Associations, § 4. 19

C.J.S., Corporations, §§ 580, 816, 896.

**ALR.** — Power of state to amend charter of a private incorporated charity, 62 ALR 573.

## PART 2

## MEETINGS AND ACTION OF THE BOARD

**14-3-820. Meetings of directors.**

(a) A board of directors may hold regular or special meetings in or out of this state.

(b) Unless the articles or bylaws provide otherwise, a board may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting. (Code 1981, § 14-3-820, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-821. Action taken without meeting.**

(a) Unless the articles or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken in accordance with subsection (b) of this Code section.

(b) Action taken without a meeting shall be taken by all members of the board, unless the articles or bylaws specifically permit such action to be taken by less than all, but not less than a majority of the board. The action must be evidenced by one or more written consents describing the action taken, signed by no fewer than the required number of directors, and delivered to the corporation for inclusion in the minutes for filing with the corporate records reflecting the action taken.

(c) Action taken under this Code section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(d) A consent signed under this Code section has the effect of a meeting vote and may be described as such in any document. (Code 1981, § 14-3-821, enacted by Ga. L. 1991, p. 465, § 1.)

**Code Commission notes.** — Pursuant to substituted for "Section" at the end of sub-  
Code Section 28-9-5, in 1991, "section" was section (a).

**COMMENT**

This section departs both from the Model Act and from its Business Code counterpart by permitting director action without a meeting by less-than-unanimous consent, if the corporation's articles or bylaws permit less-than-unanimous written consent. In no event may director action without a meeting be accomplished by the written consent of less than a majority of the board. Thus, if a corporation's articles or bylaws permit board action by written consent of a majority of the board, or some greater percentage, then



the written consent of the requisite number of directors, although less than all of the directors, constitutes the action of the board.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1446-1450.

**C.J.S.** — 19 C.J.S., Corporations, § 462.

#### 14-3-822. Notice.

(a) Unless the articles or bylaws provide otherwise, regular meetings of the board may be held without notice of the date, time, place, and purpose of the meeting.

(b) Unless the articles or bylaws provide otherwise, special meetings of the board must be preceded by at least two days' notice to each director of the date, time, and place, but not the purpose, of the meeting. (Code 1981, § 14-3-822, enacted by Ga. L. 1991, p. 465, § 1.)

#### 14-3-823. Waiver of notice.

(a) A director may waive any notice required by this chapter, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b) of this Code section, the waiver must be in writing, signed by the director entitled to the notice, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting (or promptly upon his arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting. (Code 1981, § 14-3-823, enacted by Ga. L. 1991, p. 465, § 1.)

#### 14-3-824. Quorum; when director deemed to assent to action.

(a) Except as otherwise provided in this chapter, the articles, or the bylaws, a quorum of a board of directors consists of:

(1) A majority of the fixed number of directors if the corporation has a fixed board size; or

(2) A majority of the number of directors prescribed or, if no number is prescribed, the number in office immediately before the meeting begins, if the corporation has a variable-range size board.

(b) The articles or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed or prescribed number of directors determined under subsection (a) of this Code section.

(c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless this chapter, the articles, or the bylaws require the vote of a greater number of directors.

(d) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless:

(1) The director objects at the beginning of the meeting (or promptly upon arrival) to holding it or transacting business at the meeting;

(2) The director's dissent or abstention from the action taken is entered in the minutes of the meeting; or

(3) The director delivers written notice of the director's dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting.

The right of dissent or abstention is not available to a director who votes in favor of the action taken. (Code 1981, § 14-3-824, enacted by Ga. L. 1991, p. 465, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1470-1476.

**C.J.S.** — 19 C.J.S, Corporations, § 466.

#### 14-3-825. Committees.

(a) Unless the articles or bylaws provide otherwise, a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have one or more directors, who serve at the pleasure of the board.

(b) If authorized by the articles or bylaws, the board or, if there are members entitled to elect directors, the members may appoint individuals who are not currently members of the board, but who formerly were members of the board of the corporation, as voting members of committees of the board. All provisions of this article applicable to directors shall apply equally to such individuals.

(c) Code Sections 14-3-820 through 14-3-824, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board, apply to committees and their members as well.

(d) To the extent specified by the board of directors or in the articles or bylaws, each committee of the board may exercise the board's authority under Code Section 14-3-801.



(e) A committee may not, however:

(1) Authorize distributions;

(2) Approve or recommend to members dissolution, merger, or the sale, pledge, or transfer of all or substantially all of the corporation's assets;

(3) Elect, appoint, or remove directors or fill vacancies on the board or on any of its committees; or

(4) Adopt, amend, or repeal the articles or bylaws.

(f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in Code Section 14-3-830. (Code 1981, § 14-3-825, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based both on the Model Act and on its Business Code counterpart, but subsection (b) is original. It is intended to authorize the practice of some nonprofit corporations of appointing former board members as voting members of director committees. Such individuals are subject to all the rules pertaining to directors contained in article 8 of the Code.

Unlike the Business Code, this section prohibits a committee of the board from authorizing distributions. See section 14-3-1301 and 14-3-1302 concerning distributions.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1508-1518.

**C.J.S.** — 19 C.J.S., Corporations, §§ 473, 474.

### PART 3

#### STANDARDS OF CONDUCT

#### 14-3-830. Standards of conduct for directors.

Unless a different standard is prescribed by law:

(1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:

(A) In a manner the director believes in good faith to be in the best interests of the corporation; and

(B) With the care an ordinarily prudent person in a like position would exercise under similar circumstances;

(2) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(A) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(B) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence;

(C) A committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; or

(D) Religious authorities, ministers, priests, rabbis, or other persons whose positions or duties in the corporation the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented;

(3) In the instances described in paragraph (2) of this Code section, a director is not entitled to rely if he has knowledge concerning the matter in question that makes reliance otherwise permitted by paragraph (2) of this Code section unwarranted;

(4) A director is not liable to the corporation, any member, or any other person for any action taken or not taken as a director if the director acted in compliance with this Code section; and

(5) A director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including, without limit, property that may be subject to restrictions imposed by the donor or transferor of such property. (Code 1981, § 14-3-830, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based both on the Model Act and on its Business Code counterpart. Unlike either, however, it contains an introductory proviso intended to acknowledge the existence of other laws that may establish different standards with respect to some activities engaged in by directors, such as investment of corporate funds. Subsection (1) departs from the Model Act and follows the Business Code formulation of standards verbatim. Subsections 2(D) and (5) are taken from the Model Act.

#### **14-3-831. Liability for unlawful distribution.**

(a) Unless a director complies with the applicable standards of conduct described in Code Section 14-3-830, a director who votes for or assents to a distribution made in violation of this chapter is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter.

(b) A director held liable for an unlawful distribution under subsection (a) of this Code section is entitled to contribution:

(1) From every other director who voted for or assented to the distribution without complying with the applicable standards of conduct described in Code Section 14-3-830; and



(2) From each person who received an unlawful distribution for the amount of the distribution whether or not the person receiving the distribution knew it was made in violation of this chapter. (Code 1981, § 14-3-831, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act. It differs from its Business Code counterpart, section 14-2-832, in that it does not contain a limitation period for proceedings brought under it. In addition, the Business Code statement that "[i]n any proceeding commenced under this Code section, a director has all of the defenses ordinarily available to a director" was omitted. This omission should not alter the availability of defenses, such as the common law business judgment rule, to directors in a proceeding under this section, because liability under this section is predicated on a violation of the standards contained in section 14-3-830. All defenses to an alleged violation of the standards contained in section 14-3-830 are necessarily available to a director in a proceeding under this section.

Section 14-3-1301 prohibits distributions except those authorized by section 14-3-1302. "Distribution" is defined in section 14-3-140(9).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 62.

**C.J.S.** — 7 C.J.S., Associations, § 59.

**ALR.** — Right of court to interfere with amount of salaries voted to officers of private corporations by directors, 44 ALR 570.

Right or duty of corporation to pay dividends; and liability for wrongful payment, 55 ALR 8; 76 ALR 885; 109 ALR 1381.

Liability of payee who accepts checks of corporation in payment of personal debts of officer who was authorized to use corporate funds for that purpose, 100 ALR 60.

Participation by corporate director in vote or meeting fixing compensation for his own services, 175 ALR 577.

Distribution of funds by nonprofit corporation absent dissolution, 51 ALR3d 1318.

#### PART 4

#### OFFICERS

#### JUDICIAL DECISIONS

**Officer liable for participation in corporate tort.** — An officer who takes part in the commission of a corporate tort or who specifically directs the particular act to be done or who participates or cooperates therein is personally liable for the commission of the tort. *Alexie, Inc. v. Old S. Bottle Shop Corp.*,

179 Ga. App. 190, 345 S.E.2d 875 (1986).

**Cited in** *Riverdale Assembly of God, Inc. v. Advanced Refrigeration, Inc.*, 128 Ga. App. 718, 197 S.E.2d 767 (1973); *Free For All Missionary Baptist Church, Inc. v. Southeastern Beverage & Ice Equip. Co.*, 135 Ga. App. 498, 218 S.E.2d 169 (1975).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1341-1343, 1360, 1395, 1396, 1521-1529, 1663. 36 Am. Jur. 2d, Fraternal

Orders and Benefit Societies, §§ 26 et seq. 66 Am. Jur. 2d, Religious Societies, §§ 8, 9.

**C.J.S.** — 10 C.J.S., Beneficial Associations,

§§ 31 et seq. 14 C.J.S., Charities, § 63. 19 C.J.S., Corporations, §§ 433, 443, 444, 450, 468, 530, 586, 595, 596. 77 C.J.S., Religious Societies, § 25 et seq.

**ALR.** — When resignation of officer of private corporation becomes effective, 20 ALR 267.

Authority of corporate officer to employ agent or broker to sell property, 159 ALR 796.

Power of president of corporation to have litigation instituted by it where board of directors has failed or refused to grant permission, 10 ALR2d 701.

Power of president of corporation to commence or to carry on arbitration proceedings, 65 ALR2d 1321.

Power and authority of president of business corporation to execute commercial paper, 96 ALR2d 549.

**14-3-840. Officers are as described in articles or bylaws or as appointed; minutes and records; holding more than one office; titles; signing of documents.**

(a) A corporation has the officers described in its articles or bylaws or appointed by the board of directors in accordance with the articles or bylaws.

(b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the articles or bylaws or the board of directors.

(c) The articles, bylaws, or the board shall delegate to one of the officers responsibility for preparing minutes of the directors' and members' meetings and for authenticating records of the corporation.

(d) Unless otherwise provided in the articles or bylaws, the same individual may simultaneously hold more than one office in a corporation.

(e) The officers of a corporation may be designated by such titles as may be provided in the articles or the bylaws; and in such case any document required or permitted by any law of this state to be signed by the president, secretary, or any other named officer of a corporation may be signed by such officer as may be stated in such document to correspond to the officer so required or permitted to sign. (Code 1981, § 14-3-840, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based on its Business Code counterpart, rather than the Model Act. The Model Act requires each corporation to have a president, treasurer and secretary, unless otherwise provided in the corporation's articles or bylaws. Like the Business Code, this section permits corporations to designate the officers it wants. The Business Code permits the designation in the bylaws or by the board in accordance with the bylaws. This section permits designation of officers in the articles, as well as in the bylaws or by the board. Subsection (d) differs from the Business Code by providing that the articles or bylaws may prohibit the same individual from holding more than one office simultaneously. Subsection (e) has no Business Code counterpart. It is based on section 14-3-108(c) of prior law.

**14-3-841. Duties of officers.**

Each officer has the authority and shall perform the duties set forth in the articles or bylaws or, to the extent consistent with the articles or bylaws,



the duties and authority prescribed by the board or by direction of an officer authorized by the board to prescribe the duties and authority of other officers. (Code 1981, § 14-3-841, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based both on the Model Act and on its Business Code counterpart. Like section 14-3-840, it permits designation of duties and authority in the articles, as well as in the bylaws or by the directors. For clarification and consistency, the words "and authority" were added to the Business Code formulation.

#### 14-3-842. Standards of conduct for officers.

Unless a different standard is prescribed by law:

(1) An officer with discretionary authority shall discharge his duties under that authority:

(A) In a manner he believes in good faith to be in the best interests of the corporation; and

(B) With the care an ordinarily prudent person in a like position would exercise under similar circumstances;

(2) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(A) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

(B) Legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence;

(3) In the instances described in paragraph (2) of this Code section, an officer is not entitled to rely if he has knowledge concerning the matter in question that makes reliance otherwise permitted by paragraph (2) of this Code section unwarranted; and

(4) An officer is not liable to the corporation, any member, or other person for any action taken or not taken as an officer, if the officer performed the duties of his office in compliance with this Code section. (Code 1981, § 14-3-842, enacted by Ga. L. 1991, p. 465, § 1.)

**Law reviews.** — For article, "The Development of Nonprofit Corporation Law and an Agenda for Reform," see 34 Emory L.J. 617 (1985).

#### COMMENT

This section is based on its Business Code counterpart. Like section 14-3-830, this section contains an introductory proviso that is in neither the Model Act nor the Business Code. The proviso is intended to acknowledge the existence of other laws that

may establish different standards for certain activities engaged in by officers, such as investment of corporate funds.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1695-1697, 1701, 1703-1707. 36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, § 28.

**C.J.S.** — 10 C.J.S., Beneficial Associations, § 34. 14 C.J.S., Charities, § 63. 19 C.J.S., Corporations, §§ 476-480, 489. 77 C.J.S., Religious Societies, § 31.

**ALR.** — Validity of individual contract by director to put or maintain a designated person in office, 12 ALR 1070; 45 ALR 795.

Power of directors to sell property of corporation without consent of stockholders, 60 ALR 1210.

Right of stockholder, director, officer, or agent, of a corporation to engage in a similar or competing business, 64 ALR 782.

Authority of corporate officer to employ agent or broker to sell property, 159 ALR 796.

What business opportunities are in "line of business" of corporation for purposes of determining whether a corporate opportunity was presented, 77 ALR3d 961.

Duty of corporate directors to exercise "informed" judgment in recommending responses to merger or tender offers, 46 ALR4th 887.

### 14-3-843. Resignation and removal of officers.

(a) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is effective unless the notice specifies a future effective date. If a resignation is made effective at a future date and the corporation accepts the future effective date, its board of directors may fill the pending vacancy before the effective date if the board provides that the successor does not take office until the effective date.

(b) A board may remove any officer at any time with or without cause.

(c) Unless otherwise provided in the articles or bylaws, any vacancies in the corporation's officers may be filled by the board. (Code 1981, § 14-3-843, enacted by Ga. L. 1991, p. 465, § 1.)

### COMMENT

This section is based on the Model Act. Unlike its Business Code counterpart, this section states that when a resignation is effective at a future date, the board may take prospective action to fill the pending vacancy before the effective date of the vacancy.

### 14-3-844. Contract rights of officers.

(a) The appointment of an officer does not itself create contract rights.

(b) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer. (Code 1981, § 14-3-844, enacted by Ga. L. 1991, p. 465, § 1.)



**14-3-845. Authority of officer to sign documents; validity of document.**

Any contract or other instrument in writing executed or entered into between a corporation and any other person is not invalidated as to the corporation by any lack of authority of the signing officers in the absence of actual knowledge on the part of the other person that the signing officers had no authority to execute the contract or other instrument if it is signed by any two officers in category 1 below or by one officer in category 1 below and one officer in category 2 below. Categories shall be as follows:

(1) Category 1 shall consist of the presiding officer of the board and the president; and

(2) Category 2 shall consist of a vice president, the secretary, the treasurer, and the executive director.

The absence of the signature of such persons from a document shall not itself impair the validity of the document or of any action taken in pursuance thereof or in reliance thereon. (Code 1981, § 14-3-845, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based on the Model Act and has no counterpart in the Business Code. It provides a safe harbor (in addition to the one contained in Code Section 14-5-7 pertaining to real property conveyancing documents) that permits third parties to rely on the signatures of specified officers of nonprofit corporations. In the nonprofit corporation context, the authority of officers is sometimes unclear because of the informality of the entity or the titles of its agents. This section is intended to provide a fail-safe mechanism for protection against a claim of lack of authority. Of course, if the third party has actual knowledge of the signing party's lack of authority, this section provides no relief.

**14-3-846. Effect of corporate seal on document.**

(a) With respect to any contract, conveyance, or similar document executed by or on behalf of a domestic or foreign corporation, the presence of the corporate seal, or a facsimile thereof, attested by the secretary or assistant secretary of the corporation, or other officer to whom the bylaws or the directors have delegated the responsibility for authenticating records of the corporation, shall attest:

(1) That the corporate seal or facsimile thereof affixed to the document is in fact the seal of the corporation or a true facsimile thereof, as the case may be;

(2) That any officer of the corporation executing the document does in fact occupy the official position indicated, that one in such position is duly authorized to execute such document on behalf of the corporation, and that the signature of such officer subscribed thereto is genuine; and

(3) That the execution of the document on behalf of the corporation has been duly authorized.

(b) When the seal of a corporation or the facsimile thereof is affixed to any document and is attested by the secretary or assistant secretary of a corporation, or other officer to whom the bylaws or the directors have delegated the responsibility for authenticating records of the corporation, a third party without knowledge or reason to know to the contrary may rely on such document as being what it purports to be.

(c) The seal of the corporation may be affixed to any document executed by the corporation, but the absence of the seal shall not itself impair the validity of the document or of any action taken in pursuance thereof or in reliance thereon. (Code 1981, § 14-3-846, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section's Business Code counterpart is section 14-2-151.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 300, 301, 304.

**C.J.S.** — 18 C.J.S., Corporations, § 106.

### PART 5

#### INDEMNIFICATION

#### RESEARCH REFERENCES

**ALR.** — Personal liability of member of voluntary association not organized for personal profit on contract with third person, 7 ALR 222; 41 ALR 754.

Responsibility of agricultural society for tort, 52 ALR 1400.

Insurance on life of officer for benefit of private corporation, 143 ALR 293.

### 14-3-850. Definitions.

As used in this part, the term:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(2) "Director" or "officer" means an individual who is or was a director or officer, respectively, of a corporation who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another domestic or foreign business or nonprofit corporation, partnership, joint venture, trust, employee benefit plan, or other entity. A director or officer is considered to be serving an employee benefit plan at the corporation's request if the director's duties to the corporation also impose duties on, or otherwise involve services by, the director to the plan or to participants in or beneficiaries of the plan. "Director" or "officer" includes, unless



the context otherwise requires, the estate or personal representative of a director.

(3) "Disinterested director" means a director who at the time of a vote referred to in subsection (c) of Code Section 14-3-853 or a vote or selection referred to in subsection (b) or (c) of Code Section 14-3-855 is not:

(A) A party to the proceeding; or

(B) An individual having a familial, financial, professional, or employment relationship with the director whose indemnification or advance for expenses is the subject of the decision being made, which relationship would, in the circumstances, reasonably be expected to exert an influence on the director's judgment when voting on the decision being made.

(4) "Expenses" includes counsel fees.

(5) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses actually incurred with respect to a proceeding.

(6) "Official capacity" means:

(A) When used with respect to a director, the office of director in a corporation; and

(B) When used with respect to an officer, as contemplated in Code Section 14-3-857, the office in a corporation held by the officer.

"Official capacity" does not include service for any other domestic or foreign corporation or any partnership, joint venture, trust, employee benefit plan, or other entity.

(7) "Party" means an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(8) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding whether civil, criminal, administrative, arbitral, or investigative and whether formal or informal. (Code 1981, § 14-3-850, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 14.)

#### COMMENT

##### Note to 1997 Amendments

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Comments to the 1996 amendments to the comparable provisions of the Business Corporation Code are applicable to these provisions.

**14-3-851. Authority to indemnify director involved in legal proceeding.**

(a) Except as otherwise provided in this Code section, a corporation may indemnify an individual who is a party to a proceeding because the individual is or was a director against liability incurred in the proceeding if:

- (1) He or she conducted himself or herself in good faith; and
- (2) He or she reasonably believed:

(A) In the case of conduct in his or her official capacity, that his or her conduct was in the best interests of the corporation;

(B) In all other cases, that his or her conduct was at least not opposed to the best interests of the corporation; and

(C) In the case of any criminal proceeding, he or she had no reasonable cause to believe his or her conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose the director believed in good faith to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirements of subsection (a) of this Code section.

(c) The termination of a proceeding by judgment, order, settlement, or conviction or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this Code section.

(d) A corporation may not indemnify a director under this Code section:

(1) In connection with a proceeding by or in the right of the corporation, except for reasonable expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct under this Code section; or

(2) In connection with any other proceeding with respect to conduct for which the director was adjudged liable on the basis that personal benefit was improperly received by the director, whether or not involving action in the director's official capacity. (Code 1981, § 14-3-851, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 14.)

**COMMENT****Note to 1997 Amendments**

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Comments to the 1996 amendments to the comparable provisions of the Business Corporation Code are applicable to these provisions.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 14-2-852, are included in the annotations for this section.



**Right to indemnification.** — The pastor, as a director of a church corporation, was entitled to mandatory indemnification of the reasonable expenses incurred in the defense of a liquidation proceeding; however, the indemnification must be proportionate to the extent that the pastor was successful in the claims against him. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S.

Ct. 1613, 128 L. Ed. 2d 340 (1994) (decided under former § 14-2-852).

Church corporation's liability to pastor, who, as a director, was a defendant in a liquidation proceeding, would have priority in the distribution of the corporate assets. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994) (decided under former § 14-2-852).

### **14-3-852. Indemnification for reasonable expenses of successful defense.**

A corporation shall indemnify a director who was successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because the director was a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding. (Code 1981, § 14-3-852, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 14.)

#### **COMMENT**

##### **Note to 1997 Amendments**

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Comments to the 1996 amendments to the comparable provisions of the Business Corporation Code are applicable to these provisions.

### **14-3-853. Advance or reimbursement of litigation expenses.**

(a) A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding because the director is a director if the director delivers to the corporation:

(1) A written affirmation of the director's good faith belief that the director has met the relevant standard of conduct described in Code Section 14-3-851 or that the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by paragraph (4) of subsection (b) of Code Section 14-3-202; and

(2) The director's written undertaking to repay any funds advanced if it is ultimately determined that the director is not entitled to indemnification under this part.

(b) The undertaking required by paragraph (2) of subsection (a) of this Code section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to the financial ability of the director to make repayment.

(c) Authorizations under this Code section shall be made by the board of directors:

(1) If there are two or more disinterested directors, by a majority vote of all the disinterested directors (a majority of whom shall for such purpose constitute a quorum) or by a majority of the members of a committee of two or more disinterested directors appointed by such a vote; or

(2) If there are fewer than two disinterested directors, by the vote necessary for action by the board in accordance with subsection (c) of Code Section 14-3-824, in which authorization directors who do not qualify as disinterested directors may participate. (Code 1981, § 14-3-853, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 14; Ga. L. 1998, p. 128, § 14.)

#### COMMENT

##### Note to 1997 Amendments

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Comments to the 1996 amendments to the comparable provisions of the Business Corporation Code are applicable to these provisions.

#### **14-3-854. Court ordered indemnification and payment of expenses.**

(a) A director who is a party to a proceeding because he or she is a director may apply for indemnification or advances of expenses to the court conducting the proceeding or to another court of competent jurisdiction. After receipt of an application, after giving any notice it considers necessary, the court shall:

(1) Order indemnification or advance for expenses if it determines that the director is entitled to indemnification under this part; or

(2) Order indemnification or advance for expenses if it determines, in view of all the relevant circumstances, that it is fair and reasonable:

(A) To indemnify the director; or

(B) To advance expenses to the director,

even if he or she has not met the relevant standard of conduct set forth in subsections (a) and (b) of Code Section 14-3-851, failed to comply with Code Section 14-3-853, or was adjudged liable in a proceeding referred to in paragraph (1) or (2) of subsection (d) of Code Section 14-3-851, but if he or she was adjudged so liable his or her indemnification shall be limited to reasonable expenses incurred in connection with the proceeding.

(b) If the court determines that the director is entitled to indemnification or advance for expenses under this part, it may also order the corporation to pay the director's reasonable expenses to obtain court ordered indemnification or advance for expenses. (Code 1981, § 14-3-854,



enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1994, p. 97, § 14; Ga. L. 1997, p. 1165, § 14.)

#### COMMENT

While part 5 is based on the Business Code, some differences exist. Subsection (2) of this section departs from its Business Code counterpart by limiting the source of any increased exculpation beyond reasonable expenses to the articles or bylaws. The Business Code permits court-ordered indemnification beyond reasonable expenses under subsection (2) if the articles or bylaws or a contract or resolution approved by the shareholders pursuant to section 14-2-856 provides for indemnification. This Code has no counterpart to Business Code section 14-2-856.

#### Note to 1997 Amendments

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Comments to the 1996 amendments to the comparable provisions of the Business Corporation Code are applicable to these provisions.

### **14-3-855. Determination of right and authorization for payment of indemnification required.**

(a) A corporation may not indemnify a director under Code Section 14-3-851 unless authorized thereunder and a determination has been made for a specific proceeding that indemnification of the director is permissible in the circumstances because the director has met the relevant standard of conduct set forth in Code Section 14-3-851.

(b) The determination shall be made:

(1) If there are two or more disinterested directors, by the board of directors by a majority vote of all the disinterested directors (a majority of whom shall for such purpose constitute a quorum), or by a majority of the members of a committee of two or more disinterested directors appointed by such a vote;

(2) By special legal counsel:

(A) Selected in the manner prescribed in paragraph (1) of this subsection; or

(B) If there are fewer than two disinterested directors, selected by the board of directors, in which selection directors who do not qualify as disinterested directors may participate; or

(3) By the members, but directors who do not qualify as disinterested directors may not vote as members on the determination.

(c) Authorization of indemnification or an obligation to indemnify and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if there are fewer than two disinterested directors or if the determination is made by special legal counsel, authorization of indemnification and

evaluation as to reasonableness of expenses shall be made by those entitled under paragraph (3) of subsection (b) of this Code section to select special legal counsel. (Code 1981, § 14-3-855, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 14.)

#### COMMENT

##### Note to 1997 Amendments

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Comments to the 1996 amendments to the comparable provisions of the Business Corporation Code are applicable to these provisions.

#### **14-3-856. Indemnification of officers, employees, and agents.**

(a) A corporation may indemnify and advance expenses under this part to an officer of the corporation who is a party to a proceeding because he or she is an officer of the corporation:

(1) To the same extent as a director; and

(2) If he or she is not a director, to such further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors, or contract except for liability arising out of conduct that constitutes:

(A) Appropriation, in violation of his or her duties, of any business opportunity of the corporation;

(B) Acts or omissions which involve intentional misconduct or a knowing violation of law;

(C) The types of liability set forth in Code Section 14-2-832; or

(D) Receipt of an improper personal benefit.

(b) The provisions of paragraph (2) of subsection (a) of this Code section shall apply to an officer who is also a director if the sole basis on which he or she is made a party to the proceeding is an act or omission solely as an officer.

(c) An officer of a corporation who is not a director is entitled to mandatory indemnification under Code Section 14-3-852, and may apply to a court under Code Section 14-3-854 for indemnification or advances for expenses, in each case to the same extent to which a director may be entitled to indemnification or advances for expenses under those provisions.

(d) A corporation may also indemnify and advance expenses to an employee or agent who is not a director to the extent, consistent with public policy, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract. (Code 1981,



§ 14-3-856, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1994, p. 97, § 14; Ga. L. 1997, p. 1165, § 14.)

#### COMMENT

The Business Code counterpart to this section is section 14-2-857.

#### Note to 1997 Amendments

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Comments to the 1996 amendments to the comparable provisions of the Business Corporation Code are applicable to these provisions.

### 14-3-857. Insurance.

A corporation may purchase and maintain insurance on behalf of an individual who is a director, officer, employee, or agent of the corporation or who, while a director, officer, employee, or agent of the corporation, serves at the corporation's request as a director, officer, partner, trustee, employee, or agent of another domestic or foreign business or nonprofit corporation, partnership, joint venture, trust, employee benefit plan, or other entity against liability asserted against or incurred by the individual in that capacity or arising from the individual's status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify or advance expenses to the individual against the same liability under this part. (Code 1981, § 14-3-857, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 14.)

#### COMMENT

#### Note to 1997 Amendments

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Comments to the 1996 amendments to the comparable provisions of the Business Corporation Code are applicable to these provisions.

### 14-3-858. Applicability of indemnification provisions.

(a) A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or shareholders, obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification or advance funds to pay for or reimburse expenses consistent with this part. Any such provision that obligates the corporation to provide indemnification to the fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with Code Section 14-3-853 to the fullest extent permitted by law, unless the provision specifically provides otherwise. Any such provision existing on July 1, 1991, shall be valid to the extent it does not provide for broader indemnification than is allowed under this part.

(b) Any provision pursuant to subsection (a) of this Code section shall not obligate the corporation to indemnify or advance expenses to a director

of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders, partners, or, in the case of limited liability companies, members or managers of a predecessor of the corporation or other entity in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by paragraph (3) of Code Section 14-3-1105.

(c) A corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to this part.

(d) This part does not limit a corporation's power to pay or reimburse expenses incurred by a director or an officer in connection with his or her appearance as a witness in a proceeding at a time when he or she is not a party.

(e) Except as expressly provided in Code Section 14-3-856, this part does not limit a corporation's power to indemnify, advance expenses to, or provide or maintain insurance on behalf of an employee or agent.

(f) The provisions of this part may be incorporated by reference into a corporation's articles of incorporation, bylaws, or a resolution of its members or board of directors. In such case, any such provision shall subsequently be deemed amended to conform with any amendments to this part, unless such provision otherwise expressly provides. (Code 1981, § 14-3-858, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1992, p. 6, § 14; Ga. L. 1997, p. 1165, § 14.)

#### COMMENT

This section varies from its Business Code counterpart, section 14-2-859, in two respects. First, subsection (a) expressly validates indemnification provisions existing on the effective date of this Code to the extent they do not provide for broader indemnification than is permitted under this part. This addition is intended to clarify that corporations that have already amended their articles or bylaws to provide for broad indemnification need not enact another amendment to conform with this Code.

Subsection (c) has no counterpart in the Business Code. It is intended to prevent unnecessary expense that may be involved in attempting to update and conform indemnification provisions to changes in the Code. This subsection permits incorporation of this part by reference in a corporation's articles or bylaws.

#### Note to 1997 Amendments

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Comments to the 1996 amendments to the comparable provisions of the Business Corporation Code are applicable to these provisions.



## PART 6

## CONFLICTING INTEREST TRANSACTIONS

## OPINIONS OF THE ATTORNEY GENERAL

**Conflict of interest disclosure requirements do not affect Board of Regents' employees.** — Provisions of the Nonprofit Corporation Code, O.C.G.A. § 14-3-101 et seq., placing certain disclosure requirements upon directors and officers of nonprofit corporations do not affect, limit or modify

the proviso in O.C.G.A. § 45-10-23(a) negating a "conflict of interest" situation for Board of Regents' employees who serve on the governing boards of foundations and associations supporting higher education institutions. 1995 Op. Att'y Gen. No. 95-36.

**14-3-860. Definitions.**

As used in this part, the term:

(1) "Conflicting interest" with respect to a corporation means the interest a director of the corporation has respecting a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) if:

(A) Whether or not the transaction is brought before the board of directors of the corporation for action, to the knowledge of the director at the time of commitment the director or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the director or a related person that it would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction; or

(B) The transaction is brought (or is of such character and significance to the corporation that it would in the normal course be brought) before the board of directors of the corporation for action, and to the knowledge of the director at the time of commitment any of the following persons is either a party to the transaction or has a beneficial financial interest so closely linked to the transaction and of such financial significance to that person that it would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction: (i) an entity (other than the corporation) of which the director is a director, general partner, agent, or employee; (ii) a person that controls one or more of the entities specified in division (i) of this subparagraph or an entity that is controlled by, or is under common control with, one or more of the entities specified in division (i) of this subparagraph; or (iii) an individual who is a general partner, principal, or employer of the director.

(2) "Director's conflicting interest transaction" with respect to a corporation means a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) respecting which a director of the corporation has a conflicting interest.

(3) "Related person" of a director means:

(A) The spouse (or a parent or sibling thereof) of the director or a child, grandchild, sibling, parent (or spouse of any thereof), or an individual having the same home as the director, or a trust or estate of which an individual specified in this subparagraph is a substantial beneficiary; or

(B) A trust, estate, incompetent, conservatee, or minor of which the director is a fiduciary.

(4) "Required disclosure" means disclosure by the director who has a conflicting interest of (A) the existence and nature of the director's conflicting interest, and (B) all facts known to the director respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment as to whether or not to proceed with the transaction.

(5) "Time of commitment" respecting a transaction means the time when the transaction is consummated or, if made pursuant to contract, the time when the corporation (or its subsidiary or the entity in which it has a controlling interest) becomes contractually obligated so that its unilateral withdrawal from the transaction would entail significant loss, liability, or other damage. (Code 1981, § 14-3-860, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-861. Transactions not subject to being enjoined, set aside, or other sanctions.**

(a) A transaction effected or proposed to be effected by a corporation (or by a subsidiary of the corporation or by any other entity in which the corporation has a controlling interest) that is not a director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in an action under the laws of this state by a member or by or in the right of the corporation or any other person who otherwise has standing, on the ground of an interest in the transaction of a director or any person with whom or which he has a personal, economic, or other association.

(b) A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in an action under the laws of this state by a member or by or in the right of the corporation or any other person who otherwise has standing, on the



ground of an interest in the transaction of the director or any person with whom or which he has a personal, economic, or other association, if:

(1) Directors' action respecting the transaction was at any time taken in compliance with Code Section 14-3-862;

(2) Members' action respecting the transaction was at any time taken in compliance with Code Section 14-3-863;

(3) Action by the superior court respecting the transaction was at any time taken in compliance with Code Section 14-3-864; or

(4) The transaction, judged in the circumstances at the time of commitment, is established to have been fair to the corporation. (Code 1981, § 14-3-861, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

Subsection (b)(3) has no counterpart in the Business Code because section 14-3-864 has no Business Code counterpart.

#### **14-3-862. Directors' action after disclosure of conflict or abstention by interested director.**

(a) Directors' action respecting a transaction is effective for purposes of paragraph (1) of subsection (b) of Code Section 14-3-861 if the transaction received the affirmative vote of a majority (but not less than two) of those qualified directors on the board of directors or on a duly empowered committee thereof who voted on the transaction after either required disclosure to them (to the extent the information was not known by them) or compliance with subsection (b) of this Code section.

(b) If a director has a conflicting interest respecting a transaction, but neither he nor a related person of the director specified in subparagraph (A) of paragraph (3) of Code Section 14-3-860 is a party thereto, and if the director has a duty under law or professional canon, or a duty of confidentiality to another person, respecting information relating to the transaction such that the director cannot, consistent with that duty, make the disclosure contemplated by subparagraph (B) of paragraph (4) of Code Section 14-3-860, then disclosure is sufficient for purposes of subsection (a) of this Code section if the director:

(1) Discloses to the directors voting on the transaction the existence and nature of his conflicting interest and informs them of the character of and limitations imposed by that duty prior to their vote on the transaction; and

(2) Plays no part, directly or indirectly, in their deliberations or vote.

(c) A majority (but not less than two) of all the qualified directors on the board of directors, or on the committee, constitutes a quorum for purposes

of action that complies with this Code section. Directors' action that otherwise complies with this Code section is not affected by the presence or vote of a director who is not a qualified director.

(d) For purposes of this Code section, "qualified director" means, with respect to a director's conflicting interest transaction, any director who does not have either (1) a conflicting interest respecting the transaction or (2) a familial, financial, professional, or employment relationship with a second director who does have a conflicting interest respecting the transaction, which relationship would, in the circumstances, reasonably be expected to exert an influence on the first director's judgment when voting on the transaction. (Code 1981, § 14-3-862, enacted by Ga. L. 1991, p. 465, § 1.)

### **14-3-863. Members' action following disclosure of conflict.**

(a) Members' action respecting a transaction is effective for purposes of paragraph (2) of subsection (b) of Code Section 14-3-861 if a majority of the votes entitled to be cast by all qualified members were cast in favor of the transaction after (1) notice to members describing the director's conflicting interest transaction, (2) provision of the information referred to in subsection (d) of this Code section, and (3) required disclosure to the members who voted on the transaction (to the extent the information was not known by them).

(b) For purposes of this Code section, "qualified members" means any members entitled to vote with respect to a director's conflicting interest transaction except the director and members that, to the knowledge, before the vote, of the secretary (or other officer or agent of the corporation authorized to tabulate votes) are a related person of the director.

(c) A majority of the votes entitled to be cast by all qualified members constitutes a quorum for purposes of action that complies with this Code section. Subject to the provisions of subsection (d) of this Code section, members' action that otherwise complies with this Code section is not affected by the presence of, or the voting by, members that are not qualified members.

(d) For purposes of compliance with subsection (a) of this Code section, a director who has a conflicting interest respecting the transaction shall, before the members' vote, inform the secretary (or other officer or agent of the corporation authorized to tabulate votes) of the identity of all members that to the knowledge of the director are related persons of the director.

(e) If a members' vote does not comply with subsection (a) of this Code section solely because of a failure of a director to comply with subsection (d) of this Code section, and if the director establishes that this failure did not determine and was not intended by him to influence the outcome of the vote, the court may, with or without further proceedings respecting



paragraph (3) of subsection (b) of Code Section 14-3-861, take such action respecting the transaction and the director, and give such effect, if any, to the members' vote, as it considers appropriate in the circumstances. (Code 1981, § 14-3-863, enacted by Ga. L. 1991, p. 465, § 1.)

#### **14-3-864. Effect of court approval of transaction.**

In a case involving a corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302, a transaction that was not the subject of either directors' action under Code Section 14-3-862 or members' action under Code Section 14-3-863 is effective for purposes of paragraph (3) subsection (b) of Code Section 14-3-861 if the transaction is approved by the superior court, in an action in which the Attorney General is joined as a party. (Code 1981, § 14-3-864, enacted by Ga. L. 1991, p. 465, § 1.)

#### **COMMENT**

This section has no counterpart in either the Business Code or the Model Act. It provides a mechanism by which a conflicting interest transaction involving a director and a charitable corporation can be judicially approved. It is intended to address a possible situation in which there are neither qualified directors nor qualified members to approve a conflicting interest transaction that is in the corporation's best interest.

#### **14-3-865. Voidability of conflicting interest transaction.**

(a) As used in this Code section, the term:

(1) "Officer" means a person who is not a director and who is holding an office described in the bylaws of the corporation or appointed by the board of directors in accordance with the bylaws of the corporation.

(2) "Officer's conflicting interest transaction" means any transaction, other than a director's conflicting interest transaction as defined in paragraph (2) of Code Section 14-3-860, between a corporation (or a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) and one or more of its officers or between a corporation and a related person of an officer.

(3) "Related person" of an officer shall have the same meaning with respect to an officer that this term has with respect to a director in paragraph (3) of Code Section 14-3-860.

(4) "Required disclosure" with respect to an officer shall have the same meaning as this term has with respect to a director in paragraph (4) of Code Section 14-3-860.

(5) "Time of commitment" shall have the same meaning as in paragraph (5) of Code Section 14-3-860.

(b) No officer's conflicting interest transaction shall be void or voidable solely because the officer is present at or participates in the meeting of the

board of directors or committee thereof which authorizes the contract or transaction.

(c) An officer's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in an action by a member or by or in the right of the corporation, on the ground of an interest in the transaction of the officer or any person with whom or which he has a personal, economic, or other association, if:

(1) The transaction was approved by the board of directors after required disclosure;

(2) The transaction was approved by the members after required disclosure;

(3) The action was approved by the superior court in an action to which the Attorney General was a party; or

(4) The transaction, judged in the circumstances at the time of commitment, is established to have been fair to the corporation. (Code 1981, § 14-3-865, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

The Business Code counterpart to this section is section 14-2-864.

### ARTICLE 9

#### RESERVED

### ARTICLE 10

## AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS

### PART 1

#### AMENDMENT OF ARTICLES OF INCORPORATION

### 14-3-1001. Authority of corporation to amend.

A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles or to delete a provision not required in the articles. Whether a provision is required or permitted in the articles is determined as of the effective date of the amendment. (Code 1981, § 14-3-1001, enacted by Ga. L. 1991, p. 465, § 1.)

#### JUDICIAL DECISIONS

**Editor's notes.** — The case cited below was decided under former § 14-3-150.

**Restructure of board of directors.** — Fact that under original articles of incorporation,



members of board of directors of nonprofit corporation could be removed from office, with or without cause, only by two-thirds' vote of entire board, did not preclude majority of board from amending articles of

incorporation so as to entirely restructure board of directors and eliminate lifetime directorships. *Morales v. Sevananda, Inc.*, 162 Ga. App. 854, 293 S.E.2d 387 (1982) (decided under former § 14-3-150).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 10. 18 Am. Jur. 2d, Corporations, §§ 79, 92-95. 36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, § 15.

**C.J.S.** — 7 C.J.S., Associations, § 6. 10 C.J.S., Beneficial Associations, § 25. 18 C.J.S., Corporations, § 54. 77 C.J.S., Religious Societies, § 8.

**ALR.** — Applicability to corporations not

organized for profit of statutes prescribing conditions under which foreign corporations may do business within state, 37 ALR 1283.

Power of corporation to amend its charter in respect of character or kind of business, 111 ALR 1525.

Power of corporation to change obligations to stockholders, 117 ALR 1290.

### 14-3-1002. Amendment where corporation has no members or members not entitled to vote.

If a corporation has no members or no members entitled to vote thereon, its incorporators until directors have been chosen and thereafter its board of directors may adopt one or more amendments to the corporation's articles subject to any approval required pursuant to Code Sections 14-3-1030 and 14-3-1041. (Code 1981, § 14-3-1002, enacted by Ga. L. 1991, p. 465, § 1.)

### COMMENT

This section is based on the Model Act. If a corporation has no members or no members entitled to vote an amendment to the articles, the board may amend the articles by majority vote, subject to any approval that may be required pursuant to section 14-3-1030 or 14-3-1041. Members are not entitled to vote on amendments to the articles unless the corporation's articles or bylaws grant them such a right. See section 14-3-610.

### JUDICIAL DECISIONS

**Cited in** *Morales v. Sevananda, Inc.*, 162 Ga. App. 854, 293 S.E.2d 387 (1982).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 10. 18 Am. Jur. 2d, Corporations, § 95.

**C.J.S.** — 7 C.J.S., Associations, § 6. 10 C.J.S., Beneficial Associations, § 25. 18 C.J.S., Corporations, §§ 54, 60.

**ALR.** — Applicability to corporations not organized for profit of statutes prescribing conditions under which foreign corporations may do business within state, 37 ALR 1283.

**14-3-1003. Amendment where vote of members required.**

If the articles or bylaws require a vote of the members:

(1) Unless the articles provide otherwise, a corporation's board of directors may adopt one or more of the following amendments to the corporation's articles without member action:

(A) To extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(B) To delete the names and addresses of the initial directors;

(C) To delete the name and address of the initial registered agent or registered office, if an annual registration is on file with the Secretary of State;

(D) To change the corporate name; or

(E) To make any other change expressly permitted by this chapter to be made without member action;

(2) If there are members required to vote thereon, to adopt an amendment to a corporation's articles:

(A) The board of directors must recommend the amendment to the members unless the board of directors elects, because of a conflict of interest or other special circumstances, to make no recommendation and communicates the basis for its election to the members with the amendment;

(B) Unless this chapter, the articles, the bylaws, the members (acting pursuant to paragraph (3) of this Code section), or the board of directors (acting pursuant to paragraph (4) of this Code section) require a greater vote or voting by class, the members entitled to vote on the amendment must approve the amendment by two-thirds of the votes cast or a majority of the voting power, whichever is less; and

(C) Any person or persons whose approval is required by a provision of the articles or bylaws authorized by Code Section 14-3-1030 or 14-3-1041 must approve the amendment in writing;

(3) The members may condition the amendment's adoption on any basis;

(4) The board may condition its submission of the proposed amendment on any basis;

(5) The corporation shall give notice to its members of the proposed membership meeting in writing in accordance with Code Section 14-3-705. The notice must state that the purpose, or one of the purposes,



of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment; and

(6) If the amendment is submitted to the members for approval by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment. (Code 1981, § 14-3-1003, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on section 10.02 of the Model Act. This Code contains separate sections for amendment of articles of corporations without members (section 14-3-1002) and for those with members entitled to vote on amendments to the articles (this section).

#### **14-3-1004. Voting on amendments by classes of members.**

If the articles or bylaws provide for voting by classes of members, then unless the articles or bylaws provide otherwise:

(1) The members of a class are entitled to vote as a class on a proposed amendment to the articles if the amendment would change the rights of that class as to voting in a different manner than such amendment would affect another class or members of another class;

(2) If a class is to be divided into two or more classes as a result of an amendment to the articles, the amendment must be approved by the members of each class that would be created by the amendment; and

(3) If a class vote is required to approve an amendment to the articles, the amendment must be approved by the members of the class by two-thirds of the votes cast by the class or a majority of the voting power of the class, whichever is less. (Code 1981, § 14-3-1004, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based generally on the Model Act and its Business Code counterpart. It differs from the Model Act because this Code does not follow the Model Act approach of categorizing nonprofit corporations. It differs from the Business Code because of the different rights and interests of members and shareholders.

#### **14-3-1005. Articles of amendment.**

A corporation amending its articles shall deliver to the Secretary of State for filing articles of amendment setting forth:

- (1) The name of the corporation;
- (2) The text of each amendment adopted;
- (3) The date of each amendment's adoption;

(4) If approval of members was not required, a statement to that effect and a statement that the amendment was approved by a sufficient vote of the board of directors or incorporators;

(5) If approval by members was required, a statement that the amendment was duly approved by the members in accordance with the provisions of Code Section 14-3-1003; and

(6) If approval of the amendment by some person or persons other than the members, the board, or the incorporators is required pursuant to Code Section 14-3-1030 or 14-3-1041, a statement that the approval was obtained. (Code 1981, § 14-3-1005, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

Subsections (5) and (6) have no Business Code counterpart.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 10. 18 Am. Jur. 2d, Corporations, § 95.

**C.J.S.** — 7 C.J.S., Associations, § 6. 18 C.J.S., Corporations, § 60.

**ALR.** — Applicability to corporations not organized for profit of statutes prescribing conditions under which foreign corporations may do business within state, 37 ALR 1283.

#### 14-3-1005.1. Notice of intent to change corporate name.

(a) Together with the articles of amendment which change the name of the corporation, the corporation shall deliver to the Secretary of State an undertaking, which may appear in the articles of amendment or be set forth in a letter or other instrument executed by an incorporator or any person authorized to act on behalf of the corporation, to publish a notice of the filing of the articles of amendment as required by subsection (b) of this Code section.

(b) No later than the next business day following the delivery of the articles of amendment and certificate as provided in subsection (a) of this Code section, the corporation shall mail or deliver to the publisher of a newspaper which is the official organ of the county where the registered office of the corporation is located or which is the newspaper of general circulation published within such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation a request to publish a notice in substantially the following form:

#### “NOTICE OF CHANGE OF CORPORATE NAME

Notice is given that articles of amendment which will change the name of \_\_\_\_\_ (present corporate name) to \_\_\_\_\_ (proposed corporate name) have been delivered to the Secretary of State for filing in accordance with the Georgia Nonprofit



Corporation Code. The registered office of the corporation is located at \_\_\_\_\_ (address of registered office).”

The request for publication of the notice shall be accompanied by a check, draft, or money order in the amount of \$40.00 in payment for the cost of publication. The notice shall be published once a week for two consecutive weeks commencing within ten days after receipt of the notice by the newspaper. Failure on the part of the corporation to mail or deliver the notice or payment therefor or failure on the part of the newspaper to publish the notice in compliance with this subsection shall not invalidate the articles of amendment or the change of the name of the corporation. (Code 1981, § 14-3-1005.1, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1999, p. 405, § 20.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, § 95. 18A Am. Jur. 2d, Corporations, § 211.

**C.J.S.** — 18 C.J.S., Corporations, § 60.

**ALR.** — Applicability to corporations not organized for profit of statutes prescribing conditions under which foreign corpora-

tions may do business within state, 37 ALR 1283.

Necessity that newspaper be published in English language to satisfy requirements regarding publication of legal or official notice, 90 ALR 500.

#### 14-3-1006. Restated articles of incorporation.

(a) A corporation's board of directors may restate its articles of incorporation at any time with or without approval by members or any other person.

(b) The restatement may include one or more amendments to the articles. If the restatement includes an amendment requiring approval by the members or any other person, it must be adopted as provided in Code Section 14-3-1003, 14-3-1030, or 14-3-1041.

(c) If the board seeks to have the restatement approved by the members at a membership meeting, the corporation shall notify each of its members of the proposed membership meeting in writing in accordance with Code Section 14-3-705. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy or summary of the restatement that identifies any amendments or other change it would make in the articles.

(d) If the board seeks to have the restatement approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the restatement that identifies any amendments or other change it would make in the articles.

(e) A corporation restating its articles shall deliver to the Secretary of State for filing articles of restatement setting forth the name of the

corporation and the text of the restated articles of incorporation together with a certificate setting forth:

(1) Whether the restatement contains an amendment to the articles requiring approval by the members or any other person other than the board of directors and, if it does not, that the board of directors adopted the restatement; or

(2) If the restatement contains an amendment to the articles requiring approval by the members, the information required by Code Section 14-3-1005; and

(3) If the restatement contains an amendment to the articles requiring approval by a person whose approval is required pursuant to Code Sections 14-3-1030 and 14-3-1041, a statement that such approval was obtained.

(f) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(g) The Secretary of State may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the certificate information required by subsection (e) of this Code section. (Code 1981, § 14-3-1006, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based both on the Model Act and on its Business Code counterpart, section 14-2-1007. Unlike the Business Code, subsection (c) permits the notice to be accompanied by either a copy or a summary of the restatement. The Business Code does not permit a summary of the restatement.

#### **14-3-1007. Amendment of articles pursuant to court order.**

(a) A corporation's articles may be amended without board approval or approval by the members or approval required pursuant to Code Section 14-3-1030 or 14-3-1041 to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles after amendment contain only provisions required or permitted by Code Section 14-3-202.

(b) The individual or individuals designated by the court shall deliver to the Secretary of State articles of amendment setting forth:

(1) The name of the corporation;

(2) The text of each amendment approved by the court;

(3) The date of the court's order or decree approving the articles of amendment;

(4) The title of the reorganization proceeding in which the order or decree was entered; and



(5) A statement that the court had jurisdiction of the proceeding under federal statute.

(c) This Code section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan. (Code 1981, § 14-3-1007, enacted by Ga. L. 1991, p. 465, § 1.)

### **14-3-1008. Effect of amendment on existing cause of action.**

An amendment to the articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, any requirement or limitation imposed upon the corporation or any property held by it by virtue of any trust upon which such property is held by the corporation, or the existing rights of persons other than members of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name. (Code 1981, § 14-3-1008, enacted by Ga. L. 1991, p. 465, § 1.)

### **COMMENT**

This section is based both on the Model Act and its Business Code counterpart, section 14-2-1009. The phrase "any requirement or limitation imposed upon the corporation or any property held by it by virtue of any trust upon which such property is held by the corporation" is from the Model Act and does not appear in section 14-2-1009.

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 10. 18 Am. Jur. 2d, Corporations, § 82. **C.J.S.** — 7 C.J.S., Associations, § 6. 18 C.J.S., Corporations, § 61.

## **PART 2**

### **AMENDMENT OF BYLAWS**

### **14-3-1020. Amendment where corporation has no members or members not entitled to vote.**

If a corporation has no members or no members entitled to vote thereon, its incorporators until the organizational meeting of directors and thereafter its board of directors may adopt one or more amendments to the corporation's bylaws subject to any approval required pursuant to Code Sections 14-3-1030 and 14-3-1041. (Code 1981, § 14-3-1020, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based on the Model Act. If a corporation has no members entitled to vote on bylaw amendments, then the directors may amend the bylaws, subject to any approval that may be required pursuant to section 14-3-1030 or 14-3-1041.

**14-3-1021. Amendment where vote of members required.**

(a) To adopt an amendment to a corporation's bylaws if there are members required to vote thereon:

(1) The board of directors must recommend the amendment to the members unless the board of directors elects, because of a conflict of interest or other special circumstances, to make no recommendation and communicates the basis for its election to the members with the amendment;

(2) Unless this chapter, the articles, the bylaws, the members (acting pursuant to subsection (b) of this Code section), or the board of directors (acting pursuant to subsection (c) of this Code section) require a greater vote or voting by class, the members entitled to vote on the amendment must approve the amendment by two-thirds of the votes cast or a majority of the voting power, whichever is less; and

(3) Any person or persons whose approval is required by a provision of the articles or bylaws authorized by Code Section 14-3-1030 or 14-3-1041 must approve the amendment in writing.

(b) The members may condition the amendment's adoption on any basis.

(c) The board may condition its submission of the proposed amendment on any basis.

(d) The corporation shall give notice to its members of the proposed membership meeting in writing in accordance with Code Section 14-3-705. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) If the amendment is submitted to the members for approval by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment. (Code 1981, § 14-3-1021, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section differs significantly from the Model Act because this Code does not follow the Model Act approach of categorizing nonprofit corporations and providing different rules for governance of different categories of nonprofit corporations.



**14-3-1022. Voting by classes of members.**

If the articles or bylaws provide for voting by classes of members, then unless the articles or bylaws provide otherwise:

(1) The members of a class are entitled to vote as a class on a proposed amendment to the bylaws if the amendment would change the rights of that class as to voting in a different manner than such amendment would affect another class or members of another class;

(2) If a class is to be divided into two or more classes as a result of an amendment to the bylaws, the amendment must be approved by the members of each class that would be created by the amendment; and

(3) If a class vote is required to approve an amendment to the bylaws, the amendment must be approved by the members of the class by two-thirds of the votes cast by the class or a majority of the voting power of the class, whichever is less. (Code 1981, § 14-3-1022, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1992, p. 6, § 14.)

**COMMENT**

See Comment to section 14-3-1004.

**PART 3****APPROVAL OF AMENDMENTS****14-3-1030. When approval by specified person required.**

The articles or the bylaws may require an amendment to the articles or bylaws to be approved in writing by a specified person or persons other than the board. Such an article or bylaw provision may only be amended with the approval in writing of such person or persons. (Code 1981, § 14-3-1030, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is taken from the Model Act. It validates the practice of some nonprofit corporations of giving a specified person or entity veto power over amendments to the articles or bylaws. Because "person" is broadly defined, this veto power may be given to any individual (including a member or delegate) or to an entity.

**PART 4****AMENDMENT TO OPERATE FOR PROFIT****COMMENT**

This part has no counterpart in the Model Act or the Business Code. It authorizes and provides a mechanism for conversion of a nonprofit corporation to a business corporation. For charitable corporations described in section 14-3-1302(a)(2), the special provisions of section 14-3-1041 must be followed.

**14-3-1040. Authority to amend articles to operate as for profit corporation.**

A corporation organized under this chapter may amend its articles of incorporation to provide that the corporation shall operate as a for profit business corporation. (Code 1981, § 14-3-1040, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This part has no counterpart in the Model Act or the Business Code. It authorizes and provides a mechanism for conversion of a nonprofit corporation to a business corporation. For charitable corporations described in section 14-3-1302(a)(2), the special provisions of section 14-3-1041 must be followed.

**14-3-1041. Procedure for amendment.**

(a) A corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302 may amend its articles of incorporation as provided in Code Section 14-3-1040 only:

(1) Upon the prior approval of the superior court in a proceeding in which the Attorney General has been given notice; or

(2) If on or before the effective date of the amendment:

(A) Assets with a value equal to the greater of the fair market value of the net tangible and intangible assets (including good will) of the corporation, or the fair market value of the corporation if it were to be operated as a business concern, are transferred or conveyed to one or more persons who would have received its assets under subsection (b) of Code Section 14-3-1403 had it dissolved;

(B) It shall return, transfer, or convey any assets held by it upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the amendment, in accordance with such condition; and

(C) The amendment is approved by a majority of the directors of the corporation who are not and will not become shareholders in, or officers, employees, agents, or consultants of the corporation following the effective date of the amendment.

(b) At least 30 days before the filing of any amendment described in Code Section 14-3-1040 by a corporation described in subsection (a) of this Code section, notice of the proposed amendment shall be delivered to the Attorney General.

(c) Without the prior written consent of the superior court in a proceeding of which the Attorney General has been given notice, no member of a corporation described in subsection (a) of this Code section may receive or keep anything as a result of an amendment described in



Code Section 14-3-1040. The court shall approve the transaction if it is in the public interest. (Code 1981, § 14-3-1041, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1993, p. 91, § 14.)

#### COMMENT

This section has no counterpart in the Model Act or the Business Code. It establishes procedures under which a charitable nonprofit corporation of the type described in section 14-3-1302(a)(2) may convert to a business corporation. Nonprofit corporations that are not described in section 14-3-1302(a)(2) need not follow these procedures to convert to business corporations; they need only amend their articles as provided in section 14-3-1040.

This section provides alternative procedures. The corporation may either obtain the approval of the superior court in a proceeding in which the Attorney General is given notice, or it may follow the procedures described in subsection (a)(2). Both procedures are designed to ensure that assets of charitable corporations cannot be diverted from their intended purposes via conversion of a nonprofit corporation to a business corporation. Subsection (b) ensures that the Attorney General will be notified of a proposed conversion of a corporation described in section 14-3-1302(a)(2). Subsection (c) prevents members of charitable corporations from benefiting personally or economically from conversion of the corporation to a for-profit corporation without judicial approval. Identical rules govern corporations described in section 14-3-1302(a)(2) that wish to merge with non-charitable corporations. See section 14-3-1102.

### 14-3-1042. Applicability of Business Corporation Code.

From and after the effective date of any amendment described in Code Section 14-3-1040, the corporation shall be subject to and governed by the provisions of Chapter 2 of this title, the "Georgia Business Corporation Code." (Code 1981, § 14-3-1042, enacted by Ga. L. 1991, p. 465, § 1.)

**Cross references.** — Georgia Business Corporation Code, § 14-2-101 et seq.

#### COMMENT

This section has no counterpart in the Business Code or the Model Act. It establishes the rule that a corporation that amends its articles in conformity with section 14-3-1040 will be governed by the Business Code, rather than this Code, from and after the effective date of the amendment.

## ARTICLE 11

### MERGER

### 14-3-1101. Definitions; plan of merger.

(a) As used in this Code section, the term:

(1) "Business corporation" means a corporation for profit, incorporated under the provisions of Chapter 2 of this title.

(2) "Entity" includes any domestic or foreign business corporation, domestic or foreign nonprofit corporation, domestic or foreign limited

liability company, domestic or foreign joint-stock association, or domestic or foreign limited partnership.

(3) "Foreign business corporation" means a corporation for profit incorporated under a law other than the law of this state.

(4) "Governing agreements" includes the articles of incorporation and bylaws of a domestic or foreign business corporation or domestic or foreign nonprofit corporation, articles of association or trust agreement or indenture and bylaws of a joint-stock association, articles of organization and operating agreement of a limited liability company, and the certificate of limited partnership and limited partnership agreement of a limited partnership, and agreements serving comparable purposes under the laws of other states or jurisdictions.

(5) "Joint-stock association" includes any association of the kind commonly known as a joint-stock association or joint-stock company and any unincorporated association, trust, or enterprise having members or having outstanding shares of stock or other evidences of financial and beneficial interest therein, whether formed by agreement or under statutory authority or otherwise, but does not include a corporation, partnership, or nonprofit organization. A joint-stock association as defined in this paragraph may be one formed under the laws of this state, including a trust created pursuant to Article 3 of Chapter 12 of Title 53, or one formed under or pursuant to the laws of any other state or jurisdiction.

(6) "Limited liability company" includes limited liability companies formed under the laws of this state or of any other state or territory or the District of Columbia, unless the laws of such other state or jurisdiction forbid the merger of a limited partnership with a corporation.

(7) "Limited partnership" includes limited partnerships formed under the laws of this state or of any other state or territory or the District of Columbia, unless the laws of such other state or jurisdiction forbid the merger of a limited partnership with a corporation.

(8) "Share" includes shares, memberships, financial or beneficial interests, units, or proprietary or partnership interests in a domestic or foreign business corporation, limited liability company, joint-stock association, or a limited partnership but does not include debt obligations of any entity.

(9) "Shareholder" includes every shareholder, member, or partner in a domestic or foreign business corporation, a limited liability company, a joint-stock association, or a limited partnership that is a party to a merger or a holder of a share of stock or other evidence of financial or beneficial interest therein.



(b) Subject to the limitations set forth in Code Section 14-3-1102, one or more nonprofit corporations may merge into an entity if the plan of merger is approved as provided in Code Section 14-3-1103.

(c) The plan of merger must set forth:

(1) The name of each corporation and entity planning to merge and the name of the surviving corporation or entity into which each plans to merge;

(2) The terms and conditions of the planned merger; and

(3) The manner and basis, if any, of converting the memberships of each corporation and the shares, financial or beneficial interests, or units in each of the entities into shares, obligations, memberships, or other securities of the surviving or any other corporation or entity or into cash or other property in whole or in part.

(d) The plan of merger may set forth:

(1) Any amendments to the articles of incorporation, bylaws, or governing agreements of the surviving corporation or entity to be effected by the planned merger; and

(2) Other provisions relating to the planned merger. (Code 1981, § 14-3-1101, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 15; Ga. L. 1998, p. 128, § 14.)

#### COMMENT

This article and section are based on the Model Act. Unlike the Business Code, which imposes virtually no restrictions or limitations on statutory mergers, this article restricts mergers involving charitable corporations described in section 14-3-1302(a)(2). Unlike the Business Code, this Code does not authorize short-form mergers or the nonprofit equivalent of a reorganization by share exchange, both of which are inappropriate in the nonprofit context. Like the Model Act and the Business Code, this article eliminates the concept of "consolidation."

Unlike the Business Code, this Code does not provide for dissenters' rights. This is for two reasons. First, members of charitable nonprofit corporations have no economic interest in the corporation. Second, while members of non-charitable corporations, such as social or athletic clubs, may have an economic interest in their corporation, the concept of dissenters' rights seems inappropriate in the nonprofit context. Although this Code provides no specific remedy for a wrongful merger, members opposed to a proposed merger could petition to enjoin it, and could petition to rescind it after the fact. In addition, money damages might be appropriate in the context of non-charitable corporations. However, when a merger has been properly approved under this article, and the directors have complied with their duties of care and loyalty, a court should not enjoin or rescind the merger. On the other hand, if the merger was not properly approved, the court should consider all the facts and circumstances in fashioning a remedy, including the good faith of the parties, the fairness of the merger, the nature of any omission or misstatement, and whether the merger would have been approved in any event. Potential remedies include rescission of the merger, an order requiring payment of damages, or validation of the merger notwithstanding the failure to comply with this article.

**Note to 1997 Amendments**

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. Subsection (a), containing definitions, is new, and the following sections were redesignated. References to specific types of organizations were replaced with references to "entity" in subsections (b), (c) and (d). Subsection (c)(3) was amended to add references to "shares, financial or beneficial interests or units" to accommodate mergers involving business organizations. These changes are intended to permit mergers of various types of entities, provided that each entity complies with the applicable laws governing mergers.

**14-3-1102. Merger without court approval; notice to Attorney General; receipt or retention by member of anything resulting from merger.**

(a) Without the prior approval of the superior court in a proceeding of which the Attorney General has been given written notice, a corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302 may merge with a domestic or foreign corporation or other entity, provided that:

(1) The corporation or entity which is the surviving corporation or entity is a corporation or entity described in paragraph (2) of subsection (a) in Code Section 14-3-1302 after the merger; or

(2)(A) On or prior to the effective date of the merger, assets with a value equal to the greater of the fair market value of the net tangible and intangible assets (including good will) of the corporation or the fair market value of the corporation if it were to be operated as a business concern are transferred or conveyed to one or more persons who would have received its assets under subsection (b) of Code Section 14-3-1403 had it dissolved;

(B) It shall return, transfer, or convey any assets held by it upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the merger, in accordance with such condition; and

(C) The merger is approved by a majority of directors of the corporation who are not and will not become members or shareholders in or officers, employees, agents, or consultants of the surviving corporation or entity.

(b) At least 30 days before consummation of any merger of a corporation pursuant to paragraph (2) of subsection (a) of this Code section, notice, including a copy of the proposed plan of merger, must be delivered to the Attorney General.

(c) Without the prior approval of the superior court in a proceeding in which the Attorney General has been given notice, no member of a corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302 may receive or keep anything as a result of a merger other than membership in the surviving corporation or entity. The court shall approve



the transaction if it is in the public interest. (Code 1981, § 14-3-1102, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 16.)

#### COMMENT

This section is based on the Model Act and has no counterpart in the Business Code. It requires corporations described in section 14-3-1302(a)(2) that would like to merge with another corporation either obtain prior judicial approval or follow the procedures outlined in subsection (a)(2) unless the surviving corporation would be a corporation described in section 14-3-1302(a)(2). In the latter event, the merger does not require either judicial approval or compliance with the provisions of subsection (a)(2). The requirements are the same as those imposed under section 14-3-1041 (relating to conversion from nonprofit to for-profit status), and are designed to prevent diversion of assets held by charitable corporations to non-charitable purposes. Under subsection (b), if the corporation wishes to follow the procedures of subsection (a)(2), it must notify the Attorney General 30 days prior to the proposed effective date of the merger. This will provide the Attorney General an opportunity to review the terms and effect of the proposed merger. If any member is to receive any economic benefit other than membership in the surviving corporation, prior judicial approval is required under subsection (c).

In addition to satisfying the requirements of subsection (a)(2), the directors and officers must satisfy their duties of care and loyalty imposed by section 14-3-830 and part 6 of article 8. If judicial approval of a merger is sought, the court should approve the merger if it is in the public interest and if the requirements of this section have been satisfied.

#### Note to 1997 Amendments

Amendments were made to subsections (a) and (c) to conform the definitions to changes made in the Business Corporation Code in 1996. In each case where the word "corporation" appeared as the merging entity, it was followed with "or entity". These changes are intended to permit mergers of various types of entities, provided that each entity complies with the applicable laws governing mergers. "Entity" is defined in Code Section 14-3-1101(a)(2).

### **14-3-1103. Approval of plan of merger by members or directors; abandonment of plan.**

(a) Unless this chapter, the articles, the bylaws, or the board of directors or members (acting pursuant to subsection (c) of this Code section) require a greater vote or voting by class, a plan of merger to be adopted must be approved:

(1) By the board;

(2) By the members, if any, by two-thirds of the votes cast or a majority of the voting power, whichever is less; and

(3) In writing by any person or persons whose approval is required by a provision of the articles authorized by Code Section 14-3-1030 for an amendment to the articles or bylaws.

(b) If the corporation does not have members, the merger must be approved by a majority of the directors in office at the time the merger is

approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with subsection (b) of Code Section 14-3-822. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed merger.

(c) The board may condition its submission of the proposed merger, and the members may condition their approval of the merger, on receipt of a higher percentage of affirmative votes or on any other basis.

(d) If the board seeks to have the plan approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with Code Section 14-3-705. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger and contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of the disappearing corporation shall include a copy or summary of the articles and bylaws that will be in effect immediately after the merger takes effect.

(e) If the board seeks to have the plan approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan. The copy or summary of the plan for members of the surviving corporation shall include any provision that, if contained in a proposed amendment to the articles of incorporation or bylaws, would entitle members to vote on the provision. The copy or summary of the plan for members of the disappearing corporation shall include a copy or summary of the articles and bylaws that will be in effect immediately after the merger takes effect.

(f) Voting by a class of members is required on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation or bylaws, would entitle the class of members to vote as a class on the proposed amendment under Code Section 14-3-1004 or 14-3-1022. The plan is approved by a class of members by two-thirds of the votes cast by the class or a majority of the voting power of the class, whichever is less.

(g) After a merger is adopted, and at any time before articles of merger are filed, the planned merger may be abandoned (subject to any contractual rights) without further action by members or other persons who approved the plan in accordance with the procedure set forth in the plan of merger or, if none is set forth, in the manner determined by the board of directors. (Code 1981, § 14-3-1103, enacted by Ga. L. 1991, p. 465, § 1.)



## COMMENT

This section is based on the Model Act. It establishes the requirements for approving a merger.

*Corporations without members.* If a corporation does not have members, the merger may be approved by a majority vote of the directors in office at the time, unless this Code or the corporation's articles or bylaws provide for a higher percentage approval. While it is normally not necessary to give directors notice of matters that will be considered at directors' meeting, subsection (b) requires that corporations without members notify the directors that one of the matters to be considered at the meeting is a proposed merger.

*Corporations with members.* If a corporation has members, the board must adopt the plan of merger and submit it to the members for their approval. Unless this Code or the corporation's articles or bylaws require a greater vote, the plan of merger must be approved by two-thirds of the votes cast or a majority of the voting power, whichever is less. Voting by class is required if the plan contains a provision that would require a class vote if it were contained in an amendment to the articles or bylaws. In such situations, each class entitled to vote must approve the plan by two-thirds of the votes cast or a majority of the voting power of the class, whichever is less. The notice of the meeting or material soliciting the approval must set forth the material facts concerning the merger. To provide flexibility, subsection (c) allows the board or the members to condition approval of the merger upon its receiving a higher percent of votes than would normally be required, or to condition approval on any other basis.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2618, 2619.

**C.J.S.** — 19 C.J.S., Corporations, §§ 798, 802.

**ALR.** — Necessity and sufficiency of legislative authority for consolidation or merger of religious bodies, 50 ALR 118.

**14-3-1104. Articles of merger; publication of notice of merger.**

(a) After a plan of merger is approved by the board of directors, and, if required by Code Section 14-3-1103, by the members and any other persons, the surviving or acquiring corporation or entity shall deliver to the Secretary of State articles of merger setting forth:

(1) The plan of merger;

(2) If approval of members was not required, a statement to that effect and a statement that the plan was approved by a sufficient vote of the board of directors;

(3) If approval by members was required:

(A) The designation, number of memberships outstanding, number of votes entitled to be cast by each class entitled to vote separately on the plan, and number of votes of each class indisputably voting on the plan; and

(B) Either the total number of votes cast for and against the plan by each class entitled to vote separately on the plan or the total number of

undisputed votes cast for the plan by each class and a statement that the number cast for the plan by each class was sufficient for approval by that class;

(4) If approval of the plan by some person or persons other than the members or the board is required pursuant to paragraph (3) of subsection (a) of Code Section 14-3-1103, a statement that the approval was obtained; and

(5) The merging corporation or entity shall deliver the articles of merger to the Secretary of State for filing in substantially the same manner as provided in its governing agreements and in compliance with any applicable laws applying to domestic entities, or, in the absence of such requirements, in substantially the same manner as provided in Code Section 14-2-1105 and shall comply with the provisions of Code Section 14-2-1105.1, except that the notice to the publisher of the newspaper shall be in substantially the following form:

#### "NOTICE OF MERGER

Notice is given that articles or a certificate of merger by and between \_\_\_\_\_ (name and state of incorporation or organization of each of the constituent corporations or entities) will be delivered to the Secretary of State for filing in accordance with the Georgia Nonprofit Corporation Code. The name of the surviving corporation (or other entity) in the merger will be \_\_\_\_\_, a corporation (or other entity) incorporated (organized pursuant to the laws of) in the State of \_\_\_\_\_. The registered office of such corporation (name of type of entity) (is) (will be) located at \_\_\_\_\_ (address of registered office) and its registered (agent) (agents) at such address (is) (are) \_\_\_\_\_ (name or names of agent or agents)."

(b) In lieu of filing articles of merger that set forth the plan of merger, the surviving or acquiring corporation or entity may file a certificate of merger which sets forth:

(1) The name and state of incorporation of each corporation or entity which is merging and the name of the surviving corporation or entity into which each other corporation or entity is merging;

(2) Any amendments to the articles of incorporation or governing agreements of the surviving corporation or entity;

(3) That the executed plan of merger is on file at the principal place of business of the surviving corporation or entity, stating the address thereof;

(4) That a copy of the plan of merger will be furnished by the surviving corporation or entity, on request and without cost, to any shareholder of any corporation or entity that is a party to the merger;



(5) If shareholder approval was not required, a statement to that effect; and

(6) If approval of the shareholders of one or more corporations or entities party to the merger was required, a statement that the merger was duly approved by the shareholders.

(c) Unless a delayed effective date is specified, a merger takes effect when the articles or certificate of merger is filed. (Code 1981, § 14-3-1104, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 17.)

#### COMMENT

This section is based on the Model Act and on its Business Code counterparts, sections 14-2-1105 and 14-2-1105.1. Business Code language pertaining to “share exchanges” is omitted because this Code has no such concept. Subsection (a)(3) requires a more detailed description of the member approval than is required under the Business Code, and subsection (a)(4) has no Business Code counterpart because the Business Code does not provide for veto power in a designated person. See section 14-3-1030. This section incorporates the publication requirement that the Business Code sets forth separately as section 14-2-1105.1.

#### Note to 1997 Amendments

Amendments to subsections (a) and (b) were made to conform the definitions to changes made in the Business Corporation Code in 1996. The words “or entity” were added after “corporation” to permit mergers of various types of entities, provided that each entity complies with the applicable laws governing mergers.

#### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the provisions, opinions under former Code Section 14-3-173 are included in the annotations for this Code section.

**Sample letter prior to 1990 amendment incompatible.** — The sample letter set out in former § 14-3-173 (see O.C.G.A. § 14-3-1104) prior to the 1990 amendment

was wholly incompatible with the current procedural scheme of the Business Corporation Code (see O.C.G.A. § 14-2-101 et seq.), and could not be reconciled with the manifest intent of the legislature to streamline and simplify the requirements for publication. 1989 Op. Att’y Gen. No. 89-48 (decided under former § 14-3-173).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2620.

**C.J.S.** — 19 C.J.S., Corporations, § 802.

**ALR.** — Necessity and sufficiency of legislative authority for consolidation or merger

of religious bodies, 50 ALR 118.

Necessity that newspaper be published in English language to satisfy requirements regarding publication of legal or official notice, 90 ALR 500.

#### 14-3-1105. Effect of merger.

When a merger takes effect:

(1) Every other corporation or entity party to the merger merges into the surviving corporation or entity and the separate existence of every corporation except the surviving corporation or entity ceases;

(2) The title to all real estate and other property owned by each corporation or entity party to the merger is vested in the surviving corporation or entity without reversion or impairment subject to any and all conditions to which the property was subject prior to the merger;

(3) The surviving corporation or entity has all liabilities and obligations of each corporation or entity party to the merger;

(4) A proceeding pending against any corporation or entity party to the merger may be continued as if the merger did not occur or the surviving corporation or entity may be substituted in the proceeding for the corporation or entity whose existence ceased; and

(5) The articles of incorporation and bylaws of the surviving corporation or entity are amended to the extent provided in the plan of merger. (Code 1981, § 14-3-1105, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1997, p. 1165, § 18.)

#### COMMENT

This section is based on the Model Act and on its Business Code counterpart, section 14-2-1106. Subsection (2) differs from the Business Code counterpart to reflect potential conditions to which property may be subject. For example, if the property was given to one of the merging corporations on the condition that it be used for a specific purpose, that condition survives the merger. See section 14-3-1107.

#### Note to 1997 Amendments

Amendments were made to conform the definitions to changes made in the Business Corporation Code in 1996. The words "or entity" were added after "corporation" to permit mergers of various types of entities, provided that each entity complies with the applicable laws governing mergers.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2624-2638.

**C.J.S.** — 19 C.J.S., Corporations, § 807.

#### 14-3-1106. Merger with foreign corporation.

(a) Except as provided in Code Section 14-3-1102, one or more foreign business or nonprofit corporations may merge with one or more domestic nonprofit corporations if:

(1) The merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger;

(2) The foreign corporation complies with Code Section 14-3-1104 if it is the surviving corporation of the merger; and

(3) Each domestic nonprofit corporation complies with the applicable provisions of Code Sections 14-3-1101 through 14-3-1103 and, if it is the surviving corporation of the merger, with Code Section 14-3-1104.



(b) Upon the merger taking effect, the surviving corporation, if it does not have a registered agent in this state, shall be deemed to have appointed the Secretary of State as its registered agent for service of process in a proceeding to enforce any obligation of a domestic corporation party to the merger, until such time as it appoints a registered agent in this state. (Code 1981, § 14-3-1106, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and on its Business Code counterpart, section 14-2-1107. It contemplates merger of a nonprofit corporation with a foreign business corporation, so long as the requirements of the Code are met.

#### JUDICIAL DECISIONS

**Cited in** Employers' Liab. Assurance Corp.  
v. Keelin, 132 Ga. App. 459, 208 S.E.2d 328  
(1974).

#### RESEARCH REFERENCES

**C.J.S.** — 19 C.J.S., Corporations, § 931.      lative authority for consolidation or merger  
**ALR.** — Necessity and sufficiency of legis-      of religious bodies, 50 ALR 118.

### 14-3-1107. Effect of merger on bequest, devise, or other transfer of property.

Any bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance, that is made to a constituent corporation and that takes effect or remains payable after the merger, inures to the surviving corporation unless the will or other instrument otherwise specifically provides. (Code 1981, § 14-3-1107, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is taken from the Model Act. It provides that certain declared transfers of property to a corporation that will disappear in a merger will inure to the benefit of the corporation that survives the merger. If the will or other instrument otherwise specifically provides, of course, it will control and the gift, bequest, devise or promise will not inure to the surviving corporation.

A provision in a will or other instrument requiring that a bequest or gift be used for a specified purpose must be complied with by the surviving corporation, even if that corporation is not engaged in the same activities as the disappearing corporation. If the surviving corporation cannot or does not want to use the bequest or gift for the specified purpose, it must seek judicial approval for the variance. Whether the variance should be granted is left to the *cy pres* doctrine and other applicable state law.

## ARTICLE 12

## SALE, ENCUMBRANCE, OR OTHER DISPOSITION OF ASSETS

**Cross references.** — Secured transactions of nonprofit or charitable corporation to generally, § 11-9-1 et seq. Transfer of assets Department of Human Resources, § 49-1-6.

## RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of provisions authorizing holders of majority of a series of corporate bonds or other obligations to waive default of obligor, or to control or dismiss suit for enforcement of security, 110 ALR 1339.

Pledge or sale by private corporation of its

own bonds as security for, or in payment of, antecedent indebtedness, as violation of constitutional or statutory restrictions against issuance of bonds except for money or property actually received, or for labor done, etc., 142 ALR 1157.

**14-3-1201. Sale or other disposal of assets in usual course of activities; mortgage or other encumbrance of assets.**

Unless otherwise provided by this chapter, the articles, or bylaws, a corporation may on the terms and conditions, for the consideration determined by the board of directors, and without the approval of the members or any other person:

(1) Sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of its activities; or

(2) Mortgage, pledge, dedicate to the repayment of indebtedness (whether with or without recourse), or otherwise encumber any or all of its property whether or not in the usual and regular course of its activities. (Code 1981, § 14-3-1201, enacted by Ga. L. 1991, p. 465, § 1.)

## COMMENT

This section is based on the Model Act. It deals with two types of transactions. First, it authorizes the board to approve a sale or other disposition of all or substantially all of a corporation's property in the usual and regular course of its activities. While such a sale or disposition would not normally be in the regular course of a corporation's activities, if it is it may be approved by the board alone, unless the articles or bylaws or this Code provide otherwise. The second type of transaction is one in which a corporation mortgages, pledges or dedicates to the repayment of indebtedness any or all of its property, whether or not the transaction is in the usual and regular course of the corporation's activities. Subject to a contrary provision in the articles or bylaws, the directors alone may approve such a pledge or mortgage.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2654, 2667.

**C.J.S.** — 19 C.J.S., Corporations, § 620.

**ALR.** — Power of directors to sell property of corporation without consent of stockholders, 5 ALR 930; 60 ALR 1210.



Trademark or tradename as asset in case of bankruptcy, insolvency, or assignment for benefit of creditors, 44 ALR 706.

Statutory added liability of stockholders of bank or other corporation as affected by sale of, or other transaction in relation to, assets, 100 ALR 1276.

Instrument issued by a corporation as certificate of preferred stock or as evidence

of indebtedness, 123 ALR 856.

Applicability of statutes regulating sale of assets or property of corporation as affected by purpose or character of corporation, 9 ALR2d 1306.

Authority of corporate officers to mortgage or pledge corporate personal property, 62 ALR2d 712.

### **14-3-1202. Sale or other disposition of assets other than in usual course of activities.**

(a) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property (with or without the good will) other than in the usual and regular course of its activities on the terms and conditions and for the consideration determined by the corporation's board if the proposed transaction is authorized by subsection (b) of this Code section.

(b) Unless this chapter, the articles, the bylaws, or the board of directors or members (acting pursuant to subsection (d) of this Code section) require a greater vote or voting by class, the proposed transaction to be authorized must be approved:

(1) By the board;

(2) By the members by two-thirds of the votes cast or a majority of the voting power, whichever is less; and

(3) In writing by any person or persons whose approval is required by a provision of the articles authorized by Code Section 14-3-1030 for an amendment to the articles or bylaws.

(c) If the corporation does not have members, the transaction must be approved by a vote of a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with subsection (b) of Code Section 14-3-822. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a copy or summary of a description of the transaction.

(d) The board may condition its submission of the proposed transaction, and the members may condition their approval of the transaction, on receipt of a higher percentage of affirmative votes or on any other basis.

(e) If the corporation seeks to have the transaction approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with Code Section 14-3-705. The notice must also state that the purpose, or one of the

purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a copy or summary of a description of the transaction.

(f) If the board needs to have the transaction approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of a description of the transaction.

(g) A corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302 must give written notice to the Attorney General 30 days before it sells, leases, exchanges, or otherwise disposes of all, or substantially all, of its property if the transaction is not in the usual and regular course of its activities, unless said transaction is with another corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302.

(h) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further action by the members or any other person who approved the transaction in accordance with the procedure set forth in the resolution proposing the transaction or, if none is set forth, in the manner determined by the board of directors. (Code 1981, § 14-3-1202, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act. It establishes procedures for authorization of the sale or other disposition of substantially all of a corporation's assets other than in the usual and regular course of its activities. The requirements are similar to those for approving a merger. See section 14-3-1103.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2659, 2675, 2676.

**C.J.S.** — 19 C.J.S., Corporations, § 620.

**ALR.** — Statutory added liability of stockholders of bank or other corporation as affected by sale of, or other transaction in relation to, assets, 100 ALR 1276.

Validity, construction, and application of provisions authorizing holders of majority of a series of corporate bonds or other obligations to waive default of obligor, or to control or dismiss suit for enforcement of security, 110 ALR 1339.

Applicability of statutes regulating sale of assets or property of corporation as affected by purpose or character of corporation, 9 ALR2d 1306.

Who may assert invalidity of sale, mortgage, or other disposition of corporate property without approval of stockholders, 58 ALR2d 784.

Authority of corporate officers to mortgage or pledge corporate personal property, 62 ALR2d 712.



ARTICLE 13  
DISTRIBUTIONS

**14-3-1301. Distributions prohibited.**

Except as provided in Code Section 14-3-1302 and Article 14 of this chapter, a corporation shall not make any distributions. (Code 1981, § 14-3-1301, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based on the Model Act. It continues the prohibition of former law on the payment of the income of a nonprofit corporation to its members, directors or officers. See section 14-3-112 of former law. The term "distribution" is defined in section 14-3-140(9) as "the payment of a dividend or any part of the income or profit of a corporation to its members, directors, or officers." Excluded from the definition are such payments as indemnification and reasonable fees, compensation and expenses.

Charitable-type corporations typically use their income to further their purposes. Corporations organized for social or other non-charitable purposes may use any net income to improve their facilities. While members of such nonprofits may receive a benefit from the improved facilities, such an indirect benefit is not a dividend or a prohibited distribution because it conforms with the corporation's purposes.

Distributions upon dissolution of a corporation are governed by this section and article 14.

**14-3-1302. Exceptions to prohibition against distributions.**

(a) A corporation may make distributions to the following:

(1) Organizations (whether or not incorporated) that are organized and operated for the same or similar purposes as the distributing corporation;

(2) Organizations (whether or not incorporated) that are organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international sports competition, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; or

(3) A state or possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia.

(b) Except for corporations described in paragraph (2) of subsection (a) of this Code section, a corporation may repurchase a membership for the consideration that the member paid for his membership if, after the purchase is completed:

(1) The corporation would be able to pay its debts as they become due in the normal course of business; and

(2) The corporation's total assets would at least equal the sum of its liabilities. (Code 1981, § 14-3-1302, enacted by Ga. L. 1991, p. 465, § 1.)

### COMMENT

This section has no counterpart in the Business Code or the Model Act. It authorizes two types of "distributions": those that are deemed to be consistent with the corporation's purposes and the public interest (authorized by subsection (a)) and those necessary to repurchase memberships (authorized by subsection (b)).

Subsection (a) authorizes three types of distributions. First, a corporation may make a distribution to an organization organized and operated for the same or similar purposes as the distributing corporation. For example, a corporation organized and operated to provide shelter for the homeless may make distributions to another organization operated for the purpose of providing food or shelter to the homeless.

Subsection (a)(2) permits distributions to specified organizations, which are the same as those described in section 501(c)(3) of the Internal Revenue Code of 1986. This subsection plays a significant role in this Code. Corporations described in this subsection are subject to special regulation to ensure that their charitable purposes are not violated. See, for example, section 14-3-170 (granting special supervisory and investigative authority to the Attorney General), section 14-3-1041 (imposing restrictions on conversion to for-profit status), section 14-3-1102 (imposing restrictions on mergers), section 14-3-1202(g) (imposing notice requirements for sale or disposition of substantially all assets), and section 14-3-1403(c) (imposing restrictions on distribution of assets in dissolution).

Subsection (a)(3) permits distributions to governmental entities, which are the same as those described in section 170(c)(1) of the Internal Revenue Code.

Subsection (b) authorizes distributions to repurchase memberships, subject to several limitations. First, the consideration paid by the corporation may not exceed what the member paid for it. This restriction is designed to prevent indirect "dividend"-type distributions via payment of unreasonably large sums for repurchase of memberships. The other two restrictions are designed to protect the corporation's creditors and are identical to the restrictions imposed by section 14-2-640 on distributions of business corporations (except for omission of language pertaining to preferential rights of shareholders). See the comment to section 14-2-640 for a description of these restrictions.

## ARTICLE 14

### DISSOLUTION

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2733 et seq.

**ALR.** — Duty of ancillary receiver to remit assets of insolvent corporation to domiciliary receiver, 45 ALR 632.

Dissolution of corporation which ex-

cuted mortgage, or purchased property subject to it, 128 ALR 572.

Dissolution of corporation on ground of intracorporate deadlock or dissension, 83 ALR3d 458.



## PART 1

## VOLUNTARY DISSOLUTION

**14-3-1401. Dissolution by incorporators or initial directors.**

A majority of the incorporators or initial directors of a corporation that has not admitted members entitled to vote on dissolution, has not commenced activities, and has no net assets may dissolve the corporation by delivering to the Secretary of State for filing articles of dissolution that set forth:

- (1) The name of the corporation;
- (2) The date of its incorporation;
- (3) That:

(A) The corporation has not admitted members entitled to vote on dissolution;

(B) The corporation has not commenced activities; or

(C) The corporation has no net assets.

- (4) That no debt of the corporation remains unpaid; and

(5) That a majority of the incorporators or initial directors authorized the dissolution. (Code 1981, § 14-3-1401, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based both on the Model Act and on its Business Code counterpart, but it differs from both. It permits dissolution approved by a majority of the incorporators or initial directors if certain conditions are satisfied. First, the corporation must not have admitted members entitled to vote on dissolution. This is similar to the Business Code requirement that the corporation not have issued shares. Second, the corporation must not have "commenced activities." The Business Code language "commenced business" was changed to reflect the different nature of nonprofit corporations. Finally, the corporation must have no net assets. This requirement is a departure from the Business Code and from the Model Act. It is intended to prevent potential solicitation and receipt of funds followed by dissolution in the simplified manner provided by the section. If the corporation has net assets, this simplified dissolution mechanism should not be available. The word "or" following subsection (3)(B) should be "and".

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2738, 2739, 2754-2756.

**C.J.S.** — 19 C.J.S., Corporations, §§ 813, 837, 838.

**14-3-1402. Proposal of dissolution and approval thereof.**

(a) A corporation's board of directors may propose dissolution for submission to the members, if there are members entitled to vote thereon.

(1) For a proposal to dissolve to be adopted:

(A) The board of directors must recommend dissolution to the members unless the board of directors elects, because of a conflict of interest or other special circumstances, to make no recommendation and communicates the basis for its determination to the members; and

(B) The members entitled to vote must approve the proposal to dissolve as provided in subsection (e) of this Code section.

(2) The board of directors may condition its submission of the proposal for dissolution on any basis.

(3) The corporation shall notify each member entitled to vote of the proposed members' meeting in accordance with Code Section 14-3-705. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.

(4) Unless the articles of incorporation, the bylaws, or the board of directors (acting pursuant to paragraph (2) of this subsection) requires a greater vote or vote by classes, the proposal to dissolve to be adopted must be approved by a majority of all the votes entitled to be cast on that proposal.

(5) If the board seeks to have dissolution approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of the plan of dissolution.

(b) Unless the articles of incorporation or bylaws requires a greater vote, if the corporation does not have members entitled to vote on dissolution, dissolution must be approved by a vote of a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice of any directors' meeting at which such approval is to be obtained in accordance with Code Section 14-3-822. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolution of the corporation and contain or be accompanied by a copy or summary of the plan of dissolution.

(c) The plan of dissolution shall conform to the requirements of Code Section 14-3-1403 and shall indicate to whom the assets owned or held by the corporation will be distributed after all creditors have been paid. (Code 1981, § 14-3-1402, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based both on the Model Act and on its Business Code counterpart. It establishes the procedures for approving dissolution.



*Corporations with members entitled to vote on dissolution.* If a corporation has members entitled to vote on dissolution, the procedures of subsections (a) and (c) must be satisfied. The reference in subsection (a)(1)(B) to subsection (e) should be changed to subsection (a)(4).

*Corporations without members entitled to vote on dissolution.* Corporations that do not have members entitled to vote on dissolution need only follow the procedures outlined in subsections (b) and (c).

#### RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2747-2756, 2879, 2880. § 18. 19 C.J.S., Corporations, §§ 813, 814, 852, 859. 77 C.J.S., Religious Societies, § 98.  
C.J.S. — 10 C.J.S., Beneficial Associations,

#### 14-3-1403. Plan of dissolution.

(a) A plan of dissolution providing for the distribution of assets shall be adopted by a corporation in the process of dissolution.

(b) The plan of dissolution shall provide for distribution of assets as follows:

(1) All liabilities and obligations of the corporation shall be paid and discharged, or adequate provisions shall be made therefor;

(2) Assets held by the corporation upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred, or conveyed in accordance with such requirements;

(3) Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes, but not held upon a condition requiring return, transfer, or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, trusts, societies, or organizations engaged in activities substantially similar to those of the dissolving corporation;

(4) Other assets, if any, shall be distributed in accordance with the articles of incorporation and bylaws to the extent that the articles of incorporation or bylaws determine the distributive rights of members, or any class or classes of members, or provide for distribution to others; and

(5) Any remaining assets may be distributed to such persons, trusts, societies, organizations, or domestic or foreign corporations as may be provided in the plan of dissolution.

(c) A corporation described in paragraph (2) of subsection (a) of Code Section 14-3-1302 shall comply with the following additional requirements:

(1) It shall give the Attorney General written notice of its intent to dissolve at or before the time it delivers articles of dissolution to the Secretary of State;

(2) It shall not transfer or convey any assets as part of the dissolution process until 30 days after it has given the written notice to the Attorney General required by paragraph (1) of this subsection; and

(3) When all or substantially all of the assets of the corporation have been transferred or conveyed, it shall deliver to the Attorney General a list showing those (other than creditors) to whom the assets were transferred or conveyed. The list shall indicate the address of each person (other than creditors) who received assets and indicate what assets each received. (Code 1981, § 14-3-1403, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on sections 14-3-212 and 14-3-213 of former law and has no counterpart in the Model Act or the Business Code. It requires adoption of a plan of dissolution that provides for distribution of the corporation's assets according to specified rules. Subsection (c) is based on the Model Act. It requires charitable-type corporations to notify the Attorney General of its intent to dissolve, wait 30 days after the notice is given before transferring any assets as part of the dissolution process, and inform the Attorney General of the identity and address of those to whom assets were transferred, other than creditors.

#### **14-3-1404. Notice of intent to dissolve.**

Upon approval of a proposal for dissolution pursuant to Code Section 14-3-1402, the corporation shall begin dissolution by delivering to the Secretary of State for filing a notice of intent to dissolve setting forth:

(1) The name of the corporation;

(2) The date dissolution was authorized; and

(3) If member approval was required for dissolution, a statement that dissolution was duly approved by the members in accordance with subsection (a) of Code Section 14-3-1402. (Code 1981, § 14-3-1404, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on section 14-2-1403 of the Business Code. See the comment to that section.

#### **14-3-1404.1. Publication of notice of intent to dissolve.**

(a) Together with the notice of intent to dissolve provided for in Code Section 14-3-1404, the corporation shall deliver to the Secretary of State a certificate executed by an officer or director of such corporation, or any person undertaking such request on behalf of the corporation, verifying that the request for publication of a notice of intent to voluntarily dissolve the corporation and payment therefor have been made as required by subsection (b) of this Code section.



(b) Prior to filing the notice of intent to dissolve provided for in Code Section 14-3-1404, the corporation shall mail or deliver to the publisher of a newspaper which is the official organ of the county where the registered office of the corporation is located or which is a newspaper of general circulation published within such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation a request to publish a notice in substantially the following form:

**"NOTICE OF INTENT TO VOLUNTARILY  
DISSOLVE A CORPORATION**

Notice is given that a notice of intent to dissolve \_\_\_\_\_  
(name of corporation), a Georgia nonprofit corporation with its registered office at \_\_\_\_\_ (address of registered office), will be delivered to the Secretary of State for filing in accordance with the Georgia Nonprofit Corporation Code."

The notice may also include the information specified in Code Section 14-3-1408. The request for publication of the notice shall be accompanied by a check, draft, or money order in the amount of \$40.00 in payment of the cost of publication. The notice shall be published once a week for two consecutive weeks commencing within ten days after receipt of the notice by the newspaper. Failure on the part of the corporation to mail or deliver the notice or payment therefor or failure on the part of the newspaper to publish the notice in compliance with this subsection shall not invalidate the dissolution of the corporation. (Code 1981, § 14-3-1404.1, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is based on section 14-2-1403.1 of the Business Code.

**14-3-1405. Revocation of dissolution proceedings.**

(a) A corporation may revoke its dissolution proceedings at any time prior to the filing of articles of dissolution.

(b) Revocation of dissolution proceedings must be authorized in the same manner as the dissolution was authorized unless that authorization permitted revocation by action by the board of directors alone, in which event the board of directors may revoke the dissolution without member action.

(c) After the revocation of dissolution proceedings is authorized, the corporation may revoke the dissolution proceedings by delivering to the Secretary of State for filing a notice of revocation of intent to dissolve, together with a copy of its notice of intent to dissolve, that sets forth:

(1) The name of the corporation;

(2) The date that the revocation of dissolution proceedings was authorized;

(3) If the corporation's board of directors or incorporators revoked the dissolution proceedings, a statement to that effect;

(4) If the corporation's board of directors revoked the dissolution proceedings authorized by the members, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and

(5) If member action was required to revoke the dissolution proceedings, the information required by paragraph (3) of Code Section 14-3-1404.

(d) Revocation of dissolution proceedings is effective when a notice of revocation of intent to dissolve is filed.

(e) When the revocation of dissolution proceedings is effective, it relates back to and takes effect as of the effective date of the filing of the notice of intent to dissolve and the corporation resumes carrying on its business as if dissolution proceedings had never occurred. (Code 1981, § 14-3-1405, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and section 14-2-1404 of the Business Code.

#### **14-3-1406. Effect of notice of intent to dissolve.**

A corporation that has filed a notice of intent to dissolve continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(1) Collecting its assets;

(2) Disposing of its properties that will not be distributed in kind in accordance with the plan of dissolution;

(3) Discharging or making provision for discharging its liabilities;

(4) Distributing its remaining property among its members in accordance with the plan of dissolution; and

(5) Doing every other act necessary to wind up and liquidate its business and affairs. (Code 1981, § 14-3-1406, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on section 14-2-1405 of the Business Code. It contains additional language in subsections (2) and (4) reflecting the requirement of section 14-3-1403 that a plan of dissolution must be adopted.



**14-3-1407. Disposition of known claims against corporation.**

(a) A corporation that has filed a notice of intent to dissolve may dispose of the known claims against it by following the procedure described in this Code section.

(b) The corporation in dissolution shall notify its known claimants in writing of the dissolution proceedings at any time after the filing of the notice of intent to dissolve. The written notice must:

(1) Describe information that must be included in a claim;

(2) Provide a mailing address where a claim may be sent;

(3) State the deadline, which may not be less than six months from the effective date of the written notice, by which the dissolved corporation must receive the claim;

(4) State that the claim will be barred if not received by the deadline; and

(5) State that the corporation will give notice of acceptance or rejection of all claims that are received in timely fashion within six months of the deadline for receipt of claims.

(c) A claim against a corporation in dissolution is barred:

(1) If a claimant who was given written notice under subsection (b) of this Code section does not deliver the claim to the dissolved corporation by the deadline; or

(2) If a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within one year from the effective date of the rejection notice.

(d) For purposes of this Code section, the term "claim" does not include a contingent liability or a claim based on an event occurring after the filing of the notice of intent to dissolve. (Code 1981, § 14-3-1407, enacted by Ga. L. 1991, p. 465, § 1.)

**COMMENT**

This section is identical to section 14-2-1406 of the Business Code.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2862, 2863.

**C.J.S.** — 19 C.J.S., Corporations, §§ 872-874, 878.

**ALR.** — Right of bondholder, stockholder, or creditor to withdraw his claim from reorganization committee, 43 ALR 1043.

**14-3-1408. Request for presentation of claims; enforcement of claims; when claims barred.**

(a) A corporation that has filed a notice of intent to dissolve may include in the notice of its intent to dissolve published under Code Section 14-3-1404.1 a request that persons with claims against the corporation present them in accordance with subsection (b) of this Code section.

(b) The request must:

(1) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(2) State that, except for claims that are contingent at the time of the filing of the notice of intent to dissolve or that arise after the filing of the notice of intent to dissolve, a claim against the corporation not otherwise barred will be barred unless a proceeding to enforce the claim is commenced within two years after publication of the notice.

(c) If a corporation that has filed a notice of intent to dissolve publishes a newspaper notice containing the information specified in subsection (b) of this Code section, all claims not otherwise barred will be barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within two years after the publication date of the newspaper notice except:

(1) Claims that are contingent at the time of the filing of the notice of intent to dissolve; and

(2) Claims that arise after the filing of the notice of intent to dissolve.

(d) If a corporation in dissolution publishes a newspaper notice containing the information specified in subsection (b) of this Code section, a claim against the corporation not otherwise barred of a claimant whose claim is contingent or based on an event occurring after the filing of the notice of intent to dissolve is barred against the corporation, its members, officers, directors, and distributees unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within two years after the date of filing of articles of dissolution or five years after the date of publication in accordance with subsection (b) of this Code section, whichever is later.

(e) Subject to the provisions of this Code section, a claim against a corporation in dissolution or against a dissolved corporation may be enforced under this Code section:

(1) Against the corporation, to the extent of its undistributed assets; or

(2) If the assets have been distributed in liquidation, against a distributee of the corporation to the extent of his pro rata share of the claim or the corporate assets distributed to him in liquidation, whichever



is less, but a distributee's total liability for all claims under this Code section may not exceed the total amount of assets distributed to him. (Code 1981, § 14-3-1408, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on section 14-2-1407 of the Business Code. It adds "distributees" in subsections (d) and (e) to the list of persons or entities against whom a potential claim may exist. A corporation may distribute its property to persons or entities that are not members. In such situations, the potential liability of the distributee is limited to the value of the assets distributed to it. See section 14-3-1408(e)(2).

#### 14-3-1409. Articles of dissolution.

(a) If a notice of intent to dissolve under Code Section 14-3-1404 has not been revoked, when all known debts, liabilities, and obligations of the corporation have been paid and discharged, or adequate provision made therefor, the corporation may dissolve by delivering to the Secretary of State for filing articles of dissolution setting forth:

(1) The name of the corporation;

(2) The date on which a notice of intent to dissolve was filed and a statement that it has not been revoked;

(3) A statement that all known debts, liabilities, and obligations of the corporation have been paid and discharged, or that adequate provision has been made therefor;

(4) A statement that all remaining property and assets of the corporation have been distributed in accordance with the plan of dissolution, or that such property and assets have been deposited with the Office of Treasury and Fiscal Services as provided in Code Section 14-3-1440;

(5) A statement that there are no actions pending against the corporation in any court, or that adequate provision has been made for the satisfaction of any judgment, order, or decree which may be entered against it in any pending action; and

(6) A statement that, if required, it notified the Attorney General of its intent to dissolve.

(b) Upon filing of articles of dissolution the corporation shall cease to exist, except for the purpose of actions or other proceedings, which may be brought against the corporation by service upon any of its last executive officers named in its last annual registration, and except for such actions as the members, directors, and officers take to protect any remedy, right, or claim on behalf of the corporation, or to defend, compromise, or settle any claim against the corporation, all of which may proceed in the corporate name.

(c) Deeds or other transfer instruments requiring execution after the dissolution of a corporation may be signed by any two of the last officers or

directors of the corporation and shall operate to convey the interest of the corporation in the real estate or other property described. (Code 1981, § 14-3-1409, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2001, p. 796, § 4.)

**The 2001 amendment**, effective July 1, Fiscal Services" for "Department of Administrative Services" in paragraph (a)(4). 2001, substituted "Office of Treasury and

#### COMMENT

This section is based on section 14-2-1408 of the Business Code. It adds a requirement that corporations required to notify the Attorney General of their intent to dissolve include a statement that they have complied with this requirement. See subsection (a)(6).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2879, 2880.

#### **14-3-1410. Revival of corporation after dissolution by expiration of period of duration.**

(a) A corporation that has been dissolved by the expiration of its period of duration but which has continued in business notwithstanding the expiration may revive its corporate existence by amending its articles of incorporation at any time during a period of ten years immediately following the expiration date fixed by the articles of incorporation, so as to extend its period of duration.

(b) If a corporation whose period of duration has expired has failed to revive its corporate existence within ten years of the expiration date fixed by its articles of incorporation as provided in subsection (a) of this Code section, the corporation may thereafter revive its corporate existence by amending its articles of incorporation so as to extend its period of duration at any time during the period beginning ten years and ending 20 years immediately following the expiration date fixed by its articles of incorporation and filing with the Secretary of State an affidavit attested by one or more of its officers or directors, stating as follows:

(1) That the corporation has continued in business, notwithstanding the expiration of its period of duration, at all times since the expiration date fixed by its articles of incorporation; and

(2) That the revival will not injure the corporation's members, creditors, or the public.

(c) As of the effective date of the amendment of articles of incorporation pursuant to subsection (a) or (b) of this Code section, the corporate existence shall be deemed to have continued without interruption from the former expiration date. If, during the period between expiration and



revival, the name of the corporation has been assumed, reserved, or registered by any other person or corporation, the revived corporation shall not engage in business until it has amended its articles of incorporation to change its name. (Code 1981, § 14-3-1410, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on section 14-2-1409 of the Business Code. It deletes the inapposite requirement of section 14-2-1409(b)(2) concerning distributions.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2914-2920.

**C.J.S.** — 18 C.J.S., Corporations, § 53.

### PART 2

#### ADMINISTRATIVE DISSOLUTION

#### 14-3-1420. Grounds for administrative dissolution.

The Secretary of State may commence a proceeding under Code Section 14-3-1421 to dissolve a corporation administratively if:

(1) The state revenue commissioner has certified to the Secretary of State that the corporation has failed to file a license or occupation tax return and that a period of one year has expired since the last day permitted for timely filing without the filing and payment of all required license and occupation taxes and penalties by the corporation; provided, however, that dissolution proceedings shall be stayed so long as the corporation is contesting, in good faith, in any appropriate proceeding, the alleged grounds for dissolution;

(2) The corporation does not deliver its annual registration to the Secretary of State, together with all required fees and penalties, within 60 days after it is due;

(3) The corporation is without a registered agent or registered office in this state for 60 days or more;

(4) The corporation does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or

(5) The corporation pays a fee as required to be collected by the Secretary of State pursuant to the Code by a check or some other form of payment which is dishonored and the corporation or its incorporator or its agent does not submit payment for said dishonored payment within 60 days from notice of nonpayment issued by the Secretary of State. (Code

1981, § 14-3-1420, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1993, p. 1231, § 28.)

**Law reviews.** — For article, "The Development of Nonprofit Corporation Law and an Agenda for Reform," see 34 Emory L.J. 617 (1985).

For note on 1993 amendment of this section, see 10 Ga. St. U.L. Rev. 74 (1993).

### COMMENT

#### Note to 1993 Amendment

The 1993 amendment added a new subparagraph (5) which authorizes administrative dissolution if the payment of fees to the Secretary of State is dishonored and not thereafter satisfied within a stated period of time.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2802, 2803, 2823, 2908, 2910.

**C.J.S.** — 19 C.J.S., Corporations, §§ 817, 860.

#### 14-3-1421. Procedure for and effect of administrative dissolution.

(a) If the Secretary of State determines that one or more grounds exist under Code Section 14-3-1420 for dissolving a corporation, he shall provide the corporation with written notice of his determination by mailing a copy of the notice, first-class mail, to the corporation at the last known address of its principal office or to the registered agent.

(b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is provided to the corporation, the Secretary of State shall administratively dissolve the corporation by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The Secretary of State shall file the original of the certificate.

(c) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Code Section 14-3-1406. Winding up the business of a corporation that has been administratively dissolved may include the corporation's proceeding, at any time after the effective date of the administrative dissolution, (1) in accordance with Code Section 14-3-1407 to notify known claimants, and (2) to mail or deliver, with accompanying payment of the cost of publication, a notice containing the information specified in subsection (b) of Code Section 14-3-1408 for publication. Upon such notice, claims against the administratively dissolved corporation will be limited as specified in Code Sections 14-3-1407 and 14-3-1408, respectively.



(d) The administrative dissolution of a corporation does not terminate the authority of its registered agent. (Code 1981, § 14-3-1421, enacted by Ga. L. 1991, p. 465, § 1.)

**14-3-1422. Reinstatement following administrative dissolution.**

(a) A corporation administratively dissolved under Code Section 14-3-1421 may apply to the Secretary of State for reinstatement. The application must:

(1) Recite the name of the corporation and the effective date of its administrative dissolution;

(2) State that the ground or grounds for dissolution either did not exist or have been eliminated;

(3) State that the name by which the corporation will be known after reinstatement satisfies the requirements of Code Section 14-3-401;

(4) Contain a statement by the corporation reciting that all taxes owed by the corporation have been paid; and

(5) Be accompanied by an amount equal to the total annual registration fees and penalties that would have been payable during the periods between dissolution and reinstatement, plus the fee required for the application for reinstatement, and any other fees and penalties payable for earlier periods.

(b) If the corporation's name no longer satisfies the requirements of Code Section 14-3-401, the corporation shall, as a condition of reinstatement, include in its application for reinstatement the adoption of a corporate name that is available in accordance with Code Section 14-3-401 and that has been reserved pursuant to Code Section 14-3-402. If the application for reinstatement contains a new corporate name, the articles of incorporation shall be deemed to have been amended to change the name of the corporation to the name so adopted.

(c) If the Secretary of State determines that the application contains the information required by subsection (a) of this Code section and that the information is correct, the Secretary of State shall prepare a certificate of reinstatement that recites his or her determination and the effective date of reinstatement, file the original of the certificate, and serve a copy on the corporation under Code Section 14-3-504.

(d) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

(e) This Code section shall apply to all corporations administratively dissolved under Code Section 14-3-1421 or any similar former statute,

regardless of the date of dissolution. (Code 1981, § 14-3-1422, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1995, p. 975, § 2; Ga. L. 1997, p. 1165, § 18.1.)

**14-3-1423. Appeal from denial of reinstatement.**

(a) If the Secretary of State denies a corporation's application for reinstatement following administrative dissolution, he shall serve the corporation under Code Section 14-3-504 with a written notice that explains the reason or reasons for denial.

(b) The corporation may appeal the denial of reinstatement to the superior court of the county where the corporation's registered office is or was located within 30 days after service of the notice of denial is perfected. The corporation appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the Secretary of State's certificate of dissolution, the corporation's application for reinstatement, and the Secretary of State's notice of denial.

(c) The court's final decision may be appealed as in other civil proceedings. (Code 1981, § 14-3-1423, enacted by Ga. L. 1991, p. 465, § 1.)

**PART 3**

**JUDICIAL DISSOLUTION**

**14-3-1430. Grounds for judicial dissolution.**

The superior court may dissolve a corporation:

(1) In a proceeding by the Attorney General if it is established that:

(A) The corporation obtained its articles of incorporation through fraud; or

(B) The corporation has continued to exceed or abuse the authority conferred upon it by law;

(2) In a proceeding by a member if it is established that:

(A) The directors are deadlocked in the management of the corporate affairs, the members are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered or the business and affairs of the corporation can no longer be conducted to the advantage of the members generally, because of the deadlock;

(B) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal or fraudulent in connection with the operation or management of the business and affairs of the corporation;



(C) The members are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired; or

(D) The corporate assets are being misapplied or wasted;

(3) In a proceeding by a creditor if it is established that:

(A) The creditor's claim has been reduced to judgment, the execution on the judgment has been returned unsatisfied, and the corporation is insolvent; or

(B) The corporation has admitted in writing that the creditor's claim is due and owing and the corporation is insolvent; or

(4) In a proceeding by the corporation to have its voluntary dissolution continued under court supervision;

provided, however, that all of the actions described in paragraphs (1) through (3) of this Code section shall be stayed so long as the corporation is contesting, in good faith, in any appropriate proceeding, the alleged grounds for dissolution. (Code 1981, § 14-3-1430, enacted by Ga. L. 1991, p. 465, § 1.)

**Law reviews.** — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

### COMMENT

This section is based on the Model Act and on its Business Code counterpart. It differs from the latter in subsection (2)(B), which omits the requirement that the proceeding be initiated by shareholders owning at least 20% of the outstanding shares.

### JUDICIAL DECISIONS

**Attorney's fees disallowed.** — In an action by plaintiff-shareholder seeking judicial dissolution due to a shareholder deadlock, plaintiff was not entitled to attorney's fees under O.C.G.A. § 9-8-13 since the court did not appoint a receiver and bring a fund into

court for distribution. *Industrial Distrib. Group, Inc. v. Waite*, 268 Ga. 115, 485 S.E.2d 792 (1997), rev'g *Industrial Distrib. Group, Inc. v. Waite*, 222 Ga. App. 233, 474 S.E.2d 28 (1996).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2788-2790, 2794, 2811, 2818-2820.

**C.J.S.** — 19 C.J.S., Corporations, §§ 811, 816, 818, 841, 842.

**ALR.** — Conclusiveness, as regards venue,

of designation of place of business in incorporation papers, 175 ALR 1092.

Dissolving or winding up affairs of corporation domiciled in another state, 19 ALR3d 1279.

**14-3-1431. Procedure for judicial dissolution.**

(a) Venue for a proceeding by the Attorney General to dissolve a corporation and for a proceeding brought by any other party named in Code Section 14-3-1430 lies in the county where a corporation's registered office is or was last located.

(b) It is not necessary to make members or directors parties to a proceeding to dissolve a corporation unless relief is sought against them individually.

(c) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the business of the corporation until a full hearing can be held. (Code 1981, § 14-3-1431, enacted by Ga. L. 1991, p. 465, § 1.)

**JUDICIAL DECISIONS**

**Editor's notes.** — Some of the cases cited below were decided under former §§ 14-3-219 and 14-3-220.

**Church property dispute.** — The first amendment did not prohibit appellate jurisdiction over an action by church members against a pastor and church seeking dissolution of the church, appointment of a receiver, an injunction against the defendant's disposing of corporate assets, and proper disposition of the assets; the dispute was capable of resolution by reference to neutral principles of law, i.e., applicable provisions of the Georgia Nonprofit Corporation Code, without infringing upon any first amendment values. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994).

**The first amendment did not preclude an involuntary receivership imposed on a**

church incorporated under the Georgia Nonprofit Corporation Code. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994) (decided under former §§ 14-3-219 and 14-3-220).

**Expenses of liquidators.** — The trial court did not abuse its discretion in refusing to award attorneys fees and expenses of litigation to a church corporation in its defense of a liquidation proceeding considering the amount of compensation awarded to the defendant and the degree to which payment of the church's expenses of litigation from the remainder would frustrate the charitable and religious purposes intended under the corporate charter. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994) (decided under former § 14-3-220).

**14-3-1432. Authority to appoint receiver or custodian; powers and duties of receiver or custodian.**

(a) A court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has



exclusive jurisdiction over the corporation and all its property wherever located.

(b) The court may appoint an individual or a domestic or foreign corporation (authorized to transact business in this state) as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(c) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(1) The receiver:

(A) May dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and

(B) May sue and defend in his own name as receiver of the corporation in all courts of this state; or

(2) The custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its members and creditors.

(d) The court, during a receivership, may redesignate the receiver a custodian and, during a custodianship, may redesignate the custodian a receiver, if doing so is in the best interests of the corporation, its members, and creditors.

(e) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and his attorney from the assets of the corporation or proceeds from the sale of the assets. (Code 1981, § 14-3-1432, enacted by Ga. L. 1991, p. 465, § 1.)

#### **14-3-1433. Decree of dissolution.**

(a) If after a hearing the court determines that one or more grounds for judicial dissolution described in Code Section 14-3-1430 exist, it may enter a decree ordering the corporation dissolved, and the clerk of the court shall deliver a certified copy of the decree to the Secretary of State, who shall file it, with the same effect as a notice of intent to dissolve.

(b) After entering the order of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with Code Section 14-3-1406. Winding up the business of a corporation judicially dissolved may include the corporation's proceeding, after the date of the order of dissolution, (1) in accordance with Code

Section 14-3-1407 to notify known claimants, and (2) to mail or deliver, with accompanying payment of the cost of publication, a notice containing the information specified in subsection (b) of Code Section 14-3-1408 for publication. Upon such notice, claims against the dissolved corporation will be limited as specified in Code Sections 14-3-1407 and 14-3-1408 respectively.

(c) When the costs and expenses of dissolution proceedings and all debts, obligations, and liabilities of the corporation have been paid and discharged or provided for and all of its remaining assets distributed to its members or provided for or such assets have been deposited with the Office of Treasury and Fiscal Services as provided in Code Section 14-3-1440, the court shall enter a decree of dissolution, and upon filing of the decree with the Secretary of State, it shall have the same effect as articles of dissolution. (Code 1981, § 14-3-1433, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2001, p. 796, § 5.)

**The 2001 amendment**, effective July 1, Fiscal Services" for "Department of Administrative Services" in subsection (c).

#### JUDICIAL DECISIONS

Cited in *Eckland v. Hale & Eckland*, 231 Ga. App. 278, 498 S.E.2d 358 (1998).

#### PART 4

#### ASSETS OF DISSOLVED CORPORATION

#### **14-3-1440. Deposit of assets with Office of Treasury and Fiscal Services.**

Assets of a dissolved corporation that should be transferred to a creditor, claimant, or member of the corporation who cannot be found or who is not competent to receive them shall be reduced to cash and deposited with the Office of Treasury and Fiscal Services for safekeeping. When the creditor, claimant, or member furnishes satisfactory proof of entitlement to the amount deposited, the Office of Treasury and Fiscal Services shall pay him or her or his or her representative that amount. After the Office of Treasury and Fiscal Services has held the unclaimed cash for six months, the Office of Treasury and Fiscal Services shall pay such cash to the Board of Regents of the University System of Georgia, to be held without liability for profit or interest until a claim for such cash shall be filed with the Office of Treasury and Fiscal Services by the parties entitled thereto. No such claim shall be made more than six years after such cash is deposited with the Office of Treasury and Fiscal Services. (Code 1981, § 14-3-1440, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2001, p. 796, § 6.)



The 2001 amendment, effective July 1, 2001, substituted "Office of Treasury and Fiscal Services" for "Department of Admin-

istrative Services" throughout the Code section and inserted "or her" in two places in the second sentence.

#### RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, § 2830.

C.J.S. — 19 C.J.S., Corporations, § 875.

### ARTICLE 15

#### FOREIGN CORPORATIONS

#### RESEARCH REFERENCES

ALR. — Right of resident creditors of foreign corporation to preference over non-resident creditors, 1 ALR 648.

ute of limitations, 122 ALR 1194.

Effect of domestication of foreign corporations, 126 ALR 1503.

Right of foreign corporation to plead stat-

#### PART 1

#### CERTIFICATE OF AUTHORITY

#### 14-3-1501. Certificate of authority to transact business required.

(a) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State.

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a) of this Code section:

(1) Maintaining or defending any action or any administrative or arbitration proceeding or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its directors or members or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts, share accounts in savings and loan associations, custodian or agency arrangements with a bank or trust company, or stock or bond brokerage accounts;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of memberships or securities or maintaining trustees or depositaries with respect to those securities;

(5) Effecting sales through independent contractors;

(6) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where the orders require acceptance

without this state before becoming binding contracts and where the contracts do not involve any local performance other than delivery and installation;

(7) Making loans or creating or acquiring evidences of debt, mortgages, or liens on real or personal property, or recording same;

(8) Securing or collecting debts or enforcing any rights in property securing the same;

(9) Owning, without more, real or personal property;

(10) Conducting an isolated transaction not in the course of a number of repeated transactions of a like nature;

(11) Effecting transactions in interstate or foreign commerce;

(12) Serving as trustee, executor, administrator, or guardian, or in like fiduciary capacity, where permitted so to serve by the laws of this state; or

(13) Owning and controlling a subsidiary corporation incorporated in or transacting business within this state.

(c) The list of activities in subsection (b) of this Code section is not exhaustive.

(d) This chapter shall not be deemed to establish a standard for activities which may subject a foreign corporation to taxation or to service of process under any of the laws of this state. (Code 1981, § 14-3-1501, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on its Business Code counterpart. The language of subsection (4) differs slightly from that of the Business Code counterpart.

#### JUDICIAL DECISIONS

**Editor's notes.** — The cases cited below was decided under former Code 1933, § 22-3201.

**Statutory compliance required where substantial local and domestic business.** — Where the local activities of the foreign corporation are not merely ancillary to the interstate features, but constitute a substantial local and domestic business separate from its interstate business, the foreign corporation must comply with the state statute. *Briarcliff Communications Group, Inc. v. Associated Press*, 154 Ga. App. 369, 268

S.E.2d 356 (1980) (decided under former Code 1933, § 22-3201).

**Foreign corporation can sue without registration.** — A foreign corporation may avail itself of the opportunity to sue in our courts without the necessity of complying with the registration statute if the transaction sued upon is exclusively or dominantly interstate in nature. *Briarcliff Communications Group, Inc. v. Associated Press*, 154 Ga. App. 369, 268 S.E.2d 356 (1980) (decided under former Code 1933, § 22-3201).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 170, 210, 219.

**C.J.S.** — 19 C.J.S., Corporations, §§ 897-900, 903, 907, 908, 911-913.

**ALR.** — Foreign corporations: soliciting subscriptions to or selling corporate stock as doing business within state, 35 ALR 625.

Applicability to corporations not organized for profit of statutes prescribing conditions under which foreign corporations may do business within state, 37 ALR 1283.

Applicability of provisions explicitly invalidating contracts made by foreign corporation not licensed to do business in state, to contracts made out of the state, 81 ALR 1134.

Solicitation within state (or District of Columbia) of orders for goods to be shipped from other state as doing business within state within statutes prescribing conditions of doing business or providing for service of process, 146 ALR 941.

**14-3-1502. Transacting business without certificate of authority.**

(a) A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

(b) The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state unless before the commencement of the proceeding the foreign corporation or its successor obtains a certificate of authority.

(c) Notwithstanding subsections (a) and (b) of this Code section, the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this state. (Code 1981, § 14-3-1502, enacted by Ga. L. 1991, p. 465, § 1.)

**Law reviews.** — For article, "Foreign Corporations in Georgia," see 10 Ga. St. B.J. 243 (1973).

## COMMENT

This section differs from its Business Code counterpart in that it does not provide for a monetary penalty for a corporation's failure to obtain a certificate of authority.

## JUDICIAL DECISIONS

**Editor's notes.** — Some of the cases cited below were decided under former Code 1933, § 22-1421.

**Inapplicable to federal courts.** — O.C.G.A. § 14-3-1502 does not apply to federal courts in the State of Georgia when exercising federal question jurisdiction and, therefore, did not prevent a consumer orga-

nization with members in the state from challenging the validity of a senatorial run-off election, even though the organization had not obtained a certificate of authority. *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993).

**Unqualified foreign corporation may be**

come third-party defendant. — An unqualified foreign corporation has the right despite absence of legal service to file its defensive pleadings on its own initiative and become a third-party defendant without

penalty. *American Photocopy Equip. Co. v. Lew Deadmore & Assocs.*, 127 Ga. App. 207, 193 S.E.2d 275 (1972) (decided under former Code 1933, § 22-1421).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 240 et seq., 260 et seq.

**C.J.S.** — 19 C.J.S., Corporations, §§ 919-921.

**ALR.** — Right of foreign corporation or its assignee to maintain an action in federal court which it could not have maintained in state court because of noncompliance with conditions of doing business in state, 133 ALR 1171.

Rule that in general inhibits foreign corporation which has failed to comply with conditions of doing or continuing business in state, or domestic corporation which has forfeited its charter, from maintaining action, as applicable to action at law to vindicate corporation's property rights against tort-feasor, 136 ALR 1160.

Effect of execution of foreign corporation's contract which, while executory, was unenforceable because of noncompliance with conditions of doing business in state, 7 ALR2d 256.

Compliance after commencement of action as affecting application of statute denying access to courts or invalidating contracts where corporation fails to comply with regulatory statute, 6 ALR3d 326.

Application of statute denying access to courts or invalidating contracts where corporation fails to comply with regulatory statute as affected by compliance after commencement of action, 23 ALR5th 744.

#### 14-3-1503. Application for certificate of authority.

(a) A foreign corporation may apply for a certificate of authority to transact business in this state by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation or, if its name is unavailable for use in this state, a corporate name that satisfies the requirements of Code Section 14-2-1506;

(2) The name of the state or country under whose law it is incorporated;

(3) Its date of incorporation;

(4) The mailing address of its principal office;

(5) The address of its registered office in this state and the name of its registered agent at that office; and

(6) The names and respective business addresses of its chief executive officer, chief financial officer, and secretary, or individuals holding similar positions.

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the secretary of state or other official having custody of corporate



records in the state or country under whose law it is incorporated. (Code 1981, § 14-3-1503, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2002, p. 989, § 10.)

**The 2002 amendment**, effective July 1, 2002, in subsection (a), deleted "and period of duration" following "incorporation" at the end of paragraph (a)(3) and substituted

the present provisions of paragraph (a)(6) for the former provisions which read: "The names and usual business addresses of its current directors and officers."

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 219 et seq.

**C.J.S.** — 19 C.J.S., Corporations, §§ 903, 904.

**ALR.** — Applicability to corporations not

organized for profit of statutes prescribing conditions under which foreign corporations may do business within state, 37 ALR 1283.

### 14-3-1504. When amended certificate of authority required.

(a) A foreign corporation authorized to transact business in this state must obtain an amended certificate of authority from the Secretary of State if it changes:

- (1) Its corporate name;
- (2) The period of its duration; or
- (3) The state or country of its incorporation.

(b) The requirements of Code Section 14-3-1503 for obtaining an original certificate of authority apply to obtaining an amended certificate under this Code section. (Code 1981, § 14-3-1504, enacted by Ga. L. 1991, p. 465, § 1.)

### 14-3-1505. Effect of certificate of authority.

(a) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the state to revoke the certificate as provided in this chapter.

(b) A foreign corporation with a valid certificate of authority has the same but no greater rights under this chapter and has the same but no greater privileges under this chapter as, and except as otherwise provided by this chapter is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(c) This chapter does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state. (Code 1981, § 14-3-1505, enacted by Ga. L. 1991, p. 465, § 1.)

## RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, §§ 238, 239, 369 et seq. C.J.S. — 19 C.J.S., Corporations, §§ 903, 905.

**14-3-1506. Corporate name of foreign corporation.**

(a) If the corporate name of a foreign corporation does not satisfy the requirements of Code Section 14-3-401 the foreign corporation to obtain or maintain a certificate of authority to transact business in this state:

(1) May add the word “corporation,” “incorporated,” “company,” or “limited,” or the abbreviation “corp.,” “inc.,” “co.,” or “ltd.,” or the name of its state of incorporation to its corporate name for use in this state; or

(2) May use a fictitious or trade name to transact business in this state if its real name is unavailable and it delivers to the Secretary of State for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious or trade name.

(b) Except as authorized by subsections (c) and (d) of this Code section, a corporate name (including a fictitious name) of a foreign corporation must be distinguishable upon the records of the Secretary of State from:

(1) The corporate name of a corporation, whether for profit or not for profit, incorporated or authorized to transact business in this state;

(2) A corporate name reserved or registered under this chapter or Chapter 2 of this title;

(3) The fictitious name adopted by a foreign corporation authorized to transact business in this state because its real name is unavailable; and

(4) The name of a limited partnership or professional association reserved or filed with the Secretary of State under this title.

(c) A foreign corporation may apply to the Secretary of State for authorization to use in this state the name of another corporation (incorporated or authorized to transact business in this state) that is not distinguishable upon his records from the name applied for. The Secretary of State shall authorize use of the name applied for if the other corporation files with the Secretary of State articles of amendment to its articles of incorporation changing its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applying corporation.

(d) A foreign corporation may use the name (including the fictitious name) of another domestic or foreign corporation whether for profit or not for profit that is used in this state if the other corporation is incorporated or authorized to transact business in this state and:

(1) The foreign corporation has merged with the other corporation;



(2) The foreign corporation has been formed by reorganization of the other corporation; or

(3) The other domestic or foreign corporation has taken the steps required by this chapter to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the foreign corporation applying to use its former name.

(e) If a foreign corporation authorized to transact business in this state changes its corporate name to one that does not satisfy the requirements of Code Section 14-3-401, it may not transact business in this state under the changed name until it adopts a name satisfying the requirements of Code Section 14-3-401 and obtains an amended certificate of authority under Code Section 14-3-1504. (Code 1981, § 14-3-1506, enacted by Ga. L. 1991, p. 465, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 185-192.

**C.J.S.** — 19 C.J.S., Corporations, § 889.

**ALR.** — Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 44 ALR2d 1156; 72 ALR3d 8.

Validity and construction of constitutional or statutory provisions which prohibit the use by a corporation or partnership, as a part of its name, of certain described words giving the impression that it is subject to governmental control, 63 ALR 1049.

#### 14-3-1507. Registered office and registered agent of foreign corporation.

Each foreign corporation authorized to transact business in this state must continuously maintain in this state:

(1) A registered office that may be the same as any of its places of business; and

(2) A registered agent, who may be:

(A) An individual who resides in this state and whose business office is identical with the registered office;

(B) A domestic corporation or domestic business corporation whose business office is identical with the registered office; or

(C) A foreign corporation or foreign business corporation authorized to transact business in this state whose business office is identical with the registered office. (Code 1981, § 14-3-1507, enacted by Ga. L. 1991, p. 465, § 1.)

## RESEARCH REFERENCES

- Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 229, 233. agent of foreign corporation under statute authorizing service of process on such agent, 17 ALR3d 625.
- C.J.S.** — 19 C.J.S., Corporations, § 902.
- ALR.** — Who is “general” or “managing”

**14-3-1508. Change of registered office or registered agent of foreign corporation.**

(a) A foreign corporation authorized to transact business in this state may change its registered office or registered agent by delivering to the Secretary of State for filing an amendment to its annual registration that sets forth:

- (1) Its name;
- (2) The street address of its current registered office;
- (3) If the current registered office is to be changed, the street address of its new registered office;
- (4) The name of its current registered agent; and
- (5) That after the change or changes are made, the street addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the street address of his business office, he may change the street address of the registered office of any foreign corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Secretary of State for filing an amendment to the annual registration that complies with the requirements of subsection (a) of this Code section. (Code 1981, § 14-3-1508, enacted by Ga. L. 1991, p. 465, § 1.)

## RESEARCH REFERENCES

- ALR.** — Who is “general” or “managing” agent of foreign corporation under statute authorizing service of process on such agent, 17 ALR3d 625.

**14-3-1509. Resignation of registered agent of foreign corporation.**

(a) The registered agent of a foreign corporation may resign his agency appointment by signing and delivering to the Secretary of State for filing a statement of resignation. The statement may include a statement that the registered office is also discontinued.

(b) On or before the date of filing of the statement of resignation, the registered agent shall deliver or mail a written notice of the agent's



intention to resign to the chief executive officer, chief financial officer, or secretary of the corporation, or a person holding a position comparable to any of the foregoing, as named, and at the address shown in the annual registration, or in the articles of incorporation if no annual registration has been filed, on or before the date of filing of the statement.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the thirty-first day after the date on which the statement was filed. (Code 1981, § 14-3-1509, enacted by Ga. L. 1991, p. 465, § 1.)

#### **14-3-1510. Service of process on foreign corporation.**

(a) The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of any process, notice, or demand required or permitted by law to be served on the foreign corporation.

(b) If a foreign corporation has no registered agent or its registered agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the chief executive officer, chief financial officer, or secretary of the foreign corporation, or a person holding a position comparable to any of the foregoing, at its principal office shown in the later of its application for a certificate of authority or its most recent annual registration. Any party that serves a foreign corporation in accordance with this subsection shall also serve a copy of the process upon the Secretary of State and shall pay a \$10.00 filing fee.

(c) Service is perfected under subsection (b) of this Code section at the earliest of:

(1) The date the foreign corporation receives the mail;

(2) The date shown on the return receipt, if signed on behalf of the foreign corporation; or

(3) Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed.

(d) This Code section does not prescribe the only means, or necessarily the required means, of serving a foreign corporation.

(e) For service in a proceeding to enforce any obligation of a domestic corporation party to a merger, see subsection (b) of Code Section 14-3-1106. (Code 1981, § 14-3-1510, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 989, § 11.)

**The 2002 amendment**, effective July 1, 2002, added "and shall pay a \$10.00 filing fee" at the end of the last sentence in subsection (b).

**Cross references.** — Service of process generally, § 9-11-4.

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly,

provided that the amendment to subsection (b) is applicable with respect to notices delivered on or after July 1, 2000.

### JUDICIAL DECISIONS

**Editor's notes.** — The following decisions were decided under former Code 1933, and were rendered prior to the 2000 amendment.

**Service on franchise not effective as to franchisor.** — Service of process made on a franchise is not effective as to the franchisor, since a franchise contract under which one

operates a type of business on a royalty basis does not create an agency or a partnership relationship. *Arthur Murray, Inc. v. Smith*, 124 Ga. App. 51, 183 S.E.2d 66 (1971) (decided under former Code 1933).

**Cited in** *Castleberry v. Gold Agency, Inc.*, 124 Ga. App. 694, 185 S.E.2d 557 (1971).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, §§ 260-266.

**C.J.S.** — 19 C.J.S., Corporations, §§ 902, 952-955, 957.

**ALR.** — Foreign corporations: soliciting subscriptions to or selling corporate stock as doing business within state, 35 ALR 625.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communication to corporation of fact of service, 89 ALR 658.

Jurisdiction of actions or proceedings involving internal affairs of foreign corporations, 89 ALR 736; 155 ALR 1231; 72 ALR2d 1211.

Effect of agreement by foreign corporation to install article within the state to bring transaction within state control, 101 ALR 356.

Statute providing for service of process upon designated state official, in action against foreign corporation, as applicable to action based on transaction outside the state, 145 ALR 630; 162 ALR 1424.

Solicitation within state (or District of Columbia) of orders for goods to be shipped from other state as doing business within state within statutes prescribing conditions of doing business or providing for service of process, 146 ALR 941.

Power of state to subject foreign corporation to jurisdiction of its courts on sole ground that corporation committed tort within state, 25 ALR2d 1202.

Foreign insurance company as subject to service of process in action on policy, 44 ALR2d 416.

Federal or state law as controlling, in diversity action, whether foreign corporation is amenable to service of process in state, 6 ALR3d 1103.

Who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on such agent, 17 ALR3d 625.

Vicarious liability of private franchisor, 81 ALR3d 764.

## PART 2

### CERTIFICATE OF WITHDRAWAL

#### 14-3-1520. Withdrawal of foreign corporation from state.

(a) A foreign corporation authorized to transact business in this state may not withdraw from this state until it obtains a certificate of withdrawal from the Secretary of State.



(b) A foreign corporation authorized to transact business in this state may apply for a certificate of withdrawal by delivering an application to the Secretary of State for filing. The application must set forth:

(1) The name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) That it is not transacting business in this state and that it surrenders its authority to transact business in this state;

(3) That it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state;

(4) A mailing address to which a copy of any process served on the Secretary of State under paragraph (3) of this subsection may be mailed under subsection (c) of this Code section; and

(5) A commitment to notify the Secretary of State in the future of any change in its mailing address.

(c) After the withdrawal of the corporation is effective, service of process on the Secretary of State under this Code section is service on the foreign corporation. Any party that serves process upon the Secretary of State in accordance with this subsection shall also mail a copy of the process to the chief executive officer, chief financial officer, or the secretary of the foreign corporation, or a person holding a comparable position, at the mailing address set forth under subsection (b) of this Code section. (Code 1981, § 14-3-1520, enacted by Ga. L. 1991, p. 465, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 278.

**ALR.** — Withdrawal of foreign corpora-

tion from state as tolling statute of limitations as to action against corporation, 133 ALR 774.

#### PART 3

#### REVOCATION OF CERTIFICATE OF AUTHORITY

##### 14-3-1530. Grounds for revocation.

The Secretary of State may commence a proceeding under Code Section 14-3-1531 to revoke the certificate of authority of a foreign corporation authorized to transact business in this state if:

(1) The foreign corporation does not deliver its annual registration to the Secretary of State within 60 days after it is due;

(2) The foreign corporation does not pay within 60 days after they are due any fees, taxes, or penalties imposed by this chapter or other law;

(3) The foreign corporation is without a registered agent or registered office in this state for 60 days or more;

(4) The foreign corporation does not inform the Secretary of State under Code Section 14-3-1508 or 14-3-1509 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;

(5) An incorporator, director, officer, or agent of the foreign corporation signed a document he knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing; or

(6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger. (Code 1981, § 14-3-1530, enacted by Ga. L. 1991, p. 465, § 1.)

#### RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, §§ 189 et seq., 413 et seq. C.J.S. — 19 C.J.S., Corporations, §§ 919, 920.

#### 14-3-1531. Procedure for and effect of revocation.

(a) If the Secretary of State determines that one or more grounds exist under Code Section 14-3-1530 for revocation of a certificate of authority, he shall provide the foreign corporation with written notice of his determination by mailing a copy of the notice, by first-class mail, to the foreign corporation at the last known address of its principal office or to the registered agent.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is provided to the corporation, the Secretary of State may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date.

(c) The authority of a foreign corporation to transact business in this state ceases on the date shown on the certificate revoking its certificate of authority.



(d) The Secretary of State's revocation of a foreign corporation's certificate of authority appoints the Secretary of State as the foreign corporation's agent for service of process in any proceeding based on a cause of action which arose during the time the foreign corporation was authorized to transact business in this state. Service of process on the Secretary of State under this subsection is service on the foreign corporation. Any party that serves process upon the Secretary of State shall also mail a copy of the process to the chief executive officer, chief financial officer, or the secretary of the foreign corporation, or a person holding a comparable position, at its principal office shown in its most recent annual registration or in any subsequent communication received by the Secretary of State from the corporation stating the current mailing address of its principal office, or, if none is on file, in its application for a certificate of authority.

(e) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation. (Code 1981, § 14-3-1531, enacted by Ga. L. 1991, p. 465, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 417.

#### 14-3-1532. Appeal from revocation.

(a) A foreign corporation may appeal the Secretary of State's revocation of its certificate of authority to the Superior Court of Fulton County within 30 days after service of the certificate of revocation is perfected under Code Section 14-3-1510. The foreign corporation appeals by petitioning the court to set aside the revocation and attaching to the petition copies of its certificate of authority and the Secretary of State's certificate of revocation.

(b) The court may summarily order the Secretary of State to reinstate the certificate of authority or may take any other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (Code 1981, § 14-3-1532, enacted by Ga. L. 1991, p. 465, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 418.

**C.J.S.** — 19 C.J.S., Corporations, §§ 919, 920.

## PART 4

## DOMESTICATION UNDER PRIOR LAW

**14-3-1540. Applicability of chapter to foreign corporations domesticated under prior law.**

(a) A foreign corporation which prior to April 1, 1969, has domesticated in this state under the procedure available prior to that date and which is a domesticated foreign corporation on that date shall have perpetual duration as a domesticated foreign corporation of this state unless its existence is terminated in its jurisdiction of incorporation or its domesticated status is dissolved in accordance with the provisions of this chapter relating to involuntary dissolution or until such time as it withdraws from this state in the manner provided in this chapter. Such domesticated foreign corporations and the members thereof shall have all the rights, privileges, and immunities and be subject to all the duties, liabilities, and disabilities applicable to similar corporations organized under the laws of this state and applicable to the members thereof, except as may be provided with respect to such domesticated foreign corporations by any of the laws of this state existing on April 1, 1969, or coming into existence thereafter.

(b) Whenever the term "foreign corporation authorized to transact business in this state" is used in this chapter, it shall be deemed to include domesticated foreign corporations, except where the context or this chapter otherwise requires. (Code 1981, § 14-3-1540, enacted by Ga. L. 1991, p. 465, § 1.)

## RESEARCH REFERENCES

**ALR.** — Applicability to corporations not organized for profit of statutes prescribing conditions under which foreign corporations may do business within state, 37 ALR 1283.

## ARTICLE 16

## RECORDS AND REPORTS

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-2612, are included in the annotations for this Code section.

**Requirement of proper purpose and reasonable time serve as safeguards** against abuse of inspection right. *Smith v. Conley*, 158 Ga. App. 191, 279 S.E.2d 491 (1981) (decided under former Code 1933, § 22-2612).

**What constitutes proper purpose.** — Element of proper purpose for inspection was satisfied where documents were sought in order to determine (1) whether proper records were being kept, (2) performance of management, and (3) condition of company. *Smith v. Conley*, 158 Ga. App. 191, 279 S.E.2d 491 (1981) (decided under former Code 1933, § 22-2612).

**Inspection within one year of request not**



**improper purpose.** — Standing alone, fact that members of nonprofit corporation had exercised their statutory right to inspect books at some time within a one-year period does not amount to evidence of improper purpose. *Smith v. Conley*, 158 Ga. App. 191,

279 S.E.2d 491 (1981) (decided under former Code 1933, § 22-2612).

**Cited in** *Smooth Ashlar Grand Lodge v. Odom*, 136 Ga. App. 812, 222 S.E.2d 614 (1975); *Smith v. Conley*, 158 Ga. App. 191, 279 S.E.2d 491 (1981).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 4. 18A Am. Jur. 2d, Corporations, §§ 333, 334, 348-401, 419, 986. 18B Am. Jur. 2d, Corporations, §§ 1479, 1512.

**C.J.S.** — 7 C.J.S., Associations, § 4. 18 C.J.S., Corporations, §§ 110, 332-338. 19 C.J.S., Corporations, §§ 505, 506.

**ALR.** — Stockholder's or officer's right to inspect books and records of corporation, 174 ALR 262.

Purposes for which stockholder or officer may exercise right to examine corporate

books and records, 15 ALR2d 11.

Attorneys' fees and other expenses incident to controversy respecting internal affairs of corporation as charge against the corporation, 39 ALR2d 580.

Right of stockholder to have corporate books inspected by attorney, accountant, or other agent without stockholder's presence, 48 ALR3d 1072.

What corporate documents are subject to shareholder's right to inspection, 88 ALR3d 663.

## PART 1

### RECORDS

#### 14-3-1601. Required corporate records.

(a) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, executed consents evidencing all actions taken by the members or board of directors without a meeting, a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation, and waivers of notice of all meetings of the board of directors and its committees.

(b) A corporation shall maintain appropriate accounting records.

(c) A corporation or its agent shall maintain a record of its members in a form that permits preparation of a list of the name and address of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.

(d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time. (Code 1981, § 14-3-1601, enacted by Ga. L. 1991, p. 465, § 1.)

### JUDICIAL DECISIONS

**Cited in** *Greer v. Davis*, 244 Ga. App. 317, 534 S.E.2d 853 (2000).

**14-3-1602. Members' right to copy and inspect records.**

(a) A corporation shall keep a copy of the following records:

(1) Its articles or restated articles of incorporation and all amendments to them currently in effect;

(2) Its bylaws or restated bylaws and all amendments to them currently in effect;

(3) Resolutions adopted by either its members or board of directors increasing or decreasing the number of directors or the classification of directors, or relating to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;

(4) Resolutions adopted by either its members or board of directors relating to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;

(5) The minutes of all meetings of members and records of all actions approved by the members for the past three years;

(6) All written communications to members generally within the past three years, including the financial statements furnished for the past three years under Code Section 14-3-1620;

(7) A list of the names and business or home addresses of its current directors and officers; and

(8) Its most recent annual report delivered to the Secretary of State under Code Section 14-3-1622.

(b) A member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in subsection (a) of this Code section if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.

(c) A member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (d) of this Code section and gives the corporation written notice at least five business days before the date on which the member wishes to inspect and copy:

(1) Excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the members, and records of action taken by the members or the board of directors without a meeting, to the extent not subject to inspection under subsection (a) of this Code section;



- (2) Accounting records of the corporation; and
- (3) Subject to Code Section 14-3-1605, the membership list.
- (d) A member may inspect and copy the records identified in subsection (c) of this Code section only if:

(1) The member's demand is made in good faith and for a proper purpose that is reasonably relevant to the member's legitimate interest as a member;

(2) The member describes with reasonable particularity the purpose and the records the member desires to inspect;

(3) The records are directly connected with this purpose; and

(4) The records are to be used only for the stated purpose.

(e) This Code section does not affect:

(1) The right of a member to inspect records under Code Section 14-3-720 or, if the member is in litigation with the corporation, to the same extent as any other litigant; or

(2) The power of a court, independently of this chapter, to compel the production of corporate records for examination. (Code 1981, § 14-3-1602, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and on its Business Code counterpart. The records that must be maintained differ. In addition, the inspection and copying contemplated under subsection (b) and (c) is to be at a reasonable time and location specified by the corporation. The Business Code counterpart provides for inspection and copying "during regular business hours at the corporation's principal office."

#### JUDICIAL DECISIONS

**Documents prepared by the attorney for a property association** were not among the records a member of the association had an automatic right to inspect and copy. *McLean v. Turtle Cove Property Ass'n*, 222 Ga. App. 709, 475 S.E.2d 718 (1996).

**Failure to prove proper purpose.** — Plaintiff, who applied to the superior court under O.C.G.A. § 14-3-604 for an order directing defendant association to produce documents falling under O.C.G.A. § 14-3-1602(c) "for the purpose of determining the perfor-

mance of management and the condition of the corporation", failed to sufficiently demonstrate that the documents sought were being sought for a proper purpose and not as an attempt to obtain discovery for plaintiff's lawsuit against defendant after the expiration of the discovery period. *Parker v. Clary Lakes Recreation Ass'n*, 243 Ga. App. 681, 534 S.E.2d 154 (2000).

Cited in *Greer v. Davis*, 244 Ga. App. 317, 534 S.E.2d 853 (2000).

#### 14-3-1603. Scope of inspection right.

(a) A member's agent or attorney has the same inspection and copying rights as the member the agent or attorney represents.

(b) The right to copy records under Code Section 14-3-1602 includes, if reasonable, the right to receive copies made by photographic, xerographic, or other means.

(c) The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member. The charge may not exceed the estimated cost of production or reproduction of the records.

(d) A corporation shall convert into written form without charge any record not in written form, upon written request of a person entitled to inspect it.

(e) The corporation may comply with a member's demand to inspect the record of members under paragraph (3) of subsection (c) of Code Section 14-3-1602 by providing the member with a list of its members that was compiled no earlier than the date of the member's demand. (Code 1981, § 14-3-1603, enacted by Ga. L. 1991, p. 465, § 1.)

#### **14-3-1604. Court-ordered inspection.**

(a) If a corporation does not allow a member who complies with subsection (b) of Code Section 14-3-1602 to inspect and copy any records required by that subsection to be available for inspection, the superior court may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the member.

(b) If a corporation does not within a reasonable time allow a member to inspect and copy any other record, the member who complies with subsections (b) and (c) of Code Section 14-3-1602 may apply to the superior court for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(c) If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the member's costs (including reasonable attorneys' fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the member to inspect the records demanded.

(d) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding member. (Code 1981, § 14-3-1604, enacted by Ga. L. 1991, p. 465, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1991, "of" was inserted preceding "Code Section" in subsection (a).



## JUDICIAL DECISIONS

**Reasonable time required for corporation to respond to request.** — Proceedings violated a nonprofit corporation's due process rights where the court signed an order allowing a member of the corporation access to corporate records without giving the corporation a reasonable opportunity to prepare and present defenses to the demand for inspection. *Westbury Square Townhouses Ass'n v. Bryan*, 223 Ga. App. 885, 479 S.E.2d 190 (1996).

**Discretion of trial court.** — In ruling on an application pursuant to O.C.G.A. § 14-3-1604 to inspect and copy the books of a nonprofit corporation, the trial court has much discretion to determine whether the purpose named is a proper one and its findings with respect to whether an applicant has shown a proper purpose must stand unless it is clearly erroneous. *Parker v. Clary Lakes Recreation Ass'n*, 243 Ga. App. 681, 534 S.E.2d 154 (2000).

**14-3-1605. Use of membership list.**

Without consent of the board, a membership list or any part thereof may not be obtained or used by any person for any purpose unrelated to a member's interest as a member. Without limiting the generality of the foregoing, without the consent of the board a membership list or any part thereof may not be:

- (1) Used to solicit money or property unless such money or property will be used solely to solicit the votes of the members in an election to be held by the corporation;
- (2) Used for any commercial purpose; or
- (3) Sold to or purchased by any person. (Code 1981, § 14-3-1605, enacted by Ga. L. 1991, p. 465, § 1.)

## COMMENT

This section is based on the Model Act. It recognizes that the membership list of a nonprofit corporation may be a valuable asset, and it imposes restrictions on the use of membership lists. If the corporation believes that a member is seeking access to the membership list for an improper purpose, it may deny access and require the member to bring an action under section 14-3-1604.

## PART 2

## REPORTS

**14-3-1620. Furnishing financial statements to members.**

(a) A corporation upon written demand from a member shall furnish that member its latest prepared annual financial statements, which may be consolidated or combined statements of the corporation and one or more of its subsidiaries or affiliates, in reasonable detail as appropriate, that include a balance sheet as of the end of the fiscal year and statement of operations for that year. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis.

(b) If annual financial statements are reported upon by a public accountant, the accountant's report must accompany them. If not, the statements must be accompanied by the statement of the president or the person responsible for the corporation's financial accounting records:

(1) Stating the president's or other person's reasonable belief as to whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and

(2) Describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year. (Code 1981, § 14-3-1620, enacted by Ga. L. 1991, p. 465, § 1.)

#### COMMENT

This section is based on the Model Act and on its Business Code counterpart. Subsection (a) follows the Model Act, rather than the Business Code. It does not specifically require corporations to prepare annual financial statements. Like the Business Code, this section requires that the most recent financial statements be provided to a member who has requested them in writing. Although some nonprofit corporations' bylaws require that annual financial statements be mailed to the members, this section eschews such a requirement as being financially prohibitive for many corporations. See also section 14-3-1601, requiring corporations to "maintain appropriate accounting records."

#### JUDICIAL DECISIONS

**Cited in** Greer v. Davis, 244 Ga. App. 317, 534 S.E.2d 853 (2000).

#### **14-3-1621. Report to members of indemnification or advance of expenses.**

If a corporation indemnifies or advances expenses to a director under Code Section 14-3-851, 14-3-852, 14-3-853, or 14-3-854 in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to the members with or before the notice of the next meeting of members. (Code 1981, § 14-3-1621, enacted by Ga. L. 1991, p. 465, § 1.)

#### **14-3-1622. Annual registration of corporation.**

(a) Each domestic corporation and each foreign corporation authorized to transact business in this state shall deliver to the Secretary of State for filing an annual registration that sets forth:

(1) The name of the corporation and the state or country under whose law it is incorporated;

(2) The street address and county of its registered office and the name of its registered agent at that office in this state;



(3) The mailing address of its principal office, if any; and

(4) The names and respective addresses of its chief executive officer, chief financial officer, and secretary, or individuals holding similar positions.

(b) Information in the annual registration must be current as of the date the annual registration is executed on behalf of the corporation.

(c) The first annual registration must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the year following the calendar year in which a domestic corporation was incorporated or a foreign corporation was authorized to transact business. Subsequent annual registrations must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the following calendar years.

(d) The initial annual registration of a domestic corporation shall be filed within 90 days after the day its articles of incorporation are delivered to the Secretary of State for filing. However, the initial annual registration of a domestic corporation whose articles of incorporation are delivered to the Secretary of State for filing subsequent to October 1 shall be filed between January 1 and April 1 of the year next succeeding the calendar year in which its certificate of incorporation is issued by the Secretary of State.

(e) If an annual registration does not contain the information required by this Code section, the Secretary of State shall promptly notify the reporting domestic or foreign corporation in writing and return the report to it for correction. If the report is corrected to contain the information required by this Code section and delivered to the Secretary of State within 30 days after the effective date of notice, it is deemed to be timely filed. (Code 1981, § 14-3-1622, enacted by Ga. L. 1991, p. 465, § 1; Ga. L. 1993, p. 1231, § 29; Ga. L. 1999, p. 405, § 21.)

#### COMMENT

##### Note to 1993 Amendment

The 1993 amendment amended subparagraph (a)(1) to require submission of an employee identification number with the annual registration. The 1993 amendment also added subparagraph (d) which mandates a different filing schedule for the initial annual registration of a domestic corporation.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 222.

**C.J.S.** — 19 C.J.S., Corporations, § 904.

**ALR.** — Persons liable under statutes imposing, upon directors, officers, or trustees

of a corporation, personal liability for its debts on account of their failure to file or publish reports, required by law, as to corporate matters, 39 ALR3d 428.

## ARTICLE 17

## APPLICABILITY

**14-3-1701. Corporations as to which chapter applicable and as to which not applicable; corporations existing on July 1, 1991; foreign and interstate commerce.**

(a) Subject to the limitations of subsection (b) of this Code section, this chapter shall apply:

(1) To all nonprofit corporations, existing on or formed after July 1, 1991, including nonprofit corporations organized under any prior general corporation law of this state or under Chapter 3 of Title 14 of the Official Code of Georgia Annotated in effect prior to July 1, 1991, that is repealed by this chapter;

(2) To all nonprofit corporations created by special Act of the General Assembly as to which power has been reserved to withdraw the franchise;

(3) To any nonprofit corporation, organization, or association, to the extent that the former general corporation law of this state or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to such corporation, organization, or association; and

(4) To any corporation organized under any statute of this state or if it were originally created by special Act of the General Assembly without reservation of power to withdraw the franchise, if under any prior general corporation law of this state applicable to nonprofit corporations such corporation either has amended its charter or has been a party to a merger or a consolidation, and also to any such corporation which after July 1, 1991, in an amendment to its articles of incorporation or restatement of the articles of incorporation or in a merger or a consolidation, elects to be subject to this chapter. Any such corporation shall have all the rights, privileges, franchises, immunities, and powers and shall be subject to all the duties, liabilities, and disabilities of a corporation to which this chapter applies as well as of the statute or special Act by which such corporation was originally created; but in the event of a conflict between such statute or special Act and this chapter, such statute or special Act shall govern.

(b) This chapter shall not apply:

(1) To corporations organized under a statute of this state other than either this chapter or any prior general corporation law, except to the extent that the former general corporation law of this state applicable to nonprofit corporations or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to such corporations;



(2) To any corporation originally created by special Act of the General Assembly as to which power has not been reserved to withdraw the franchise, except as otherwise provided in subsection (a) of this Code section;

(3) To any corporation originally created by special Act of the General Assembly as to which power has been reserved to withdraw the franchise, if the purpose of the corporation would require its organization to take place under a statute other than this chapter, if it were being organized after July 1, 1991, except to the extent that the former general corporation law of this state or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to corporations organized for that purpose;

(4) To any public authority created by special Act of the General Assembly, except to the extent that the former general corporation law of this state or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to such public authority; or

(5) To corporations of any class to the extent that such class is specifically exempted from this chapter or any of its provisions.

(c) This chapter shall not impair the existence of any nonprofit corporation existing on July 1, 1991. Subject to Code Section 14-3-610, any such existing corporation to which this chapter is applicable and its members, directors, and officers shall have the same rights and be subject to the same limitations, restrictions, liabilities, and penalties as a corporation formed under this chapter and its members, directors, and officers.

(d) If the articles of incorporation, charter, or bylaws of a corporation in existence on July 1, 1991, contain any provisions that were not authorized or permitted by the prior general corporation law of this state but which are authorized or permitted by this chapter, the provisions of the articles of incorporation, charter, or bylaws shall be valid on and from that date, and action may be taken on and from that date in reliance on those provisions.

(e) This chapter shall apply to commerce with foreign nations and among the several states only insofar as the application may be permitted under the Constitution and laws of the United States. (Code 1981, § 14-3-1701, enacted by Ga. L. 1991, p. 465, § 1.)

#### JUDICIAL DECISIONS

**Hospital authorities exempted from Business Corporation Code.** — The phrase “corporations engaged in any business” in O.C.G.A. § 34-9-1 includes only those corpo-

rations governed by the Georgia Business Corporation Code, O.C.G.A. § 14-2-201 et seq. Hospital authorities are not governed by Georgia Business Corporation Code, but

are expressly exempted therefrom. *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978).

**Actions of directors of nonprofit colleges** must be reviewed in light of corporate rather than trust principles. This is because the

formalities of trust law are inappropriate to the administration of colleges and universities which, in this era, operate as businesses. *Corporation of Mercer Univ. v. Smith*, 258 Ga. 509, 371 S.E.2d 858 (1988).

#### RESEARCH REFERENCES

**ALR.** — Responsibility of agricultural society for tort, 52 ALR 1400.

### 14-3-1702. Applicability to qualified foreign corporations.

A foreign corporation transacting business in this state on or after July 1, 1991, is subject to this chapter. A foreign corporation that is authorized to transact business or conduct affairs in this state on July 1, 1991, is not required to obtain a new certificate of authority. (Code 1981, § 14-3-1702, enacted by Ga. L. 1991, p. 465, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Foreign Corporations, § 359.

**C.J.S.** — 19 C.J.S., Corporations, § 887.

**ALR.** — Effect of domestication of foreign corporations, 18 ALR 130; 126 ALR 1503.

Applicability to corporations not organized for profit of statutes prescribing conditions under which foreign corporations may do business within state, 37 ALR 1283.

### 14-3-1703. Saving provisions.

(a) Except as provided in subsection (b) of this Code section, the repeal of a statute by this chapter does not affect:

(1) The operation of the statute or any action taken under it before its repeal;

(2) Any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the statute before its repeal, except as provided in Code Section 14-3-1408; but the same, as well as actions that are pending on July 1, 1991, may be asserted, enforced, prosecuted, or defended as if the prior statute has not been repealed;

(3) Any violation of the statute, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal;

(4) Transactions validly entered into before July 1, 1991, and the rights, duties, and interests flowing from them shall remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by any statute repealed by this chapter as though the repeal had not occurred;



(5) Any proceeding, reorganization, or dissolution commenced under the statute before its repeal, and the proceeding, reorganization, or dissolution may be completed in accordance with the statute as if it had not been repealed; or

(6) Any meeting of members or directors or action by written consent noticed or any action taken before its repeal as a result of a meeting of members or directors or action by written consent.

(b) If a penalty or punishment imposed for violation of a statute repealed by this chapter is reduced by this chapter, the penalty or punishment if not already imposed shall be imposed in accordance with this chapter. (Code 1981, § 14-3-1703, enacted by Ga. L. 1991, p. 465, § 1.)

## CHAPTER 4

## SECRETARY OF STATE CORPORATIONS

## Article 1

## General Provisions

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- 144-1. Intention.  
 144-2. Existing venue statutes unaffected by chapter.

## Article 2

## Incorporation

- 144-21. Number of directors; effect upon acts of directors prior to April 1, 1969.  
 144-22. Use of name of another without consent.  
 144-23. Objection to grant of charter; hearing thereon.  
 144-24. Appeal from action of Secretary of State.  
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## Article 3

## Corporate Finance

- 144-40. Creation of shares with or without par value and of classes of shares.  
 144-41. Authority prerequisite to issuance of stock.  
 144-42. Application of laws governing par stock to nonpar stock.  
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 144-46. Statement as to nonpar stock.  
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## Article 4

## Powers and Liabilities

- 144-60. Powers generally.  
 144-61. Power to make donations for public welfare or for charitable,

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- 144-62. scientific, or educational purposes.  
 Continuous succession; term of articles of incorporation or charter.  
 144-63. Liability of persons transacting business before minimum capital stock subscribed for.  
 144-64. Responsibility for acts of officers.  
 144-65. Improper dividends; liability of officers.

## Article 5

## Renewal or Revival of Charter

- 144-80. Renewal of charter.  
 144-81. Revival of expired charter.

## Article 6

## Amendment of Charter

- 144-100. Application for amendment of charter of companies incorporated by Act of General Assembly; surrender of certain powers by insurance companies.  
 144-101. Issuance of certificate of amendment to acquire powers; form.  
 144-102. Issuance of certificate of amendment to surrender powers; form.  
 144-103. Acceptance of amendment conclusively presumed.  
 144-104. Secretary of State to keep record of amendments.  
 144-105. Amendments of charter and changes in capitalization of railroad companies undergoing reorganization in bankruptcy proceedings.

## Article 7

## Change of Name, Capital Stock, Place of Business, or Number of Directors

- 144-120. Petition for change of name, principal office, capital stock, or number of directors.  
 144-121. Issuance of certificate of change of name, principal office, capital stock, or number of directors.



## Article 8

## Merger and Share Exchange

- Sec.  
 144-140. Merger or share exchange consolidation of corporations incorporated by Secretary of State.  
 144-141. Merger or share exchange consolidation of corporations chartered by Secretary of State with domestic corporations incorporated under Chapter 2.  
 144-142. Merger or share exchange consolidation of corporations chartered by Secretary of State with foreign corporations.  
 144-143. Right of stockholder to dissent from merger or share exchange consolidation — Demand for payment of value of stock.  
 144-144. Arbitration of value of stock [Repealed].  
 144-145. Appeal from appraisal.  
 144-146. Cessation of stockholders' rights and transfer of stock to corporation.  
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## Sec.

- tion of judgment determining value of stock.  
 144-148. Stockholders of surviving or resulting corporation.  
 144-149. Article cumulative of other provisions.  
 144-150. Recording of charter of consolidated or merged corporation.

## Article 9

## Forfeiture and Dissolution

- 144-160. Forfeiture of charter.  
 144-161. Effect of dissolution upon causes of action; service of process.

## Article 10

## Annual Reports and Fees

- 144-180. Annual registration required.  
 144-181. Penalty for failure to report [Repealed].  
 144-182. Filing of reports by Secretary of State; correction of improper reports [Repealed].  
 144-183. Fees of Secretary of State for filing documents.

**Cross references.** — Grant of corporate powers and privileges, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

**Administrative rules and regulations.** —

Powers of Secretary of State over corporations, see Official Compilation of Rules and Regulations of State of Georgia, Rules of Office of Secretary of State, Ch. 590-1-1.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 150, 151.

**C.J.S.** — 18 C.J.S., Corporations, §§ 19-21.

## ARTICLE 1

## GENERAL PROVISIONS

## 144-1. Intention.

This chapter is intended to be and is merely a recompilation of existing statutes affecting and regulating corporations chartered by the Secretary of State and complements and supplements the express provisions of existing statutes governing banking, trust, insurance, railroad, canal, navigation, express, and telegraph corporations. All references in this chapter to corporations chartered by or incorporated by the Secretary of State shall

refer only to the aforesaid corporations, except as otherwise provided, and shall not refer to corporations incorporated by the Secretary of State under Chapter 2 of this title. (Code 1933, § 22-4801, enacted by Ga. L. 1969, p. 152, § 72; Ga. L. 1976, p. 1102, § 37.)

**Cross references.** — Banking and trust companies generally, § 7-1-240 et seq. Insurance companies generally, § 33-1-1 et seq. Telephone and telegraph companies generally, § 46-5-1 et seq. Railroad companies

generally, § 46-8-1 et seq. Express companies generally, § 46-9-230 et seq. Canal companies generally, § 52-4-1 et seq. Navigation companies generally, § 52-5-1 et seq.

### COMMENT

#### Note to 1976 Amendment

The 1976 amendment added the second sentence of this section to avoid any possibility of interpreting the references in Chapter 4 to corporations chartered by or incorporated by the Secretary of State as including corporations incorporated by the Secretary of State pursuant to the Georgia Business or Nonprofit Corporation Codes, unless Chapter 4 provides otherwise. This clarification was made desirable by the change in corporate filing procedures effected by the 1976 constitutional amendment.

#### Note to 1981 Amendment

The 1981 amendment to this section added the word "trust" to the list of the companies to which the Secretary of State may grant corporate powers and privileges. This amendment conforms this section to Article III, Section VIII, Paragraph V of the 1976 Constitution.

### 14-4-2. Existing venue statutes unaffected by chapter.

Nothing in this chapter shall affect existing statutes with respect to the venue of actions against railroad, electric, banking, trust, insurance, canal, navigation, express, and telegraph companies, which existing statutes include, as to express companies, those statutes codified as Code Sections 46-9-234 through 46-9-236; as to telegraph companies, that statute codified as Code Section 46-5-149; as to companies under the jurisdiction of the Georgia Public Service Commission, that statute codified as Code Section 46-2-92. (Code 1933, § 22-4802, enacted by Ga. L. 1969, p. 152, § 98; Ga. L. 1984, p. 22, § 14.)

### COMMENT

#### Note to 1981 Amendment

The 1981 amendment to this section added the word "trust" to the list of companies in this section.



## ARTICLE 2

### INCORPORATION

#### 14-4-21. Number of directors; effect upon acts of directors prior to April 1, 1969.

Every banking, trust, insurance, railroad, canal, navigation, express, and telegraph corporation shall have such number of directors, not less than three, as may be provided by its charter, any amendment thereto granted prior to April 1, 1969, or thereafter, or by its bylaws in the absence of any such charter provision. The effect of this Code section shall be that all actions taken prior to April 1, 1969, by the board of directors of any such corporation shall be valid and binding for all purposes as if this Code section had been enacted before such action was taken and as if such board of directors had been constituted as provided by this Code section. (Ga. L. 1958, p. 92, §§ 1, 2; Code 1933, § 22-4102, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1983, p. 506, § 2.)

**Editor's notes.** — Ga. L. 1983, p. 506, § 1, not codified by the General Assembly, provides: "It is the intent of this Act to imple-

ment certain changes required by Article III, Section VI, Paragraph V (a) of the Constitution of the State of Georgia."

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1349-1352.

**C.J.S.** — 19 C.J.S., Corporations, §§ 434, 435.

**ALR.** — Construction and effect of corporate bylaws or articles relating to change in number of directors, 3 ALR3d 623.

#### 14-4-22. Use of name of another without consent.

Whenever application is made to the Secretary of State to obtain a charter or the authorization of articles of incorporation for any purpose, it shall be unlawful for the applicant either to use the name of any person, order, lodge, society, or corporation as a corporate name or to mention any such name in connection with the purpose of such proposed organization without furnishing at the time of application an affidavit of consent executed by such person, order, lodge, society, or corporation. (Ga. L. 1923, p. 82, § 1; Code 1933, § 22-202; Code 1933, § 22-4201, enacted by Ga. L. 1968, p. 565, § 1.)

#### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-202, are included in the annotations for this section.

**Motion to revoke and set aside incorpora-**

**tion because of prior use of name.** — A motion to revoke and set aside an order of incorporation on the grounds of movant's prior use of the name used by the corporation and arguing that the order of incorpo-

ration had been improvidently granted because movant had not been given notice before the order of incorporation, and praying that the order of incorporation be set aside insofar as the use of the name claimed by movant was concerned, is not an equity case within the meaning of that term as used in Ga. Const. 1983, Art. VI, Sec. VI, Para. III, defining the jurisdiction of the Supreme Court. The grounds of the motion are not

such as are relievable only in equity. On the contrary, the motion is one to set aside an order of the court on an alleged legal ground. A court of law has jurisdiction to entertain such a motion in a proper proceeding by petition, with rule nisi or process, and to grant the relief prayed. *Methodist Episcopal Church, S., Inc. v. Decell*, 187 Ga. 526, 1 S.E.2d 432 (1939) (decided under former Code 1933, § 22-202).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 277, 289, 290, 296, 297.

**C.J.S.** — 18 C.J.S., Corporations, §§ 98, 100, 101, 103.

#### 14-4-23. Objection to grant of charter; hearing thereon.

It shall be the right of any person, order, lodge, society, or corporation interested in the result of an application to obtain a charter or the authorization of articles of incorporation in which the name of such person, order, lodge, society, or corporation is used unlawfully under Code Section 14-4-22 to file written objections and to appear before the Secretary of State. The Secretary of State, after hearing the issue formed by the application and objections filed thereto and after hearing evidence thereon, may in his discretion grant or refuse such charter or articles of incorporation. Such application and objections filed thereto may be heard within the office of the Secretary of State at such reasonable time as he may designate. (Ga. L. 1923, p. 82, § 2; Code 1933, § 22-203; Code 1933, § 22-4202, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1982, p. 3, § 14.)

#### 14-4-24. Appeal from action of Secretary of State.

Either party to a hearing held pursuant to Code Section 14-4-23 who is dissatisfied with the action of the Secretary of State may appeal to the Superior Court of Fulton County, whereupon the matter shall be tried de novo by the court without a jury. The court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper. (Ga. L. 1923, p. 82, § 3; Code 1933, § 22-205; Code 1933, § 22-4203, enacted by Ga. L. 1968, p. 565, § 1.)

#### 14-4-25. When previously used corporate name becomes available for use by others.

(a) The name of a corporation shall become immediately available for use by others upon:

- (1) The surrender by the corporation of its franchise;



(2) The effective date of an amendment changing the name of the corporation;

(3) The voluntary or involuntary dissolution of the corporation.

(b) Upon the effective date of a merger or consolidation, the names of the constituent corporations shall become immediately available except insofar as one of such names shall be the name of the surviving or resulting corporation.

(c) Nothing in this Code section shall abrogate or limit the law as to unfair competition or unfair trade practice nor derogate from the common law, or principles of equity, or the statutes of this state or of the United States with respect to the right to acquire and protect trade names and trademarks. (Code 1933, § 22-4204, enacted by Ga. L. 1968, p. 565, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 277.

**C.J.S.** — 18 C.J.S., Corporations, § 100.

### ARTICLE 3

#### CORPORATE FINANCE

#### RESEARCH REFERENCES

**ALR.** — Corporate stock without par value, 19 ALR 131; 36 ALR 791; 45 ALR 1501; 65 ALR 1347.

#### **14-440. Creation of shares with or without par value and of classes of shares.**

Every corporation having capital stock incorporated prior to April 1, 1969, or thereafter by the Secretary of State or by Act of the General Assembly, including corporations with powers derived from both of such sources, except an insurance company, which shall be subject to the provisions of Code Section 33-14-45, or a banking or trust company, which shall be subject to the provisions of Code Section 7-1-413, may, upon its organization or thereafter in the manner provided in this article, create shares of stock with or without par value and may create two or more classes of stock with such preferences, voting powers, restrictions, and qualifications as shall be designated in its petition, declaration, or other application for incorporation or as subsequently shall be decided upon, provided there shall be but one class of common stock, each share of which shall stand upon an equality with every other share. Before any such corporation can begin business as a corporation there must be at least \$1,000.00 paid in for such nonpar value common stock either in cash or in tangible assets at their fairly appraised valuation. (Ga. L. 1925, p. 224, § 1; Code 1933, §§ 22-801,

22-803, 22-804; Code 1933, §§ 22-4501, 22-4503, 22-4504, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1994, p. 694, § 1.)

**Law reviews.** — For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 196 (1994).

### COMMENT

#### Note to 1981 Amendment

The 1981 amendment consolidated §§ 22-4501, 22-4503, and 22-4504 of prior Title 22 in this section.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 222, 436-441, 452, 453.      **C.J.S.** — 18 C.J.S., Corporations, §§ 148, 149, 170.

#### 14441. Authority prerequisite to issuance of stock.

Before any corporation shall avail itself of this article, it shall procure appropriate corporate authority therefor in the manner provided by law. The Secretary of State is authorized to grant such powers to the several classes of corporations of which he has jurisdiction to grant or amend charters. (Ga. L. 1925, p. 224, § 1; Ga. L. 1926, Ex. Sess., p. 48, § 1; Code 1933, § 22-802; Code 1933, § 22-4502, enacted by Ga. L. 1968, p. 565, § 1.)

### RESEARCH REFERENCES

**C.J.S.** — 18 C.J.S., Corporations, § 170.

#### 14442. Application of laws governing par stock to nonpar stock.

The provisions of law relating to the issue of shares of capital stock with par value, including in the case of a corporation under the jurisdiction of the Georgia Public Service Commission the laws defining the duties and powers of said commission with respect to the issuance of shares of stock, shall, except as otherwise provided in this article, apply also to the issue of shares without par value. (Ga. L. 1925, p. 224, § 2; Code 1933, § 22-805; Code 1933, § 22-4505, enacted by Ga. L. 1968, p. 565, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 452, 453.      **C.J.S.** — 18 C.J.S., Corporations, § 148.



**14-443. Consideration for sale of nonpar stock.**

A corporation may issue and dispose of its authorized shares without par value for such consideration as may be authorized or prescribed in its charter or certificate of incorporation or amendments thereof or, if there is no provision therein with respect thereto, for such consideration as may be fixed by the stockholders at a meeting duly called for that purpose, or by the board of directors when acting under general or special authority granted by the stockholders or under general authority conferred by the charter or certificate of incorporation or amendments thereof. Any and all shares without nominal or par value issued for the consideration prescribed or fixed in accordance with this Code section shall be fully paid and not liable to any further call or assessment thereon; nor shall the subscriber or holder be liable for any further payment. (Ga. L. 1925, p. 224, § 2; Code 1933, § 22-806; Code 1933, § 22-4506, enacted by Ga. L. 1968, p. 565, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 453, 494.

**C.J.S.** — 18 C.J.S., Corporations, § 169.

**14-444. Change of par stock into nonpar stock.**

Every corporation of the character included in Code Section 14-440 having shares with par value, whether issued and outstanding or only authorized, may, at a meeting duly called for the purpose, by the vote of a majority of all its stock entitled to vote or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, including in any event a majority of the outstanding stock of each class affected, change such shares of any class thereof into an equal or greater number of shares of the same class without par value or provide for the exchange thereof pro rata for an equal or greater number of shares without par value, provided that all shares in any one class shall be changed or exchanged on the same basis; and provided, further, that the preferences, restrictions, and qualities of the outstanding shares so changed or exchanged shall not be otherwise affected nor the relative voting powers of the different classes of shares be altered. (Ga. L. 1925, p. 224, § 3; Code 1933, § 22-807; Code 1933, § 22-4507, enacted by Ga. L. 1968, p. 565, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 456.

**C.J.S.** — 18 C.J.S., Corporations, §§ 131, 148.

**ALR.** — Modern status of rules governing allocation of stock dividends or splits between principal and income, 81 ALR3d 876.

#### 14445. Application for incorporation of corporations having nonpar stock.

Upon the organization of any corporation having shares of stock without par value, the petition, declaration, or other application for incorporation required by law, in addition to other matters required to be stated, shall state:

(1) The number of shares with par value and the number of shares without par value that may be issued and the designation of the classes, if any, into which such shares are divided;

(2) The par value of the shares, if any, other than the shares to be without par value; and

(3) If there are to be two or more classes of stock, a description of the different classes including a statement of the respective preferences, restrictions, and qualities thereof. (Ga. L. 1925, p. 224, § 4; Code 1933, § 22-808; Code 1933, § 22-4508, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1982, p. 3, § 14.)

#### 14446. Statement as to nonpar stock.

Any law requiring that the amount of par value of the capital stock of a corporation be stated in any certificate, report, or other instrument shall be deemed to be complied with so far as shares without par value are concerned by stating with respect to such shares the number authorized, issued, or to be issued, as the case may be, and the fact that they are without par value. (Ga. L. 1925, p. 224, § 5; Code 1933, § 22-809; Code 1933, § 22-4509, enacted by Ga. L. 1968, p. 565, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 205.

**C.J.S.** — 18 C.J.S., Corporations, §§ 126, 127.

#### 14447. Meeting “duly called for the purpose” defined.

A meeting “duly called for the purpose,” as that phrase is used in this article, shall mean a meeting of the stockholders called and notified for the purpose in the manner prescribed by the bylaws of the corporation concerned. Unless required by the bylaws, no publication of the call or notice in any newspaper shall be necessary. (Ga. L. 1925, p. 224, § 6; Code 1933, § 22-810; Code 1933, § 22-4510, enacted by Ga. L. 1968, p. 565, § 1.)



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 963, 973, 977.

**C.J.S.** — 18 C.J.S., Corporations, §§ 365-367.

## ARTICLE 4

## POWERS AND LIABILITIES

## 14-4-60. Powers generally.

All corporations have the right to sue and be sued, to have and use a common seal, to make bylaws binding on their own members not inconsistent with the laws of this state and of the United States, to receive donations by gift or will, to purchase and hold such property, real or personal, as is necessary to the purpose of their organization, and to do all such acts as are necessary for the legitimate execution of this purpose. (Orig. Code 1863, § 1633; Code 1868, § 1678; Code 1873, § 1679; Code 1882, § 1679; Civil Code 1895, § 1852; Civil Code 1910, § 2216; Code 1933, § 22-703; Code 1933, § 22-4103, enacted by Ga. L. 1968, p. 565, § 1.)

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## CONTRACTS

## BYLAWS

## ASSIGNMENT OF ASSETS

## FORMATION OF PARTNERSHIP

## General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1868, § 1678; former Code 1873, § 1679; former Code 1882, § 1679; former Civil Code 1895, § 1852; and former Civil Code 1910, § 2216, are included in the annotations for this Code section.

**Corporations may act as reasonably necessary to effectuate express powers.** — Although corporations have only such powers as are granted in the charter, yet where an express power is granted, this carries with it the right to do any act which may be found reasonably necessary to effectuate the power expressly granted. What is and what is not too remote from the main purpose must be determined by the particular facts of each case. *Snook v. Georgia Imp. Co.*, 83 Ga. 61, 9 S.E. 1104 (1889); *National Bank v. Amoss*, 144 Ga. 425, 87 S.E. 406, 1918A Ann. Cas. 74 (1915) (decided under former Code 1882,

§ 1679 and former Civil Code 1910, § 2216).

The word "necessary" is to be given a reasonable construction, and not to be so construed as to hamper and obstruct, or practically prevent, the profitable and reasonable exercise of the corporate powers and the conduct of the corporate business. *J.L. Young Co. v. Minchew*, 42 Ga. App. 228, 155 S.E. 356 (1930) (decided under former Civil Code 1910, § 2216).

**Every person is charged with notice of limitations on powers** of corporation fixed by law. *First Nat'l Bank v. Monroe*, 135 Ga. 614, 69 S.E. 1123, 32 L.R.A. (n.s.) 550 (1911) (decided under former Civil Code 1910, § 2216).

## Contracts

**Power to contract.** — The power to make contracts would seem to be an incident to every corporation, unless the charter pro-

**Contracts (Cont'd)**

vides the contrary. *Wood Hydraulic Hose Mining Co. v. King*, 45 Ga. 34 (1872) (decided under former Code 1868, § 1678).

**Extent of corporate contractual power.** — Many contracts may be made which are not in an absolute sense essential to the conduct of business, and yet may be legitimate as advancing the principal business or rendering it more profitable. Such contracts would not be invalid. *Kohlruss v. Zachery*, 139 Ga. 625, 77 S.E. 812, 46 L.R.A. (n.s.) 72 (1913) (decided under former Civil Code 1910, § 2216).

**Bylaws**

**Power to pass bylaws.** — It is within the power of a corporation to pass such bylaws as are not inconsistent with its charter and the purposes for which it was created. *Interstate Bldg. & Loan Ass'n v. Wooten*, 113 Ga. 247, 38 S.E. 738 (1901) (decided under former Civil Code 1895, § 1852).

**Bylaws must be reasonable.** — If the bylaws of a corporation are so unreasonable as to shock one's ideas of right and justice, a court of equity will interpose if property be at stake. *Hussey v. Gallagher*, 61 Ga. 86 (1878) (decided under former Code 1873, § 1679).

**Power to amend bylaws.** — As an incident to its power to pass bylaws, a business corporation may make amendments to its bylaws which are not inconsistent with its charter or constitution. *Crittenden v. Southern Home Bldg. & Loan Ass'n*, 111 Ga. 266, 36 S.E. 643 (1900); *Interstate Bldg. & Loan Ass'n v. Wooten*, 113 Ga. 247, 38 S.E. 738 (1901) (decided under former Civil Code 1895, § 1852).

Where given amendments to the bylaws of a corporation are, under its charter and constitution, allowable, they are not, as to a particular stockholder, fraudulent or void merely because made without the stockholder's knowledge, or because the stockholder "has never ratified, acquiesced in, or consented to the same." *Maynard v. Interstate Bldg. & Loan Ass'n*, 112 Ga. 443, 37 S.E. 741 (1900); *Crittenden v. Southern Home Bldg. & Loan Ass'n*, 111 Ga. 266, 36 S.E.

643 (1900) (decided under former Civil Code 1895, § 1852).

**Change in bylaws cannot impair vested rights.** — While a private corporation may at any time exercise in a lawful manner its inherent right to amend, alter, or repeal its bylaws, no amendment, alteration, or repeal thereof can have the legal effect of defeating any vested right of its stockholders. This is true because, under the fundamental law of the land, power to adopt bylaws impairing the obligation of a contract cannot be constitutionally conferred upon a corporation. *Interstate Bldg. & Loan Ass'n v. Wooten*, 113 Ga. 247, 38 S.E. 738 (1901) (decided under former Civil Code 1895, § 1852).

**Insurance company bylaw amendment binding on insured.** — An amendment to the bylaws of an insurance company, merely for the purpose of regulating its mode of business, and adding no new condition to the policies already issued, is binding on the insured. *Georgia Masonic Mut. Life Ins. Co. v. Gibson*, 52 Ga. 640 (1874) (decided under former Code 1873, § 1679).

**Bylaws providing for expulsion of member.** — Corporations have the power to pass bylaws providing for expulsion of members, but they have not an uncontrollable discretion in the enforcement of such bylaws. In a proper case the same may be construed by the court. *State ex rel. Waring v. Georgia Medical Soc'y*, 38 Ga. 608, 95 Am. Dec. 408 (1869) (decided under former Code 1868, § 1678).

**Bylaws concerning officers' salaries.** — A bylaw providing that official salaries are to be fixed by the president and directors of a corporation is within the legal competency of a corporation to establish, and an officer accepting an appointment and serving with knowledge of such bylaw is to be understood as undertaking the performance of duties for such salary as may be fixed by a fair and honest execution of the bylaw. *Eagle & Phoenix Mfg. Co. v. Browne*, 58 Ga. 240 (1877) (decided under former Code 1873, § 1679).

**Bylaw cannot impose liability for corporate debts on shareholders.** — When neither the charter of a corporation nor any general statute imposes on the individual members liability to pay its debts, such liability cannot be imposed by a bylaw of the corporation,



and in such case equity will not entertain a bill against the stockholders to enforce such liability. *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98, 2 Am. R. 563 (1869) (decided under former Code 1868, § 1678).

#### Assignment of Assets

**Power to assign corporate assets to officers while corporation insolvent.** — Sound public policy forbids assignment to officers of a corporation of any of the corporate assets while the corporation is insolvent, with a view to prefer them as creditors for antecedent debts. *Jones v. Ezell*, 134 Ga. 553, 68

S.E. 303 (1910) (decided under former Civil Code 1910, § 2216).

#### Formation of Partnership

**Power to form partnership must be authorized by charter.** — The power to form a partnership is not one of those which is common to all corporations, and charter authority is necessary. *Gunn v. Central R.R.*, 74 Ga. 509 (1885); *South Carolina & Ga. R.R. v. Augusta Southern R.R.*, 107 Ga. 164, 33 S.E. 36 (1899) (decided under former Code 1882, § 1679 and former Civil Code 1895, § 1852).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 300-302, 314. 18B Am. Jur. 2d, Corporations, §§ 1990 et seq., 2170.

**C.J.S.** — 18 C.J.S., Corporations, §§ 98-102, 106, 111 et seq. 19 C.J.S., Corporations, §§ 554, 555, 558-568, 572.

**ALR.** — Validity of obligation given by corporation for a personal debt of officer or stockholder, 47 ALR 78.

Liability of corporation for contracts of subsidiary, 38 ALR3d 1102.

#### 144-61. Power to make donations for public welfare or for charitable, scientific, or educational purposes.

Every private corporation incorporated in this state on or after April 1, 1969, shall have, in addition to the powers granted in its articles of incorporation or charter and in addition to other general powers conferred by law, power to make donations for the public welfare or for charitable, scientific, or educational purposes. Every private corporation incorporated prior to April 1, 1969, and whose articles of incorporation or charter was issued subject to the right reserved in the state to change the articles of incorporation or charter or withdraw the franchise shall also have the power described in this Code section. (Ga. L. 1953, Nov.-Dec. Sess., p. 121, § 1; Code 1933, § 22-4107, enacted by Ga. L. 1968, p. 565, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, § 2092.

**C.J.S.** — 19 C.J.S., Corporations, § 653.

#### 144-62. Continuous succession; term of articles of incorporation or charter.

Corporations shall have continuous succession during the time limited by their articles of incorporation or charters, notwithstanding the death of their members. Should any articles of incorporation or charter granted to a private corporation be silent as to its continuance, such articles of incorporation or charter shall expire at the end of 30 years from the date

of its grant by the Secretary of State. (Orig. Code 1863, § 1632; Code 1868, § 1677; Code 1873, § 1678; Code 1882, § 1678; Civil Code 1895, § 1851; Civil Code 1910, § 2215; Code 1933, § 22-702; Code 1933, § 22-4108, enacted by Ga. L. 1968, p. 565, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 68, 69.

**C.J.S.** — 18 C.J.S., Corporations, § 52.

**ALR.** — Extension or renewal of period of corporate existence, 108 ALR 59.

### 14-463. Liability of persons transacting business before minimum capital stock subscribed for.

Persons who organize a company and transact business in its name before the minimum capital stock has been subscribed for are liable to creditors to make good the minimum capital stock with interest. (Civil Code 1895, § 1856; Civil Code 1910, § 2220; Code 1933, § 22-707; Code 1933, § 22-4104, enacted by Ga. L. 1968, p. 565, § 1.)

**History of section.** — The language of this Code section is derived in part from the decision in *Burns v. Beck*, 83 Ga. 471, 10 S.E. 121 (1889).

### JUDICIAL DECISIONS

#### ANALYSIS

GENERAL CONSIDERATION

APPLICATION

REMEDY

STOCK TRANSFER BY ORGANIZERS

DEFENSES

#### General Consideration

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 2220, and Ga. L. 1937-38, Ex. Sess., p. 214, § 34, are included in the annotations for this Code section.

**Organizers or subscribers liable to extent minimum capital not paid.** — To the extent that the minimum capital has not been paid in, the organizers of the corporation or the subscribers to the stock, as the case may be, are liable to creditors. *Eubanks v. Allstate Ins. Co.*, 441 F.2d 7 (5th Cir. 1971) (decided under Ga. L. 1937-38, Ex. Sess., p. 214, § 34).

As a matter of law, when the stock of a corporation is not subscribed for up to the minimum amount of capital fixed by the charter, and none of it is paid in, if the incorporators organize, elect themselves officers, proceed to business, contract debts up to

and beyond the nominal capital, having paid in nothing whatever, they commit a legal fraud by so doing, and are liable to creditors to make good the minimum capital, together with interest thereon, should this be necessary to discharge the corporate debts. *Howard v. Long*, 142 Ga. 789, 83 S.E. 852 (1914); *Smith v. Citizens & S. Bank*, 148 Ga. 764, 98 S.E. 466 (1919) (decided under former Civil Code 1910, § 2220).

**Promoters initially liable on provisional contracts.** — Prior to the formal and complete organization of a corporation, the organizers of it may make provisional contracts in behalf of the corporation, which may become binding on the corporation after it begins business; but in the meantime, and until the corporation is legally organized, the promoters are liable as partners. *Rosenheim Shoe Co. v. Horne*, 10 Ga. App. 582, 73 S.E. 953 (1912), later appeal, 14 Ga.



App. 13, 80 S.E. 24 (1913) (decided under Civil Code 1910, § 2220).

**Purpose.** — The requirement of former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63) was for the purpose of creating a fund for the ultimate benefit of those who may extend credit to the corporation. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S.E. 13 (1911); *Smith v. Citizens & S. Bank*, 148 Ga. 764, 98 S.E. 466 (1919) (decided under former Civil Code 1910, § 2220).

**Capital stock of a corporation is deemed a trust fund** for payment of its debts. *Williams v. Clemons*, 178 Ga. 619, 173 S.E. 718 (1934) (decided under former Civil Code 1910, § 2220); *Eubanks v. Allstate Ins. Co.*, 441 F.2d 7 (5th Cir. 1971) (decided under Ga. L. 1937-38, Ex. Sess., p. 214, § 34).

### Application

**Section is strictly construed.** — Former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63) was in derogation of the common law, and must be strictly construed. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S.E. 13 (1911); *Ham v. Robinson Co.*, 146 Ga. 442, 91 S.E. 483 (1917) (decided under former Civil Code 1910, § 2220).

**Former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63) was remedial**, and not penal; and a cause of action thereunder does not abate with the death of one liable by virtue of the statute. *Ham v. Robinson Co.*, 146 Ga. 442, 91 S.E. 483 (1917) (decided under former Civil Code 1910, § 2220).

**Section not applicable to actions ex delicto.** — The cause of action given to creditors against persons who organize a company and transact business in its name before the minimum capital stock has been subscribed, does not include an action by one whose claim or demand against the corporation is ex delicto and does not spring from contract, express or implied. *Howard v. Long*, 142 Ga. 789, 83 S.E. 852 (1914) (decided under former Civil Code 1910, § 2220).

**Breach of lease contract constitutes debt.** — The claim of the plaintiff for damages for breach of a contract of lease, where the persons who organized the company transacted business in its name before the minimum capital stock had been subscribed, is a debt within the meaning of former Civil

Code 1910, § 2220 (see O.C.G.A. § 14-4-63). *American Ice Cream Mfg. Co. v. Economy Laundry Co.*, 148 Ga. 624, 97 S.E. 678 (1918) (decided under former Civil Code 1910, § 2220).

**What constitutes "minimum capital stock."** — Where the application for charter and the charter of the corporation name only one sum as the proposed capital of the corporation, that sum is the "minimum capital stock" which former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63) required to be subscribed for in order to relieve the organizers of the corporation from individual liability to creditors. *Rosenheim Shoe Co. v. Horne*, 10 Ga. App. 582, 73 S.E. 953 (1912), later appeal, 14 Ga. App. 13, 80 S.E. 24 (1913); *Smith v. Citizens & S. Bank*, 148 Ga. 764, 98 S.E. 466 (1914) (decided under former Civil Code 1910, § 2220).

**Only bona fide subscriptions counted.** — In determining whether the minimum capital stock in a corporation has been subscribed, only bona fide subscriptions should be counted; colorable and illusory subscriptions, and conditional subscriptions, unless the conditions have been performed and the subscriptions thus made absolute before the persons organizing such corporation begin business in its name, should be rejected. *Athens Apt. Corp. v. Hill*, 156 Ga. 437, 119 S.E. 631 (1923) (decided under former Civil Code 1910, § 2220).

**Participation in transaction of business essential to liability.** — Under former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63), participation in the transaction of the business as well as in the organization of the company was essential to liability, so that a bill failing to allege that defendant stockholders participated in the transaction of the business by the company is insufficient. *O.B. Andrews Co. v. Willingham*, 286 F. 117 (5th Cir. 1923) (decided under former Civil Code 1910, § 2220).

### Remedy

**Accrual of cause of action.** — Where debtor company never received enough capital stock for its organization, no cause of action arose in favor of the bank before the persons who organized the company transacted business in its name with the bank, and the statute of limitations did not apply until a cause of action accrued. *Rucker v. Mobley*,

**Remedy (Cont'd)**

178 Ga. 496, 173 S.E. 392 (1934) (decided under former Civil Code 1910, § 2220).

**Creditor's right to presume that statute complied with.** — The requirement of the statute that the minimum capital stock of a corporation shall be subscribed for before the organizers thereof shall transact business in its name is obviously for the purpose of creating a fund, when the subscriptions to the amount of the minimum capital stock shall have been paid, for the ultimate benefit of those who may extend credit to the corporation; and such persons have the right to presume that the statute has been complied with, and to rely, if necessary, upon the statutory liability of those failing to observe the law. *Williams v. Clemons*, 178 Ga. 619, 173 S.E. 718 (1934) (decided under former Civil Code 1910, § 2220).

**Remedy in equity.** — The liability imposed by former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63) constituted a trust fund for the benefit of all creditors, and an action at law cannot be maintained by one creditor among many for the appropriation of the whole or any part of such liability to the creditor's own benefit, to the possible exclusion of all or any of the other creditors; but the remedy is in equity by a petition brought at the instance of one or more creditors and in behalf of all other creditors who may come in and be made parties plaintiff to the action. *Hill & Merry v. Jackson Stores*, 137 Ga. 174, 73 S.E. 13 (1911); *Mobley ex rel. State Banking Co. v. Rucker*, 176 Ga. 178, 167 S.E. 104 (1932) (decided under former Civil Code 1910, § 2220).

**Stock Transfer by Organizers**

**Organizers liable for debts even after stock transfer.** — Persons who organize a company and transact business in its name before the minimum capital stock has been subscribed for, but who afterwards sell and transfer their stock and interest in the company, are nevertheless subject to the liability prescribed by former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63) for the satisfaction of debts subsequently contracted

by the corporation. *Williams v. Clemons*, 178 Ga. 619, 173 S.E. 718 (1934) (decided under former Civil Code 1910, § 2220).

**Organizers committing fraud upon creditors.** — Organizers of a company who transact business in its name before the minimum capital stock has been subscribed for are considered as committing a fraud upon those who may extend credit to the company, and former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63) imposed a liability upon them for engaging in such fraudulent transaction, and they should not be allowed to escape the statutory penalty for such fraud by disposing of their stock. *Williams v. Clemons*, 178 Ga. 619, 173 S.E. 718 (1934) (decided under former Civil Code 1910, § 2220).

**Defenses**

**Creditor's knowledge that minimum capital stock not subscribed as defense.** — If at the time credit was extended the creditor knew that the requisite amount of capital stock had not been subscribed, the creditor would not have been misled, and as to that creditor the persons organizing the corporation and transacting business in its name would not be estopped from pleading such knowledge as a defense to a suit brought under former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63). *Lowe v. Byrd*, 148 Ga. 388, 96 S.E. 1001 (1918); *Farmers Whse. & Fertilizer Co. v. Macon Fertilizer Works*, 150 Ga. 429, 104 S.E. 207 (1920); *Athens Apt. Corp. v. Hill*, 156 Ga. 437, 119 S.E. 631 (1923); *Williams v. Clemons*, 178 Ga. 619, 173 S.E. 718 (1934) (decided under former Civil Code 1910, § 2220).

**Running of statute of limitations.** — In an action for fraud under former Civil Code 1910, § 2220 (see O.C.G.A. § 14-4-63), the statute of limitations did not begin to run until the plaintiffs had knowledge that the minimum capital stock of the corporation had not been subscribed for before the organizers thereof began to transact business in the name of the corporation. *Williams v. Clemons*, 178 Ga. 619, 173 S.E. 718 (1934) (decided under former Civil Code 1910, § 2220).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, § 135. 18A Am. Jur. 2d, Corporations, §§ 254, 255.

**ALR.** — Inadequate capitalization as factor in disregard of corporate entity, 63 ALR2d 1051.

## 14-464. Responsibility for acts of officers.

Every corporation acts through its officers and is responsible for the acts of such officers in the sphere of their appropriate duties; and no corporation shall be relieved of its liability to third persons for the acts of its officers by reason of any bylaws or other limitation upon the power of the officer not known to such third person. (Orig. Code 1863, § 1634; Code 1868, § 1679; Code 1873, § 1680; Code 1882, § 1680; Civil Code 1895, § 1861; Civil Code 1910, § 2225; Code 1933, § 22-712; Code 1933, § 22-4105, enacted by Ga. L. 1968, p. 565, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-712, are included in the annotations for this Code section.

**Officers and agents distinguished.** — The officers, as such, are the corporation, while the agent is a mere employee or servant of the corporation. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953) (decided under former Code 1933, § 22-712).

**Corporation not liable merely because tort-feasor is director and officer.** — The mere fact that one who commits a tort is a director and officer of a corporation does not, without more, render the corporation liable. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953) (decided under former Code 1933, § 22-712).

**When corporation is liable for malicious acts of agent or officer.** — A corporation is not liable for the malicious acts of its agent or officer unless the same are authorized, or were within the scope of the agent's duties, or were in themselves a violation of a duty owed by the corporation to the party injured, or such acts were ratified by the corporation. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953) (decided under former Code 1933, § 22-712).

Bank was not liable for a malicious prosecution in which its vice-president participated, encouraged and aided, and purported to act for the corporation, where it did not affirmatively appear that the bank

authorized the vice-president to engage in such prosecution or aid and abet therein, or that the bank assented thereto or ratified the same. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953) (decided under former Code 1933, § 22-712).

**Responsibility for acts of president.** — A corporation can only act by and through its proper and duly authorized officers, agents, and servants. The president of a corporation is its alter ego in many respects, and, without any special delegation of authority, is presumed to have power to act for it in matters within the scope of its ordinary business. However, the president of a corporation, who has no charter authority nor authority from the controlling board of directors, either general or special, so to do, cannot borrow money in the name of the corporation and execute a corporate promissory note binding upon such corporation, where the corporation received none of the proceeds of the loan, nor any benefit therefrom, nor ratified such action upon the part of its president in any manner. *Farmers' & Merchants' Bank v. Stovall Inv. Co.*, 50 Ga. App. 277, 177 S.E. 882 (1934) (decided under former Code 1933, § 22-712).

**Corporate liability because of ratification.** — While a president of a corporation has no general authority by reason of office alone to borrow money and bind the corporation by a note evidencing the loan, signed by the president in the name of the corporation,

yet where the proceeds of such note go to the corporation and are checked out by its duly empowered officers, such conduct amounts to a ratification of such act whether

authorized or not. *Black Walnuts v. First Nat'l Bank*, 53 Ga. App. 304, 185 S.E. 726 (1936) (decided under former Code 1933, § 22-712).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1663-1683.

**ALR.** — Right of individual creditor to enforce for his own benefit personal liability of directors or officers of corporation for incurring excessive debts, 43 ALR 1147.

Validity of obligation given by corporation for a personal debt of officer or stockholder, 47 ALR 78.

Implied or ostensible authority of officer or employee of private corporation to take or negotiate leaseholds for corporation or its subsidiaries, 107 ALR 996.

Power of corporate officer or agent to hire employees for life, 28 ALR2d 929.

### 14-4-65. Improper dividends; liability of officers.

No corporation or association shall declare any dividend or distribute any money among its members as profits when such dividend or money is not declared or distributed from the actual legitimate net earnings and in any manner increases its debts. Should the president, directors, or other agent of any corporation declare a dividend or dividends in violation of the above provisions they shall be subject to an action for double the amount of damages that any person or persons may sustain in consequence of the declaring of such dividend or dividends. (Ga. L. 1877, p. 35, §§ 1-3; Code 1882, §§ 4604a, 4604b, 4604c; Penal Code 1895, § 691; Ga. L. 1902, p. 58, § 1; Penal Code 1910, § 740; Code 1933, § 22-713; Code 1933, § 22-4106, enacted by Ga. L. 1968, p. 565, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1216, 1217, 1307-1317.

**C.J.S.** — 18 C.J.S., Corporations,

§§ 294-298. 19 C.J.S., Corporations, §§ 485, 489.

## ARTICLE 5

### RENEWAL OR REVIVAL OF CHARTER

**Law reviews.** — For article, "An Introduction to the New Georgia Corporation Law," see 4 Ga. St. B.J. 419 (1968).

### RESEARCH REFERENCES

**ALR.** — Extension or renewal of period of corporate existence, 108 ALR 59.

Reinstatement of repealed, forfeited, ex-

pired, or suspended corporate charter as validating acts in interim, 13 ALR2d 1220.

Reinstatement of repealed, forfeited, ex-



pired, or suspended corporate charter as validating interim acts of corporation, 42 ALR4th 392.

#### 14-4-80. Renewal of charter.

(a) Any railroad, canal, navigation, express, or telegraph company heretofore incorporated by an Act of the General Assembly or by a certificate of the Secretary of State may have its charter renewed and its corporate existence extended for a period of 30 years by filing with the Secretary of State at any time within six months prior to the expiration of its charter an application signed with its corporate name and under its corporate seal, in which it shall state:

- (1) The name of the corporation;
- (2) When and how it was incorporated, giving the date of its original charter and all amendments and renewals thereto; and
- (3) That it desires a renewal of its charter as set out in the original charter and amendments thereto.

Upon filing such application, the corporation shall pay to the Secretary of State a fee of \$100.00 to be paid by him into the state treasury.

(b) Such corporation shall file with the application an abstract from the minutes of the corporation, duly certified by the president and secretary of the corporation, showing that the application for renewal has been authorized by resolution which has been duly adopted by the affirmative vote of the holders of a majority of the shares entitled to vote thereon at a meeting held for the purpose of passing upon such resolution.

(c) Upon the filing of the application and abstract, the Secretary of State shall issue to the petitioning corporation a certificate under the seal of the state renewing its charter for a period of 30 years from the date of its expiration. The Secretary of State shall keep on file the application and abstract and shall record the application, the abstract, and the certificate granting the renewal in a book kept for that purpose.

(d) Upon filing the application and abstract and the issuance of the certificate prescribed, the corporation shall be conclusively presumed to have accepted the renewal of its charter; and the corporation shall be a body corporate and shall continue in existence for the space of 30 years with all the powers, privileges, and liabilities granted in the original charter and the amendments thereto, so far as the same are not in conflict with the Constitution and laws of the state, in force on April 1, 1969, or thereafter. (Ga. L. 1893, p. 88, §§ 1-3; Civil Code 1895, §§ 1836, 1837, 1838; Civil Code 1910, §§ 2193, 2194, 2195; Code 1933, §§ 22-501, 22-502, 22-503; Code 1933, §§ 22-4301, 22-4302, 22-4303, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1969, p. 152, § 102; Ga. L. 1982, p. 3, § 14.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2914-2920.

**C.J.S.** — 18 C.J.S., Corporations, §§ 52, 53.

**14-481. Revival of expired charter.**

(a) In all cases where a charter of any corporation incorporated by an Act of the General Assembly or by a certificate of the Secretary of State has expired and such corporation has continued in business in ignorance of such expiration, such charter may be revived in the same manner as original charters are procured from the Secretary of State at any time within ten years from the date of expiration, provided that a majority of the stockholders of the corporation at a regular or special meeting, notice of the purpose of the meeting having been given to the stockholders, shall have adopted a resolution asking for such revival and stating that all the stockholders shall be bound by the resolution.

(b) Upon the issuance by the Secretary of State of a certificate reviving the corporation, all the property and other rights of the corporation shall continue in the corporation as so revived and the acts of such corporation in the period between the date of expiration and date of revival shall be thereby confirmed and held as the acts of the original corporation so revived. The corporation shall continue from the date of issuance of the certificate by the Secretary of State for the full period allowed by law for such corporations. (Ga. L. 1912, p. 107, § 1; Ga. L. 1914, p. 96, § 2; Ga. L. 1933, p. 124, § 1; Code 1933, §§ 22-601, 22-602; Code 1933, §§ 22-4304, 22-4305, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1982, p. 3, § 14.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under Ga. L. 1912, p. 107; Ga. L. 1914, p. 96, and former Code 1933, §§ 22-601, 22-602, are included in the annotations for this Code section.

**Corporation is not entirely extinct by expiration of charter.** — A company must be treated as a de facto corporation within the period in which the charter may be renewed when the record shows no facts to the effect that a revival of the corporation may not yet be had. *West v. Flynn Realty Co.*, 53 Ga. App. 594, 186 S.E. 753 (1936) (decided under former Code 1933, § 22-601).

A corporation whose charter has expired is not a perfect legal entity so as to be classed as a corporation de jure, but may be consid-

ered as a corporation de facto. *Huey v. National Bank*, 177 Ga. 64, 169 S.E. 491 (1933) (decided under Ga. L. 1912, p. 107; Ga. L. 1914, p. 96).

A corporation is not deprived of all semblance of legality merely by the expiration of its charter; but the charter may under certain conditions be revived at any time within ten years, and if it is so revived all of the property and other rights of such corporation shall continue as corporate assets and all that the corporation may have done in the meantime shall be held as the acts and doings of the original corporation so revived. *Huey v. National Bank*, 177 Ga. 64, 169 S.E. 491 (1933) (decided under Ga. L. 1912, p. 107; Ga. L. 1914, p. 96).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2914, 2917.

## ARTICLE 6

## AMENDMENT OF CHARTER

**Law reviews.** — For article, "An Introduction to the New Georgia Corporation Law," see 4 Ga. St. B.J. 419 (1968).

**14-4-100. Application for amendment of charter of companies incorporated by Act of General Assembly; surrender of certain powers by insurance companies.**

(a) Any insurance, railroad, canal, navigation, express, or telegraph company, incorporated prior to April 1, 1969, by special Act of the General Assembly, may amend its charter so as to acquire any or all of the corporate powers and privileges granted to a like corporation under the Acts passed prior to April 1, 1969, or thereafter, providing for the grant of corporate powers and privileges to such companies by the Secretary of State, by filing with the Secretary of State an application signed with the corporate name stating the name and character of the corporation, the date of the original Act of incorporation and all amendments thereto, and that it desires an amendment to its charter by having granted to it the corporate powers and privileges granted to similar corporations by the Act or certain specified sections of the Act, providing for the grant of corporate powers and privileges to such corporations by the Secretary of State, and by paying to the Secretary of State the fee provided by law, to be paid by him into the state treasury. The company shall file along with the application an abstract from the minutes of the corporation, duly certified by the president and secretary of the corporation, which abstract shows that the application for amendment has been authorized by resolution which has been duly adopted by the affirmative vote of the holders of a majority of the shares entitled to vote thereon at a meeting held for the purpose of passing upon the resolution.

(b) Whenever any insurance company incorporated by special Act of the General Assembly which is permitted by its charter to do other than a fire insurance business desires to abandon the same or any part thereof, it may, upon application to the Secretary of State, relinquish and surrender any or all of the powers and privileges granted to it for the conduct of such other business, provided no rights of contract are thereby violated. (Ga. L. 1893, p. 89, § 1; Civil Code 1895, § 1840; Ga. L. 1902, p. 49, § 1; Civil Code 1910, § 2197; Code 1933, § 22-505; Code 1933, § 22-4306, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1969, p. 152, § 103.)

## JUDICIAL DECISIONS

**Charter amendment authorizing majority vote.** — A 1970 charter amendment authorizing a railroad company, originally chartered by the General Assembly in 1847, to amend its charter by a vote of the majority of

its stockholders, which amendment was approved by all shares present, was valid. *Long v. Atlanta & W.P.R.R.*, 253 Ga. 257, 320 S.E.2d 530 (1984).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 92-95.

**C.J.S.** — 18 C.J.S., Corporations, §§ 55-58.

**ALR.** — Power of corporation to change obligations to stockholders, 117 ALR 1290.

**144-101. Issuance of certificate of amendment to acquire powers; form.**

If application shall be made under subsection (a) of Code Section 144-100 to amend the charter of an insurance, railroad, canal, navigation, express, or telegraph company incorporated by special Act of the General Assembly, the Secretary of State shall issue to the corporation the following certificate:

To whom it may concern — Greetings:

(Insert here name of petitioning corporation), a corporation created by an Act of the General Assembly of this state by an Act approved (insert here date of approval of Act), and Acts amendatory thereof, approved (insert here date of approval of amendatory Acts), having petitioned for an amendment of the charter of said corporation, in terms of the law in such case made and provided, the corporate powers and privileges set out in the Act (or certain specified sections of the Act), providing for the grant of corporate powers and privileges by the Secretary of State to (insert charter of company), are hereby conferred upon (insert name of company desiring amendment).

Witness my hand and the seal of this state, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

(Ga. L. 1893, p. 89, § 1; Civil Code 1895, § 1841; Ga. L. 1902, p. 49, § 2; Civil Code 1910, § 2198; Code 1933, § 22-506; Code 1933, § 22-4307, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1982, p. 3, § 14; Ga. L. 1983, p. 3, § 11; Ga. L. 1999, p. 81, § 14.)

**144-102. Issuance of certificate of amendment to surrender powers; form.**

If application shall be made by an insurance company under subsection (b) of Code Section 144-100 to amend its charter, the Secretary of State shall issue the insurance company the following certificate:

To whom it may concern — Greetings:

(Insert here name of petitioning insurance company), a corporation



created by an Act of the General Assembly of this state by an Act approved (insert here date of approval of Act), and Acts amendatory thereof, approved (insert here date of approval of amendatory Acts), having petitioned for an amendment of the charter of said corporation, in terms of the law in such case made and provided, by (insert here the particular powers or privileges which said insurance company desires to relinquish or surrender), said amendment is hereby granted and allowed and made a part of the charter of the said (insert name of insurance company desiring amendment).

Witness my hand and the seal of this state, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

(Civil Code 1895, § 1841; Ga. L. 1902, p. 49, § 2; Civil Code 1910, § 2198; Code 1933, § 22-507; Code 1933, § 22-4308, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1999, p. 81, § 14.)

#### **144-103. Acceptance of amendment conclusively presumed.**

After the filing of an application for an amended charter under Code Section 144-100 and the issuance of the certificate prescribed in Code Section 144-101 or 144-102, the corporation shall be conclusively presumed to have accepted the amendment specified and shall have, enjoy, and exercise all the corporate powers and privileges set out in the Act or the particular section of the Act specified in the application and certificate. (Ga. L. 1893, p. 89, § 2; Civil Code 1895, § 1842; Civil Code 1910, § 2199; Code 1933, § 22-508; Code 1933, § 22-4309, enacted by Ga. L. 1968, p. 565, § 1.)

#### **RESEARCH REFERENCES**

C.J.S. — 18 C.J.S., Corporations, §§ 55-58.

#### **144-104. Secretary of State to keep record of amendments.**

The Secretary of State shall keep on file all applications and abstracts filed with him under Code Section 144-100 and a book in which he shall enter the names of all the companies obtaining amendments to charters under that Code section, the date of the amendment, and, if appropriate, the Act or portions of the Act adopted as an amendment. (Ga. L. 1893, p. 89, § 3; Civil Code 1895, § 1843; Civil Code 1910, § 2200; Code 1933, § 22-509; Code 1933, § 22-4310, enacted by Ga. L. 1968, p. 565, § 1.)

**144-105. Amendments of charter and changes in capitalization of railroad companies undergoing reorganization in bankruptcy proceedings.**

(a) Notwithstanding any other laws of this state applicable to amendments of charters or certificates of incorporation of railroad companies incorporated under the laws of this state or to changes in the capitalizations thereof or to the issuance of capital stock, bonds, or other securities thereby, in cases in which a plan of reorganization of any such railroad company pursuant to Title 11, U.S.C., the act of Congress of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," as amended, or the Bankruptcy Reform Act of 1978 (either of which federal acts is referred to in this chapter as the "National Bankruptcy Act") has been confirmed by decree or order of a court of competent jurisdiction, the reorganization managers or committee designated in the plan of reorganization to consummate the same, or such other person or persons as may be so authorized by the court or judge in such reorganization proceedings, shall have full power and authority to adopt such amendments of the charter or certificate of incorporation of such railroad company, to make such changes in its authorized capitalization, and to issue such capital stock, bonds, and other securities as may be necessary and proper to put into effect and carry out such plan of reorganization and the decrees and orders of the court relative thereto without action by the directors or stockholders of such railroad company.

(b) After the adoption of such amendments of the charter or certificate of incorporation of such railroad company and the making of such changes in its authorized capitalization, a petition executed, acknowledged, and sworn to by such reorganization managers or committee, or such other person or persons so authorized by the court or judge to adopt such amendments and make such changes in capitalization, shall be filed in the office of the Secretary of State. Such petition shall show:

(1) The name and character of the company and, if the name has been changed, the name under which it previously existed;

(2) The dates of the original Act of incorporation, charter, or certificate of incorporation and of all amendments thereto;

(3) The amendments adopted;

(4) The new authorized capitalization of such company;

(5) The amount of capital stock, bonds, and other securities to be issued; and

(6) The fact that such amendments, new capitalization, and issuance of capital stock, bonds, and other securities were authorized by the plan of reorganization or in decrees or orders of the court relative thereto and



that the plan has been confirmed under Title 11, U.S.C., the National Bankruptcy Act, with the title and venue of the proceeding and the date when the decree or order confirming the plan was made.

(c) Upon the filing of such petition in the office of the Secretary of State and the payment to him of a fee of \$25.00, to be paid by him into the state treasury, the Secretary of State shall issue an appropriate certificate of change in the form prescribed in Code Section 14-4-121. Any such reorganized railroad company shall not be precluded from thereafter further amending its charter or certificate of incorporation or changing its capitalization or issuing capital stock, bonds, or other securities in the manner otherwise provided by law. (Code 1933, § 22-519, enacted by Ga. L. 1950, p. 220, § 1; Code 1933, § 22-4316, enacted by Ga. L. 1968, p. 565, § 1.)

**Cross references.** — Reorganization of railroad corporation sold under trust deed or judicial sale or upon which mortgage is foreclosed, §§ 46-8-107, 46-8-108.

**U.S. Code.** — The Bankruptcy Reform Act of 1978, referred to in this Code section, is codified at 11 U.S.C. § 101 et seq.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2694.

### ARTICLE 7

#### CHANGE OF NAME, CAPITAL STOCK, PLACE OF BUSINESS, OR NUMBER OF DIRECTORS

##### **14-4-120. Petition for change of name, principal office, capital stock, or number of directors.**

(a) Any railroad, insurance, express, telegraph, canal, or navigation company, whether incorporated by special Act of the General Assembly or by the Secretary of State under the general law, may have its corporate name, its principal office, the face value of each share of its capital stock, the number of its board of directors, or the amount of its capital stock changed by filing a petition in the office of the Secretary of State. The petition shall be signed with the corporate name and shall state the name and character of the corporation, the date of its original charter and all amendments thereto, and the fact that it desires an amendment to its charter changing its corporate name, its principal office, and the face value of each share of its capital stock, the number of its board of directors, or the amount of any or all of its capital stock, as the case may be.

(b) Such company shall file with the petition a certified abstract from the minutes of the board of directors showing that the petition for the proposed amendment has been authorized by the affirmative vote of the holders of a

majority of the capital stock entitled by the terms of the company's charter to vote thereon at a meeting of the stockholders called by resolution of the board of directors for the purpose of voting on the amendment; provided, however, if the petition is to change the principal office of the company, the certified abstract from the minutes shall show that the amendment was authorized by the affirmative vote of the holders of two-thirds of the capital stock of the company. The certified abstract from the minutes shall show also that notice of such meeting was mailed to each stockholder or, in the case of death, to his legal representatives or heirs at law and addressed to his last known residence at least ten days prior to the day of the meeting.

(c) An affidavit made and signed in due form of law by the president or secretary of the company shall be attached to said petition, which affidavit shows that the petition has been published once a week for four weeks in that newspaper in which are published the sheriff's sales of the county in which the principal office of the company is located. (Ga. L. 1895, p. 52, § 1; Civil Code 1895, § 1844; Ga. L. 1897, p. 26, §§ 1, 2; Ga. L. 1907, p. 55, § 1; Civil Code 1910, § 2201; Ga. L. 1913, p. 49, § 1; Ga. L. 1925, p. 91, § 1; Code 1933, §§ 22-510, 22-511, 22-513, 22-514; Code 1933, §§ 22-4311, 22-4312, 22-4313, 22-4314, enacted by Ga. L. 1968, p. 565, § 1.)

#### COMMENT

##### Note to 1981 Amendment

The 1981 amendment consolidated §§ 22-4311, 22-4312, 22-4313, and 22-4315 of prior Title 22 in this section.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 287, 288, 308, 466-469, 475-478. 18B Am. Jur. 2d, Corporations, § 1352.  
**C.J.S.** — 18 C.J.S., Corporations, §§ 103, 177, 178.

#### **144-121. Issuance of certificate of change of name, principal office, capital stock, or number of directors.**

When the petition, abstract, and affidavit required by Code Section 144-120 have been filed in the office of the Secretary of State, he shall issue to the petitioning company under the great seal of the state a certificate in the following form:

To all to whom these presents may come — Greetings:

Whereas, the (here insert name of petitioning corporation), a corporation created and existing under the laws of this state, has filed in this office, in terms of the law, a petition asking that its charter be amended by changing (its corporate name, or its principal office, or the face value of each share of its capital stock, or the number of its board of directors, or the amount of any or all of its capital stock, as the case may be) from \_\_\_\_\_ to \_\_\_\_\_ and has complied with all the requirements of the



law in such cases made and provided; therefore, the State of Georgia hereby amends the charter of the said (insert name of company) by changing (its corporate name, or principal office, etc., as the case may be) from (insert old name, or old principal office, etc.) to (insert new name, or new principal office, etc.).

In witness whereof, these presents have been signed by the Secretary of State, and the great seal has been attached hereof at the capitol in Atlanta on this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

(Ga. L. 1895, p. 52, § 2; Civil Code 1895, § 1845; Civil Code 1910, § 2202; Code 1933, § 22-515; Code 1933, § 22-4315, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1999, p. 81, § 14.)

## ARTICLE 8

### MERGER AND SHARE EXCHANGE

**Law reviews.** — For note on 1993 amendment of this article, see 10 Ga. St. U.L. Rev. 74 (1993).

#### **144-140. Merger or share exchange consolidation of corporations incorporated by Secretary of State.**

Any two or more corporations incorporated by the Secretary of State under provisions other than Chapter 2 of this title, except banks and trust companies, may merge into a single corporation or enter into a share exchange in the manner set forth in Article 11 of Chapter 2 of this title. (Code 1933, § 22-4401, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1976, p. 1102, § 33; Ga. L. 1989, p. 946, § 104; Ga. L. 1993, p. 1231, § 30.)

### COMMENT

#### **Note to 1976 Amendment**

The 1976 amendment to this section effected no change in the procedure for merger of Secretary of State corporations but removed a clause stating that no petition need be submitted to a judge of the superior court, since no such exception was necessary after the changes effected by the 1976 constitutional amendment.

#### **Note to 1993 Amendment**

The 1993 amendment conformed this section to the revised Business Corporation Code, by eliminating a reference to a consolidation and replacing it with a reference to a share exchange.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2608.

**C.J.S.** — 19 C.J.S., Corporations, § 796.

**14-4-141. Merger or share exchange consolidation of corporations chartered by Secretary of State with domestic corporations incorporated under Chapter 2.**

A corporation which has received its charter from the Secretary of State under provisions other than Chapter 2 of this title, other than a bank or trust company, may merge or enter into a share exchange with a domestic corporation or corporations governed by Chapter 2 of this title in accordance with Code Section 14-2-1108. (Code 1933, § 22-4402, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1976, p. 1102, § 34; Ga. L. 1989, p. 946, § 105; Ga. L. 1993, p. 1231, § 31.)

**COMMENT**

**Note to 1976 Amendment**

The 1976 amendment to this section made no substantive change but deleted a reference to corporations chartered by the superior courts that was made obsolete by the changes effected in the 1976 constitutional amendment.

**Note to 1993 Amendment**

The 1993 amendment conformed this section to the revised Business Corporation Code, by eliminating a reference to a consolidation and replacing it with a reference to a share exchange.

**JUDICIAL DECISIONS**

**Merger involving chartered company subsequently adopting corporate law.** — The proposed merger between a railroad company originally chartered by the General Assembly in 1847, but which amended its

charter in 1970 to adopt the provisions of the general corporate laws, and a nonrailroad corporation was not unlawful. *Long v. Atlanta & W.P.R.R.*, 253 Ga. 257, 320 S.E.2d 530 (1984).

**OPINIONS OF THE ATTORNEY GENERAL**

**The specific intent of former Code 1933, § 22-4402 (see O.C.G.A. § 14-4-141)** was to except banks and trust companies from the

provisions allowing Secretary of State corporations to merge with superior court corporations. 1972 Op. Att'y Gen. No. 72-169.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2608.

**C.J.S.** — 19 C.J.S., Corporations, § 796.

**14-4-142. Merger or share exchange consolidation of corporations chartered by Secretary of State with foreign corporations.**

A corporation which has received its charter from the Secretary of State under provisions other than Chapter 2 of this title, other than a bank or trust company, may merge or enter into a share exchange with one or more foreign corporations in accordance with Code Section 14-2-1107. (Code



1933, § 22-4403, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1976, p. 1102, § 35; Ga. L. 1989, p. 946, § 106; Ga. L. 1993, p. 1231, § 32.)

#### COMMENT

##### Note to 1976 Amendment

The 1976 amendment to this section effected no change in the procedure for merger of Secretary of State corporations but removed a clause stating that no petition need be submitted to a judge of the superior court, since no such exception was necessary after the changes effected by the 1976 constitutional amendment.

##### Note to 1993 Amendment

The 1993 amendment conformed this section to the revised Business Corporation Code, by eliminating a reference to a consolidation and replacing it with a reference to a share exchange.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, § 2642 et seq. **C.J.S.** — 19 C.J.S., Corporations, § 796.

#### **144-143. Right of stockholder to dissent from merger or share exchange consolidation — Demand for payment of value of stock.**

If any corporation incorporated by the Secretary of State under provisions other than Chapter 2 of this title, except banks and trust companies, merges or enters into a share exchange with another corporation pursuant to Code Section 14-4-140, 14-4-141, or 14-4-142, the rights of shareholders of such corporation to dissent from and obtain payment of the fair value of their shares in connection with such merger or share exchange shall be governed by provisions of Article 13 of Chapter 2 of this title. (Code 1933, § 22-4404, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1993, p. 1231, § 33.)

#### COMMENT

##### Note to 1993 Amendment

The 1993 amendment conformed this section to the revised Business Corporation Code, by eliminating a reference to a consolidation and replacing it with a reference to a share exchange. It also conformed the procedures for dissenters' rights to those of the Business Corporation Code. Former section 14-4-144 was repealed in its entirety to achieve this result.

#### JUDICIAL DECISIONS

**Injunction not an available remedy.** — The minority shareholders of a railroad company were not entitled to enjoin a merger between the railroad and a non-railroad corporation, having offered no facts to support the same, and having an adequate remedy at law under O.C.G.A. § 14-2-250 and § 14-4-143, which provide for a fair and adequate price to dissenting shareholders. *Long v. Atlanta & W.P.R.R.*, 253 Ga. 257, 320 S.E.2d 530 (1984).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2574-2586.

**C.J.S.** — 19 C.J.S., Corporations, §§ 799-801.

**ALR.** — Construction and effect of provision for payment of dissenting stockholders in statutes relating to merger, consolidation, or reorganization of banks or other corporations, 162 ALR 1237; 174 ALR 960.

Timeliness and sufficiency of dissenting stockholder's notice of his objection to consolidation or merger and of his demand for payment for his shares, 40 ALR3d 260.

Valuation of stock of dissenting stockholders in case of consolidation or merger of corporation, sale of its assets, or the like, 48 ALR3d 430.

**144-144. Arbitration of value of stock.**

Reserved. Repealed by Ga. L. 1993, p. 1231, § 34, effective July 1, 1993.

**Editor's notes.** — This Code section was based on Ga. L. 1968, p. 565, § 1.

**144-145. Appeal from appraisal.**

Within ten days after an appraisal is filed in the office of the clerk of the superior court pursuant to Code Section 14-4-144, either the dissenting stockholder or the corporation may enter an appeal in writing to the superior court from the finding of the arbitrators. At the term succeeding and convening not less than 20 days after the filing of the appeal, the judge of the superior court shall cause an issue to be made and tried by a jury as to the value of the stock with the same right to move for a new trial and to seek appellate review as applies in other cases. (Code 1933, § 22-4406, enacted by Ga. L. 1968, p. 565, § 1.)

## RESEARCH REFERENCES

**ALR.** — Valuation of stock of dissenting stockholders in case of consolidation or merger of corporation, sale of its assets, or the like, 48 ALR3d 430.

**144-146. Cessation of stockholders' rights and transfer of stock to corporation.**

Upon making demand in writing for the value of his stock under Code Section 14-4-143, a stockholder shall forfeit all rights with respect to such stock except the right to receive payment therefor. Upon payment of the agreed value of the stock or of the value of the stock on final judgment, the stockholder shall transfer his stock to the surviving or resulting corporation. (Code 1933, § 22-4407, enacted by Ga. L. 1968, p. 565, § 1.)



**144-147. Enforcement against corporation of judgment determining value of stock.**

In the event the surviving or resulting corporation shall fail to pay the amount of a judgment determining the value of a dissenting stockholder's stock within ten days after the judgment becomes final, execution shall issue thereon and said judgment shall be enforced as other judgments of the superior court are enforced. (Code 1933, § 22-4408, enacted by Ga. L. 1968, p. 565, § 1.)

**144-148. Stockholders of surviving or resulting corporation.**

Each stockholder in either of the consolidating or merging corporations at the time the merger or consolidation becomes effective who is entitled to vote but who does not vote against the merger or consolidation and object thereto in writing, as provided in Code Section 144-143, and each stockholder in each of the constituent corporations at the time the merger or consolidation becomes effective who is not entitled to vote and who does not object thereto in writing, as provided in Code Section 144-143, shall cease to be a stockholder in such constituent corporation and shall be deemed to have assented to the consolidation or merger. Such stockholders together with the stockholders voting in favor of the consolidation or merger shall be entitled to receive certificates of stock in the surviving or resulting corporation or other securities or property in the manner and on the terms specified in the agreement. (Code 1933, § 22-4409, enacted by Ga. L. 1968, p. 565, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2639, 2640.

**C.J.S.** — 19 C.J.S., Corporations, § 808.

**144-149. Article cumulative of other provisions.**

The right and power to merge or consolidate provided by this article is cumulative and is in addition to any power or right to merge or consolidate vested in corporations created prior to April 1, 1969, or provided by or under the terms of other statutes or this Code. (Code 1933, § 22-4410, enacted by Ga. L. 1968, p. 565, § 1.)

**144-150. Recording of charter of consolidated or merged corporation.**

Upon the merger or consolidation of corporations as provided in this article, the consolidated corporation or the corporation into which the constituent corporations are merged may cause to be recorded in the records of any clerk of any superior court of this state a certified copy of the charter of the consolidated corporation or the corporation into which the

constituent corporations are merged with the certificate of the Secretary of State thereon with the same force and effect as is provided by the statutes of this state for the record of deeds conveying title to land. (Code 1933, § 22-4411, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1976, p. 1102, § 36.)

#### COMMENT

##### Note to 1976 Amendment

The 1976 amendment made no substantive change to this section but deleted a reference to the order of a judge of the superior court, since such reference was made obsolete by the changes effected by the 1976 constitutional amendment.

### ARTICLE 9

### FORFEITURE AND DISSOLUTION

#### 14-4-160. Forfeiture of charter.

(a) A corporation may forfeit its charter:

(1) By failure to file its annual registration with the Secretary of State as required by Code Section 14-4-180 or by failure to file its annual license or occupational tax return on or before the day such return becomes due;

(2) By having procured its charter through fraud; or

(3) By continuing to violate the laws of this state in a manner likely to injure the public or the corporation's shareholders, creditors, or debtors after written notice by the Secretary of State to the corporation at its last known address as shown by the records of the Secretary of State, except that the Secretary of State shall not declare a forfeiture on this ground so long as the corporation is contesting in good faith in any appropriate judicial or administrative proceeding the alleged violation or violations of the laws of this state.

(b) Forfeiture may be declared by the Secretary of State for the reasons stated in this Code section, and such a forfeiture shall have the effect of dissolving the corporation; but before any forfeiture shall be so declared the corporation shall be afforded a hearing by the Secretary of State on not less than 30 days' notice. Such hearing shall be held in the office of the Secretary of State at such reasonable time as he shall designate.

(c) From an adverse decision of the Secretary of State the corporation may appeal to the Superior Court of Fulton County, whereupon the matter shall be tried de novo by the court without a jury; and the court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper. (Code 1933, § 22-4109, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1969, p. 152, § 97; Ga. L. 1989, p. 1027, § 31.)



**Cross references.** — Institution by Department of Banking and Finance of quo warranto or other appropriate proceedings to vacate and forfeit articles of incorporation

of financial institution, § 7-1-92. Voluntary dissolution of financial institutions, § 7-1-113 et seq.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2788-2802, 2823.

**C.J.S., Corporations,** §§ 812, 818, 819, 823, 835, 840, 841, 844.

**C.J.S.** — 18 C.J.S., Corporations, § 37. 19

### 144-161. Effect of dissolution upon causes of action; service of process.

(a) The dissolution of a corporation either as a result of the expiration of its charter or for any other cause shall not bring about its total extinction nor operate to extinguish any demand or cause of action against it in favor of any person whomsoever, whether arising from contract or tort; nor shall such dissolution work the abatement of any action pending against it at the time of such dissolution; but all such pending actions may be prosecuted and enforced to a conclusion as though such corporation were still undissolved.

(b) Actions for the enforcement of any demand or cause of action due by a dissolved corporation may to a like extent be instituted and enforced against it in any court having jurisdiction thereof at the time of its dissolution; and service thereon may be perfected either by seizure of the property of such corporation, by any form of legal process, or by serving with process issued upon said actions any person who, as an agent or officer of such corporation, was subject to be served as its officer or agent at the time of such dissolution. (Ga. L. 1918, p. 136, §§ 1, 2; Code 1933, §§ 22-1210, 22-1211; Code 1933, §§ 22-4110, 22-4111, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1982, p. 3, § 14.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-1210, are included in the annotations for this Code section.

**A corporation is not entirely extinct because of expiration of its charter.** — A company must be treated as a de facto corporation within the period in which the charter may be renewed when the record shows no facts to the effect that a revival of the corporation may not yet be had. *West v. Flynn Realty Co.*, 53 Ga. App. 594, 186 S.E. 753 (1936) (decided under former Code 1933, § 22-1210).

**Demand or cause of action not extinguished by dissolution of corporation.** — If

the defendant insurance company were dissolved, its dissolution would not operate to extinguish the demand or cause of action against it in this state, and "pending suits may be prosecuted and enforced to a conclusion as though such corporation were still undissolved." *Manufacturing Lumbermen's Underwriters v. South Ga. Ry.*, 57 Ga. App. 699, 196 S.E. 244 (1938) (decided under former Code 1933, § 22-1210).

**Protection of citizens in collection of claims.** — The statute as to the depositing of bonds and retaining them so long as there is a pending claim in the state, and the statute providing for the prosecution of pending suits after the dissolution of a foreign corpo-

ration, are a part of the general scheme of the Georgia law to protect Georgia citizens in the collection of just claims against foreign corporations which are dissolved and which have their principal assets in another state. *Manufacturing Lumbermen's Underwriters v. South Ga. Ry.*, 57 Ga. App. 699, 196 S.E. 244 (1938) (decided under former Code 1933, § 22-1210).

**Bonds required of foreign insurance corporations doing business.** — The bonds which a foreign insurance corporation doing business in this state is required to deposit with the state treasurer (now director of the Office of Treasury and Fiscal Services) are to prevent a suit against a dissolved corporation from being futile and unavailing; and a suit brought in a local court is a condition precedent to the appropriation of the bonds

held by the state treasurer (now director of the Office of Treasury and Fiscal Services) to the payment of a fire loss. *Manufacturing Lumbermen's Underwriters v. South Ga. Ry.*, 57 Ga. App. 699, 196 S.E. 244 (1938) (decided under former Code 1933, § 22-1210).

**Citizenship of county of principal office does not cease during dissolution.** — Former Code 1933, § 22-1210 (see O.C.G.A. § 14-4-161) existed for the purposes therein named. There was nothing in it to indicate that during the period of dissolution a corporation ceases for the purpose of suit to be a citizen of that county where its principal office was located. *Newman Motors, Inc. v. Arrington*, 194 Ga. 569, 22 S.E.2d 163 (1942) (decided under former Code 1933, § 22-1210).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 19 Am. Jur. 2d, Corporations, §§ 2842, 2843, 2896, 2901-2906.

**C.J.S.** — 19 C.J.S., Corporations, §§ 858, 881.

**ALR.** — Who is "managing agent" of domestic corporation within statute providing for service of summons or process thereon, 71 ALR2d 178.

Manner of service of process upon foreign corporation which has withdrawn from state, 86 ALR2d 1000.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 ALR3d 738.

## ARTICLE 10

### ANNUAL REPORTS AND FEES

#### 144-180. Annual registration required.

It shall be the duty of all corporations incorporated by the Secretary of State to file with the Secretary of State an annual registration as prescribed by Code Section 14-2-1622. (Ga. L. 1906, p. 105, § 2; Civil Code 1910, § 2209; Code 1933, § 22-1703; Code 1933, § 22-4601, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1969, p. 152, § 69; Ga. L. 1977, p. 324, § 17; Ga. L. 1989, p. 1027, § 32.)

### COMMENT

#### Note to 1969 Amendment

The 1969 amendment to this section added trust companies as corporations exempt from making annual reports.

#### Note to 1977 Amendment

The 1977 amendment to this section changed the filing date for annual reports by Secretary of State corporations from November 1 to April 1 to correspond with the April



1 filing date for annual reports required of corporations organized under the Georgia Business Corporation Code. See § 14-2-351.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, § 339.

**C.J.S.** — 19 C.J.S., Corporations, § 583.

**ALR.** — Persons liable under statutes imposing, upon directors, officers, or trustees

of a corporation, personal liability for its debts on account of their failure to file or publish reports, required by law, as to corporate matters, 39 ALR3d 428.

### 144-181. Penalty for failure to report.

Reserved. Repealed by Ga. L. 1989, p. 1027, § 33, effective July 1, 1989.

**Editor's notes.** — This Code section was based on Ga. L. 1906, p. 105, § 4; Ga. L. 1968, p. 565, § 1; Ga. L. 1975, p. 778, § 3.

### 144-182. Filing of reports by Secretary of State; correction of improper reports.

Reserved. Repealed by Ga. L. 1989, p. 1027, § 34, effective July 1, 1989.

**Editor's notes.** — This Code section was based on Ga. L. 1968, p. 565, § 1; Ga. L. 1982, p. 3, § 14.

### 144-183. Fees of Secretary of State for filing documents.

The Secretary of State shall collect fees as prescribed in Code Section 14-2-122 when the documents described in this chapter are delivered to him for filing. (Code 1933, § 22-4701, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1969, p. 152, §§ 70, 71; Ga. L. 1989, p. 1027, § 35.)

**Cross references.** — Fees to be paid to Secretary of State for filing of articles of incorporation or amendment of financial institutions, § 7-1-862.

### COMMENT

#### Note to 1969 Amendment

The 1969 amendment to this section added to the words "Certification of a copy or" at the beginning of paragraph (8) and added paragraph (9).

### OPINIONS OF THE ATTORNEY GENERAL

**General Assembly intended by former Code 1933, § 22-4701 (see O.C.G.A. § 14-4-183) to provide uniform fees to be charged by the Secretary of State for the**

Secretary's duties relating to the corporations which are chartered by the Secretary of State, including banking corporations. 1969 Op. Att'y Gen. No. 69-492.

## CHAPTER 5

MISCELLANEOUS PROVISIONS RELATING TO  
CORPORATIONS

Article 1		Sec.	
General Provisions		14-5-22.	Condition of acceptance of documents.
Sec.		14-5-23.	Rules and regulations.
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14-5-5.	Personal use or borrowing of corporate property by officer or director [Repealed].	14-5-41.	Validity of contracts and deposits; enforcement.
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14-5-11.	Applicability of Chapters 2 and 3 to corporations chartered by General Assembly; filing of annual registration with Secretary of State.	14-5-47.	Authority of churches or religious societies over trustees holding land for their use.
		14-5-48.	Vacancies in administration of land trusts for use of churches and religious societies; certificate of appointment.
		14-5-49.	Applicability of Code Sections 14-5-46 through 14-5-48 to other societies.
		14-5-50.	Corporate rights generally.
		14-5-51.	Powers of eleemosynary and religious corporations extended.
Article 2			
Corporation Commissioner			
14-5-20.	Secretary of State as corporation commissioner.		
14-5-21.	Fees; report.		

**Administrative rules and regulations.** — State of Georgia, Office of Secretary of State, Rules of General Applicability, Official Compilation of the Rules and Regulations of the Commissioner of Corporations, Chapter 590-7-1.



**RESEARCH REFERENCES**

**ALR.** — Financial inability of corporation to take advantage of business opportunity as affecting determination whether “corporate

opportunity” was presented, 16 ALR4th 185. State regulation of land ownership by alien corporation, 21 ALR4th 1329.

**ARTICLE 1****GENERAL PROVISIONS****14-5-1. Intention.**

This chapter is intended to be and is merely a recompilation of existing statutes affecting and regulating corporations and is not intended to change or alter the legal status of any corporation in existence on April 1, 1969. (Code 1933, § 22-5601, enacted by Ga. L. 1969, p. 152, § 74.)

**JUDICIAL DECISIONS**

**Cited in** Bagley v. Carter, 235 Ga. 624, 220 S.E.2d 919 (1975).

**14-5-2. By whom powers granted.**

All corporate powers and privileges of banking, trust, insurance, railroad, canal, navigation, express, and telegraph companies shall be issued and granted by the Secretary of State. Corporate powers and privileges of all other private companies shall be granted only as provided in Chapters 2 and 3 of this title. (Code 1933, § 22-5101, enacted by Ga. L. 1968, p. 565, § 1.)

**Cross references.** — Granting corporate powers and privileges, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

**COMMENT****Note to 1981 Amendment**

The 1981 amendment to this section added the word “trust” to the list of corporations governed by the Secretary of State to conform to Article III, Section VIII, Paragraph V of the 1976 Constitution.

**OPINIONS OF THE ATTORNEY GENERAL**

**Editor’s notes.** — In light of the similarity of the provisions, an opinion under former Code 1933, § 22-201 is included in the annotations for this Code section.

**A telephone company may not be chartered by the Secretary of State.** 1957 Op. Att’y Gen. p. 24 (decided under former Code 1933, § 22-201).

## RESEARCH REFERENCES

**ALR.** — Power and duty of bank which has acquired a public service plant to continue its operation, 8 ALR 248.

Right of insurance company, in view of its

public interest, to reject applications for insurance (including validity, construction, and application of statutes in that regard), 123 ALR 139.

**14-5-3. Right of state to withdraw franchise when charter granted since January 1, 1863.**

In all cases of private charters granted to corporations since January 1, 1863, the state reserves the right to withdraw the franchise unless such right is expressly negated in the charter. (Orig. Code 1863, § 1636; Code 1868, § 1681; Code 1873, § 1682; Code 1882, § 1682; Civil Code 1895, § 1880; Civil Code 1910, § 2239; Code 1933, § 22-1202; Code 1933, § 22-5102, enacted by Ga. L. 1968, p. 565, § 1.)

**Law reviews.** — For survey article on business associations, see 34 Mercer L. Rev. 13 (1982).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1868, § 1681, and former Code 1882, § 1682, are included in the annotations for this Code section.

**Includes power to modify.** — The power to withdraw an entire franchise necessarily includes the power to modify or restrict the exercise of it. *West End & A. St. R.R. v. Atlanta St. R.R.*, 49 Ga. 151 (1873) (decided under former Code 1868, § 1681).

**If the corporation has made contracts,** valid under the laws of the state at the time they were made, the state cannot unmake them, or impose other or different terms on the corporation, to its injury, and for the benefit of the other contracting party. *Coast-Line R.R. v. Mayor of Savannah*, 30 F. 646 (S.D. Ga. 1887) (decided under former Code 1882, § 1682).

**If rights vested, there is no state control.** — The state under former Code 1882, § 1682 (see O.C.G.A. § 14-5-3) has no control over vested rights and interests, acquired by the company, and not constituting a part

of the act of incorporation. *Coast-Line R.R. v. Mayor of Savannah*, 30 F. 646 (S.D. Ga. 1887) (decided under former Code 1882, § 1682).

**Corporation's power to impair shareholders' rights differs from state's power.** — There is a substantial difference between corporation's attempting to reserve right to impair vested rights of its shareholders through altering or amending its internal structure and retention by state of power to modify or withdraw charters granted to corporations created by the state. *Baugh v. Citizens & S. Nat'l Bank*, 248 Ga. 180, 281 S.E.2d 531 (1981).

**Repeal by implication.** — Where in an act of incorporation the legislature has reserved the right of repeal (which would seem to be in every instance since the adoption of this section), repeal may be by implication of a precedent affirmative statute so far as it is contrary thereto. *West End & A. St. R.R. v. Atlanta St. R.R.*, 49 Ga. 151 (1873) (decided under former Code 1868, § 1681).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18 Am. Jur. 2d, Corporations, §§ 83-90.

#### 14-5-4. Corporate existence not subject to collateral attack by person dealing with corporation.

The existence of a corporation claiming a charter under color of law cannot be collaterally attacked by persons who have dealt with it as a corporation. Such persons are estopped from denying its corporate existence. (Civil Code 1895, § 1862; Civil Code 1910, § 2226; Code 1933, § 22-714; Code 1933, § 22-5103, enacted by Ga. L. 1968, p. 565, § 1.)

**History of section.** — The language of this Code section is derived in part from the decisions in *Killet v. State*, 32 Ga. 292 (1861); *Imboden v. Etowah & Battle Branch Mining Co.*, 70 Ga. 86 (1883); and *Rogers v. Toccoa*

*Power Co.*, 161 Ga. 524, 131 S.E. 517 (1926).

**Law reviews.** — For survey article on business associations, see 34 *Mercer L. Rev.* 13 (1982).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1895, § 1862; former Civil Code 1910, § 2226; former Code 1933, § 22-714, are included in the annotations for this Code section.

**Those dealing with corporation cannot deny its existence.** — All who deal with corporation as such are estopped from denying its corporate existence or its right to control as such. *Brooke v. Day*, 129 Ga. 694, 59 S.E. 769 (1907); *Edenfield v. Bank of Millen*, 7 Ga. App. 645, 67 S.E. 896 (1910); *Dorris v. F & M Bank*, 22 Ga. App. 514, 96 S.E. 450 (1918) (decided under former Civil Code 1895, § 1862 and under former Civil Code 1910, § 2226).

**At date of contract in suit arising thereunder.** — One who has contracted with a corporation as such is estopped to deny its existence as a corporation at the date of the contract, in any suit arising thereunder; and in such case the corporation is designated a corporation. *Petty v. Brunswick & W. Ry.*, 109 Ga. 666, 35 S.E. 82 (1900); *Brown v. Atlanta Ry. & Power Co.*, 113 Ga. 462, 39 S.E. 71 (1901) (decided under former Civil Code 1895, § 1862).

**Application of doctrine of corporation by estoppel.** — Allegations that prior to and at the time a lease was executed the defendants

held themselves out as a particular corporation, and that plaintiff dealt with them as such corporation, if proven, would authorize the application of the doctrine of corporation by estoppel. *Cahoon v. Ward*, 231 Ga. 872, 204 S.E.2d 622 (1974).

Where sufficient allegations are made in a petition which, if proved, could result in application of the doctrine of corporation by estoppel it is error for a trial court to hold as a matter of law that a lease is void merely because on the date the lease was signed the lessee was not a de jure corporation. *Cahoon v. Ward*, 231 Ga. 872, 204 S.E.2d 622 (1974).

The doctrine of corporation by estoppel is viable in Georgia. *Goodwyne v. Moore*, 170 Ga. App. 305, 316 S.E.2d 601 (1984).

The trial court was incorrect in applying the doctrine of corporation by estoppel where it was undisputed that the corporation was not in existence at the time that the transactions in question took place. *Don Swann Sales Corp. v. Echols*, 160 Ga. App. 539, 287 S.E.2d 577 (1981).

The doctrine of corporation by estoppel should not be applied where an individual purporting to act for a nonexistent corporation attempts to escape liability on a contract by defending on the basis of the nonexistent corporation. *Don Swann Sales Corp. v. Echols*, 160 Ga. App. 539, 287 S.E.2d 577 (1981).

An individual purporting to act for a nonexistent corporation cannot escape liability on a contract by defending on the basis of the nonexistent corporation. In that situation the doctrine of corporation by estoppel does not apply; however, if there is a corporation in existence, although with a different name, corporation by estoppel would be applicable. *Guernsey Petro. Corp. v. Data Gen. Corp.*, 183 Ga. App. 790, 359 S.E.2d 920, cert. denied, 183 Ga. App. 906, 359 S.E.2d 920 (1987).

**When doctrine applies.** — Doctrine of corporation by estoppel is inapplicable to transactions occurring prior to issuance of certificate of incorporation. *Echols v. Vienna Sausage Mfg. Co.*, 162 Ga. App. 158, 290 S.E.2d 484 (1982).

The doctrine of corporation by estoppel does not permit an individual to escape liability for obligations undertaken as an agent for a corporation which has not yet been "registered" (i.e., issued a certificate of incorporation) by the Secretary of State. *Video Power, Inc. v. First Capital Income Properties, Inc.*, 188 Ga. App. 691, 373 S.E.2d 855 (1988).

**When legality of corporate existence cannot be questioned.** — When a person enters into a contract with an entity purporting to be a corporation, and such entity is described in the contract by its corporate name, such person admits the legal existence of the corporation with reference to any action brought to enforce the contract, and for the purpose of that action will not be allowed to question the legality of the corporate existence. *Cahoon v. Ward*, 231 Ga. 872, 204 S.E.2d 622 (1974); *Goodwyne v. Moore*, 170 Ga. App. 305, 316 S.E.2d 601 (1984); *Pinson v. Hartsfield Int'l Commerce Ctr., Ltd.*, 191 Ga. App. 459, 382 S.E.2d 136, cert. denied, 191 Ga. App. 923, 382 S.E.2d 136 (1989).

One who deals with a corporation as such cannot, in the absence of fraud, deny the legality of the corporate existence for the purpose of holding the owner liable. *Amason v. Whitehead*, 186 Ga. App. 320, 367 S.E.2d 107 (1988).

**Where company has at least character of de facto corporation.** — Where the suit is a mere collateral attack upon the life and being of the company as a corporation, such an attack is not permissible, where the com-

pany has at least the character of a de facto corporation. *Huey v. National Bank*, 177 Ga. 64, 169 S.E. 491 (1933) (decided under former Code 1933, § 22-714).

**When lack of corporate existence cannot be asserted.** — An insurance company that issues a policy of liability insurance to a purported corporation, pending its application for corporate charter, and receives from the applicants a premium for such policy, cannot, in an action on the policy for a claim arising after the issuance of the policy but before the grant of the charter, set up the want of corporate existence in the insured at the time of the issuance and delivery of the policy or at the time of the accident giving rise to the claim. *Rogers v. McKinley*, 52 Ga. App. 161, 182 S.E. 805 (1935) (decided under former Code 1933, § 22-714).

Those who have dealt with a corporation as such cannot deny its corporate existence; one who has contracted with a corporation as such cannot in an action to enforce the contract set up the invalidity of its corporate existence. *Rogers v. McKinley*, 52 Ga. App. 161, 182 S.E. 805 (1935) (decided under former Code 1933, § 22-714).

Where a person enters into a contract with a body purporting to be a corporation, and such body is described in the contract by the corporate name or is otherwise clearly recognized as an existing corporation, such person thereby admits the legal existence of the corporation for the purpose of any action that may be brought to enforce the contract, and in such an action that person will not be permitted, by a plea of null corporation or otherwise, to deny the legality of its corporate existence. *West v. Flynn Realty Co.*, 53 Ga. App. 594, 186 S.E. 753 (1936) (decided under former Code 1933, § 22-714).

Because plaintiff knowingly contracted with a corporation, plaintiff was estopped from denying its corporate existence in an effort to avoid the mandatory arbitration clause in the contract. *Litland v. Smith*, 247 Ga. App. 277, 543 S.E.2d 468 (2000).

**Subscription to stock is dealing with corporation.** — Where the plaintiff dealt with the defendants not as promoters but as officers of a corporation, plaintiff bought stock from them not as individuals, but from the corporation. Having thus dealt with the corporation as such plaintiff is estopped to



deny the legality of its organization. *Orr v. McLeay*, 6 Ga. App. 417, 65 S.E. 164 (1909) (decided under former Civil Code 1895, § 1862).

**Estoppel by matter of record.** — A plaintiff who proceeds against a defendant as a corporation is estopped to deny its corporate existence, and is bound by the terms of the charter as to the principal office of the corporation. *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S.E. 709 (1902);

*Richmond County v. Richmond County Reformatory Inst.*, 141 Ga. 457, 81 S.E. 232 (1914) (decided under former Civil Code 1895, § 1862 and former Civil Code 1910, § 2226).

**Cited in** *Siplast, Inc. v. Inland Container Corp.*, 172 Ga. App. 341, 323 S.E.2d 187 (1984); *Skipper Sams, Inc. v. Roswell-Holcomb Assocs.*, 247 Ga. App. 237, 543 S.E.2d 765 (2000).

## OPINIONS OF THE ATTORNEY GENERAL

**Office of Secretary of State not estopped to deny that corporation dissolved.** — Whether or not the office of Secretary of State has dealt with a corporation dissolved

by the expiration of its charter, as a corporation, it is not estopped to deny that the corporation has been dissolved. 1980 Op. Att'y Gen. No. 80-20.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 260-267.

**C.J.S.** — 18 C.J.S., Corporations, §§ 64-66.

**ALR.** — Form of pleading necessary to raise issue of corporate existence, 55 ALR 510.

Estoppel of defendant to deny plaintiff's

corporate existence by filing counterclaim or cross action against it, 51 ALR2d 1449.

Disregarding corporate entity in settling accounts between close corporation and its stockholder or stockholders, 100 ALR2d 385.

### 14-5-5. Personal use or borrowing of corporate property by officer or director.

Repealed by Ga. L. 1988, p. 1070, § 2, effective July 1, 1989.

**Editor's notes.** — This Code section was based on Ga. L. 1887, p. 94, § 1; Civil Code 1895, § 1872; Civil Code 1910, § 2236; Code

1933, § 22-723; Code 1933, § 22-5104, enacted by Ga. L. 1968, p. 565, § 1.

### 14-5-6. Contributions to influence official action prohibited; penalty.

(a) It shall be illegal for any corporation incorporated under the laws of, or doing business in, this state or any officer or agent thereof to make or authorize directly or indirectly any contributions from corporate funds for the purpose of influencing the vote, judgment, or action of any officer of this state, whether he is employed in the legislative, executive, or judicial branch.

(b) Any person or corporation or any officer thereof who shall violate subsection (a) of this Code section relating to corporate contributions to influence official action shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine in the sum of ten times the amount of the contribution made or \$1,000.00, whichever is greater, or by imprison-

ment for not less than one year nor more than four years, or both. (Ga. L. 1908, p. 65, §§ 1, 2; Civil Code 1910, § 2237; Penal Code 1910, § 672; Code 1933, §§ 22-724, 22-9902; Code 1933, §§ 22-5105, 22-9901, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1969, p. 152, § 75; Ga. L. 1981, p. 874, § 1.)

**Cross references.** — Bribery, § 16-10-2. Lobbying, § 21-5-70 et seq.

**Law reviews.** — For article surveying business associations developments in Georgia

from mid-1980 through mid-1981 concerning partnerships and corporations, see 33 Mercer L. Rev. 19 (1981).

### OPINIONS OF THE ATTORNEY GENERAL

**Corporate campaign contributions to incumbents not prohibited.** — Nothing in former Code 1933, § 22-5105 (see O.C.G.A. § 14-5-6) or any provision of former Code 1933, § 40-38 (see O.C.G.A. Ch. 5, T. 21), prohibited a corporate contribution to the election or reelection campaign of an incumbent candidate for state office. 1975 Op. Att'y Gen. No. 75-143.

**The manifest intent of former Code 1933, § 22-5105 (see O.C.G.A. § 14-5-6) was to prevent corporations from contributing funds designed to influence the actions, judgments, and decisions of state officers in the performance of their duties.** 1975 Op. Att'y Gen. No. 75-143.

**Corporation accepting contributions on behalf of candidates** is subject to reporting

requirements of O.C.G.A. § 21-5-4. 1981 Op. Att'y Gen. No. 81-109.

**Services rendered by corporate employees collecting contributions** on behalf of candidates constitute reportable contributions, and expenditures made to facilitate collection are reportable expenditures. 1981 Op. Att'y Gen. No. 81-109.

**Permissibility of corporate payroll deductions.** — There is no statutory prohibition against use of corporate payroll deductions to obtain political action committee contributions, where payroll deduction is specifically authorized by employee so long as contributions are not used to influence political actions and so long as no such prohibition is contained in corporate charter. 1981 Op. Att'y Gen. No. 81-109.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18B Am. Jur. 2d, Corporations, §§ 1893-1896, 2134-2137, 2141.

**ALR.** — Recovery of money paid, or property transferred, as a bribe, 60 ALR2d 1273.

Criminal liability of corporation for brib-

ery or conspiracy to bribe public official, 52 ALR3d 1274.

Power of corporation to make political contribution or expenditure under state law, 79 ALR3d 491.

### 14-5-7. Execution of instruments conveying interest in real property or releasing security agreement.

(a) Instruments executed by a corporation conveying an interest in real property, when signed by the president or vice-president and attested or countersigned by the secretary or an assistant secretary or the cashier or assistant cashier of the corporation, shall be conclusive evidence that the president or vice-president of the corporation executing the document does in fact occupy the official position indicated; that the signature of such officer subscribed thereto is genuine; and that the execution of the document on behalf of the corporation has been duly authorized. Any corporation may by proper resolution authorize the execution of such instruments by other officers of the corporation.



(b) Instruments executed by a corporation releasing a security agreement, when signed by one officer of the corporation or by an individual designated by the officers of the corporation by proper resolution, without the necessity of the corporation's seal being attached, shall be conclusive evidence that said officer signing is duly authorized to execute and deliver the same. (Ga. L. 1962, p. 516, § 1; Code 1933, § 22-5106, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1982, p. 1197, §§ 1, 2; Ga. L. 1992, p. 1180, § 2.)

**Editor's notes.** — Ga. L. 1992, p. 1180, § 3, not codified by the General Assembly, provided that the amendment to subsection (a) is applicable to acts occurring prior to July 1, 1992, as well as to acts occurring on or after such date.

**Law reviews.** — For survey article on business associations, see 34 Mercer L. Rev. 13 (1982).

### JUDICIAL DECISIONS

**Applicability to Uniform Commercial Code.** — O.C.G.A. § 14-5-7 applies to the release of instruments securing interests in real property and interests created under former Article 9 of the Uniform Commercial Code (§ 11-9-101 et seq.). *Goger v. Merchants Bank* (In re Feifer Indus., Inc.), 155 Bankr. 256 (Bankr. N.D. Ga. 1993).

**No presumption of officers' authority without corporate seal.** — If the corporate seal does not appear upon a deed executed by the president of a corporation and attested by the secretary, there is no presumption as to the officers' authority to execute it. *Village Creations, Ltd. v. Crawfordville Enters., Inc.*, 232 Ga. 131, 206 S.E.2d 3 (1974).

**Mere parol evidence is insufficient to prove authority.** — In the absence of the corporate seal, mere parol evidence indicat-

ing that one is the president of the corporation involved in the transaction is insufficient to prove the authority to transfer. In re Gray, 7 Bankr. 535 (Bankr. M.D. Ga. 1980).

**Warranty deeds.** — Although warranty deeds were not conclusive evidence of a vice president's authority under the statute, there was no reversible error since the lender did not rely on the warranty deeds but on the opinion of counsel and the marked insurance binder. The lender was also a bona fide purchaser and would not be divested of its interest in the properties. *R.W. Holdco, Inc. v. SCI/RW Holdco, Inc.*, 250 Ga. App. 414, 551 S.E.2d 826 (2001).

Cited in *Merrill v. Knight State Bank*, 721 F.2d 1321 (11th Cir. 1983); *Bald Mt. Park v. Oliver*, 863 F.2d 1560 (11th Cir. 1989).

### OPINIONS OF THE ATTORNEY GENERAL

**Cancellation of security deeds and writs of execution from record.** — 1972 Op. Att'y Gen. No. U72-79.

**Cancellation of deeds to secure debt.** — Under Ga. L. 1986, p. 754, amending O.C.G.A. §§ 44-14-3 and 44-14-67, dealing with deeds to secure debt and their cancellation, the release of corporate security interests in real property or security interests

under the UCC, signed by an officer or delegated agent, as provided in O.C.G.A. § 14-5-7(b), will continue to constitute conclusive evidence of corporate authorization for the release, and when the clerk is presented with such a release apparently so signed, in the absence of overt signs of impropriety, it should be accepted for recording. 1986 Op. Att'y Gen. No. 86-17.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 188 Am. Jur. 2d, Corporations, § 2005.

**C.J.S.** — 19 C.J.S., Corporations, § 655.

**14-5-8. Joint tenancy of shares and securities.**

Whenever certificates for shares or other securities issued by domestic or foreign corporations are or have been issued or transferred to two or more persons in joint tenancy on the books or records of the corporation, it is presumed in favor of the corporation, its registrar, and its transfer agent that the shares or other securities are owned by such persons in joint tenancy with right of survivorship and not otherwise. A domestic or foreign corporation or its registrar or transfer agent is not liable for transferring or causing to be transferred on the books of the corporation to the surviving joint tenants where a joint tenant dies a resident of this state any share or shares or other securities theretofore issued by the corporation to two or more persons in joint tenancy with right of survivorship on the books or records of the corporation, whether or not the transfer was made by the corporation or its registrar or transfer agent with actual or constructive knowledge of the existence of any understanding, agreement, condition, or evidence that the shares or securities were held other than in joint tenancy or with actual or constructive knowledge of the invalidity of the joint tenancy or of a breach of trust by the joint tenants. (Ga. L. 1967, p. 647, § 1; Code 1933, § 22-5107, enacted by Ga. L. 1968, p. 565, § 1.)

**Cross references.** — Joint tenancy with survivorship generally, § 44-6-190.

**Law reviews.** — For article discussing joint tenancy arrangements as a means of avoid-

ing probate, see 6 Ga. L. Rev. 74 (1971). For article, "Transfer-on-Death Securities Registration: A New Title Form," see 21 Ga. L. Rev. 789 (1987).

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**Joint tenancy not terminated by tenant's incapacity.** — Joint tenancies in bank and stock investment accounts and in real property did not terminate as a matter of law when one of the joint tenants was declared incapacitated and a guardian was appointed

for the tenant's person and property. A guardian, unlike a trustee, has no beneficial title in the ward's estate, but is merely a custodian or manager. *Moore v. Self*, 222 Ga. App. 71, 473 S.E.2d 507 (1996).

**RESEARCH REFERENCES**

**ALR.** — Statute relating to joint tenancy in personal property as applicable to choses in action, 144 ALR 1465.

**14-5-9. Jurisdiction and service of summons in garnishment proceedings.**

The court in which is pending an action, attachment, or judgment upon which is sought garnishment against a corporation shall also have jurisdiction of the garnishment proceeding where the corporation has an agent and place of business in the county in which the court is situated. Service of the summons of garnishment upon the agent in charge of the office or business of the corporation in that county shall be sufficient service. (Ga. L.



1884-85, p. 99, § 2; Civil Code 1895, § 1900; Civil Code 1910, § 2259; Code 1933, § 22-1102; Code 1933, § 22-5302, enacted by Ga. L. 1968, p. 565, § 1.)

**Law reviews.** — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution

of venue questions, see 9 Ga. St. B.J. 254 (1972).

### JUDICIAL DECISIONS

**Cited in** *Davenport v. Petroleum Delivery Serv. of Ga., Inc.*, 235 Ga. 116, 218 S.E.2d 848 (1975).

### RESEARCH REFERENCES

**ALR.** — Conclusiveness, as regards venue, of designation of place of business in incorporation papers, 175 ALR 1092.

Who is "managing agent" of domestic

corporation within statute providing for service of summons or process thereon, 71 ALR2d 178.

#### 14-5-10. Derivative actions.

Repealed by Ga. L. 1988, p. 1070, § 2, effective July 1, 1989.

**Editor's notes.** — This Code section was based on Ga. L. 1968, p. 565, § 1; Ga. L. 1969, p. 152, § 73; Ga. L. 1970, p. 605, § 5.

For present provisions governing derivative actions, see Code Section 14-2-831.

#### 14-5-11. Applicability of Chapters 2 and 3 to corporations chartered by General Assembly; filing of annual registration with Secretary of State.

(a) If there is no other statute which authorizes or prescribes the manner in which any domestic corporation which is not otherwise subject to Chapter 2 or Chapter 3 of this title may amend its charter or articles of incorporation, merge, or take any other action which a corporation which is subject to Chapter 2 or Chapter 3 of this title is authorized to take, such domestic corporation is authorized to take such action in the same manner and subject to the same provisions, conditions, limitations, and procedures prescribed in Chapter 2 or Chapter 3 of this title. The provisions of this Code section shall apply to corporations chartered by Acts of the General Assembly of Georgia.

(b) Each domestic corporation and each foreign corporation which is doing business in this state and which is not otherwise required to register with the Secretary of State under any other law of this state shall deliver to the Secretary of State for filing an annual registration in the same manner, containing the same information, and subject to the same conditions, requirements, fees, and procedures as set out in Code Section 14-2-1622.

Any corporation failing to file such registration shall be subject to the same penalties as provided in Chapter 2 of this title for corporations which fail to file an annual registration. (Code 1981, § 14-5-11, enacted by Ga. L. 1989, p. 1027, § 36.)

## ARTICLE 2

### CORPORATION COMMISSIONER

#### 14-5-20. Secretary of State as corporation commissioner.

The Secretary of State shall be corporation commissioner and shall be charged with the execution of the duties set forth in Chapters 2 through 5 of this title. The corporation commissioner shall appoint a person as assistant corporation commissioner and shall delegate such of the commissioner's powers and duties to the assistant corporation commissioner as the corporation commissioner desires. Where the office of Secretary of State shall become vacant by resignation, death, or otherwise, the Secretary of State's authority as corporation commissioner shall immediately vest in the assistant corporation commissioner who shall be charged with the execution of the duties of the Secretary of State set forth in this title until the office of Secretary of State ceases to be vacant. (Ga. L. 1906, p. 105, § 1; Civil Code 1910, § 2208; Code 1933, § 22-1701; Code 1933, § 22-5201, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1980, p. 623, § 19; Ga. L. 1986, p. 1454, § 8; Ga. L. 1993, p. 1231, § 35.)

**Cross references.** — Secretary of State      ment of this section, see 10 Ga. St. U.L. Rev. generally, § 45-13-1 et seq.      74 (1993).

**Law reviews.** — For note on 1993 amend-

## COMMENT

### Note to 1980 Amendment

The 1980 amendment added the second sentence to this section to provide that during a vacancy in the office of the Secretary of State, the duties of the Secretary as ex officio corporation commissioner shall be exercised by the assistant corporation commissioner.

### Note to 1986 Amendment

The 1986 amendment deleted "ex officio" from before "corporation commissioner" in each description of the Secretary of State's title in this Section.

#### 14-5-21. Fees; report.

All fees collected by the Secretary of State shall be paid into the state treasury for the use of the state, and the Secretary of State shall include in his annual reports a full statement of all fees collected or received under Chapters 2 through 5 of this title and the disposition thereof. (Ga. L. 1906,



p. 105, § 6; Civil Code 1910, § 2213; Ga. L. 1931, p. 7, § 86; Code 1933, § 22-1702; Code 1933, § 22-5202, enacted by Ga. L. 1968, p. 565, § 1.)

#### 14-5-22. Condition of acceptance of documents.

The Secretary of State shall accept for filing and recording only those documents which are suitable for reproduction. (Code 1933, § 22-5203, enacted by Ga. L. 1968, p. 565, § 1.)

#### 14-5-23. Rules and regulations.

Notwithstanding any other law to the contrary, the Secretary of State may promulgate such rules and regulations, not inconsistent with the provisions of this title, which are incidental to and necessary for the implementation and enforcement of such provisions of this title as are administered by the Secretary of State. Such rules and regulations shall be promulgated in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 14-5-23, enacted by Ga. L. 1986, p. 1454, § 9.)

**Law reviews.** — For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986).

### COMMENT

#### Note to 1986 Amendment

This section was added by a 1986 amendment. For the first time, by virtue of that amendment, the Secretary of State is authorized to issue rules and regulations under Title 14. Such rules are required to be issued in accordance with the Georgia Administrative Procedure Act (§ 50-13-1 *et seq.*).

### ARTICLE 3

## CORPORATIONS ORGANIZED FOR RELIGIOUS, FRATERNAL, OR EDUCATIONAL PURPOSES

**Cross references.** — Use of names and emblems by fraternal or charitable organizations, § 10-1-470 *et seq.*

### RESEARCH REFERENCES

**ALR.** — Interference by courts with regulations of associations or societies as to language to be used, 36 ALR 1531.

Necessity and sufficiency of legislative authority for consolidation or merger of religious bodies, 50 ALR 118.

Undue influence in nontestamentary gift to clergyman, spiritual adviser, or church, 14 ALR2d 649.

Determination of property rights between local church and parent church body: modern view, 52 ALR3d 324.

**14-5-40. Applicability of Chapter 3 of title.**

Chapter 3 of this title shall be fully applicable to all nonprofit corporations organized for religious, fraternal, or educational purposes, including incorporated churches, religious and fraternal societies, schools, academies, colleges, or universities which are "nonprofit corporations" as that term is defined in paragraph (21) of Code Section 14-3-140. (Code 1933, § 22-5501, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1991, p. 465, § 2.)

**Law reviews.** — For article discussing equal protection in public school financing through taxation, in light of *Serrano v.*

*Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971), see 21 J. of Pub. L. 23 (1972).

**JUDICIAL DECISIONS**

**Actions of directors of nonprofit colleges** must be reviewed in light of corporate rather than trust principles. This is because the formalities of trust law are inappropriate to the administration of colleges and universities which, in this era, operate as businesses.

*Corporation of Mercer Univ. v. Smith*, 258 Ga. 509, 371 S.E.2d 858 (1988).

Cited in *Free For All Missionary Baptist Church, Inc. v. Southeastern Beverage & Ice Equip. Co.*, 135 Ga. App. 498, 218 S.E.2d 169 (1975).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 66 Am. Jur. 2d, Religious Societies, § 4.

§ 7. 14 C.J.S., Charities, § 60. 77 C.J.S., Religious Societies, § 7.

**C.J.S.** — 10 C.J.S., Beneficial Associations,

**14-5-41. Validity of contracts and deposits; enforcement.**

All contracts made with any nonprofit corporation referred to in Code Section 14-5-40, all deposits for its account, and all conveyances of title to or by it shall be legal and valid. All such contracts may be enforced in the same manner and in the same way as if such nonprofit corporation referred to in Code Section 14-5-40 were a private individual. (Ga. L. 1889, p. 161, § 4; Civil Code 1895, § 2366; Civil Code 1910, § 2839; Code 1933, § 22-404; Code 1933, § 22-5502, enacted by Ga. L. 1968, p. 565, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 66 Am. Jur. 2d, Religious Societies, § 56.

**C.J.S.** — 14 C.J.S., Charities, § 65.

**ALR.** — Power of religious or charitable society or corporation to bind itself to pay annuity as condition of receiving gift, 50 ALR 290.

Consolidation or merger of churches of same denomination as affecting property rights, 66 ALR 177.

Power and capacity of members of unincorporated association, lodge, society, or club to convey, transfer, or encumber association property, 15 ALR2d 1451.



**14-5-42. Authority to act as trustee of charitable trust.**

Nonprofit corporation(s) referred to in Code Section 14-5-40 created prior to April 1, 1969, or created thereafter pursuant to this article are authorized to act in their corporate capacity as trustee to administer and carry into effect any charitable trust created prior to April 1, 1969, or thereafter created by deed or by will which is consistent with their corporate purposes. (Ga. L. 1889, p. 161, § 5; Civil Code 1895, § 2367; Civil Code 1910, § 2840; Code 1933, § 22-405; Code 1933, § 22-5503, enacted by Ga. L. 1968, p. 565, § 1.)

**JUDICIAL DECISIONS**

**Legislative intent.** — It was not the intent of the General Assembly in enacting former Code 1933, § 41A-1103 (see O.C.G.A. § 7-1-242) to repeal former Code 1933, § 22-5503 (see O.C.G.A. § 14-5-42). *McGonagle v. Duncan*, 244 Ga. 308, 260 S.E.2d 44 (1979).

**Selection of administrator by beneficially interested religious foundation.** — Religious foundation beneficially interested under a

will within the meaning of former Code 1933, § 113-1202 (see pre-1998 Probate Code, O.C.G.A. § 53-6-24(2)) was entitled (there being no spouse) to select a disinterested person as administrator pursuant to paragraph (6) of that section and it could select its executive director in lieu of a wholly disinterested person. *McGonagle v. Duncan*, 244 Ga. 308, 260 S.E.2d 44 (1979).

**RESEARCH REFERENCES**

**ALR.** — Trust for school children as charitable, or merely benevolent, 25 ALR2d 1114.

**14-5-43. Church represented by majority; effect of withdrawal of part of congregation.**

The majority of those who adhere to its organization and doctrines represent a church. The withdrawal by one part of a congregation from the original body or the uniting of a part of a congregation with another church or denomination is a relinquishment of all rights in the church abandoned. (Civil Code 1895, § 2360; Civil Code 1910, § 2833; Code 1933, § 22-406; Code 1933, § 22-5504, enacted by Ga. L. 1968, p. 565, § 1.)

**History of section.** — The language of this Code section is derived in part from the decision in *Bates v. Houston*, 66 Ga. 198 (1880).

**Law reviews.** — For comment on Presbyterian Church in the United States v. Mary

Elizabeth Blue Hull Mem. Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969), cert. denied, 396 U.S. 1041, 90 S. Ct. 680, 24 L. Ed. 2d 685 (1970), see 6 Ga. St. B.J. 438 (1970).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, §§ 22-406 and 22-5504, are included in the annotations for this Code section.

**Applicable only to churches with congregational government.** — Former Code 1933, § 22-5504 (see O.C.G.A. § 14-5-43) properly was to be construed as being applicable only to churches having a congregational form of government. *Jones v. Wolf*, 244 Ga. 388, 260 S.E.2d 84 (1979), cert. denied, 444 U.S. 1080, 160 S. Ct. 1031, 62 L. Ed. 2d 763 (1980) (decided under former Code 1933, § 22-5504).

O.C.G.A. § 14-5-43 is applicable only to churches having a congregational form of government and, thus, members of a church not categorized as congregational had standing to bring an action alleging a diversion of church property from the purpose for which the church and its assets had been devoted. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S.

1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994).

**In case of disagreement, majority represents church.** — Minorities of a church membership cannot act for the church; the majority of the members, in case of disagreement, represents the church. *Walker v. Ful-Kalb, Inc.*, 181 Ga. 563, 183 S.E. 776 (1936) (decided under former Code 1933, § 22-406).

**Minority of church membership cannot bind the church** by contract unless properly authorized to act for it. *Walker v. Ful-Kalb, Inc.*, 181 Ga. 563, 183 S.E. 776 (1936) (decided under former Code 1933, § 22-406).

**Cited in** *Carden v. LaGrone*, 225 Ga. 365, 169 S.E.2d 168 (1969); *James v. Gainey*, 231 Ga. 543, 203 S.E.2d 163 (1974); *Lucas v. Hope*, 515 F.2d 234 (5th Cir. 1975); *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979); *First Rebecca Baptist Church, Inc. v. Atlantic Cotton Mills*, 263 Ga. 867, 440 S.E.2d 159 (1993).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 66 Am. Jur. 2d, Religious Societies, §§ 21, 33.

**C.J.S.** — 77 C.J.S., Religious Societies, §§ 18 et seq., 70 et seq..

**ALR.** — Determination by the civil courts of property rights between contending factions of an independent or congregational

church, 8 ALR 105; 70 ALR 75.

Change of denominational relations or fundamental doctrines by majority faction of independent or congregational church as ground for award of property to minority, 15 ALR3d 297.

## 14-5-44. Church edifice liable to sale for debt.

In the absence of other property, where a church congregation has incurred a valid debt the church edifice and site are liable to sale for its payment. (Civil Code 1895, § 2361; Civil Code 1910, § 2834; Code 1933, § 22-407; Code 1933, § 22-5505, enacted by Ga. L. 1968, p. 565, § 1.)

**History of section.** — The language of this Code section is derived in part from the

decision in *Lyons v. Planters' Loan & Sav. Bank*, 86 Ga. 485, 12 S.E. 882 (1890).

## 14-5-45. Interference by courts with management of church.

Courts are reluctant to interpose in questions affecting the management of the temporalities of a church; but, when property is devoted to a specific doctrine or purpose, the courts will prevent it from being diverted from the



trust. (Civil Code 1895, § 2362; Civil Code 1910, § 2835; Code 1933, § 22-408; Code 1933, § 22-5506, enacted by Ga. L. 1968, p. 565, § 1.)

**History of section.** — The language of this Code section is derived in part from the decision in *Bates v. Houston*, 66 Ga. 198 (1880).

**Cross references.** — Exercise of judicial power by courts generally, § 15-1-3.

**Law reviews.** — For comment on Presby-

terian Church in the United States v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969), cert. denied, 396 U.S. 1041, 90 S. Ct. 680, 24 L. Ed. 2d 685 (1970), see 6 Ga. St. B.J. 438 (1970).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 2835, and former Code 1933, § 22-408, are included in the annotations for this Code section.

**First amendment commands civil courts to decide church property disputes** without resolving underlying controversies over religious doctrine. Hence, states, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions. *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969) (decided under former Code 1933, § 22-408).

**Former Civil Code 1910, § 2835 (see O.C.G.A. § 14-5-45) does not apply** where the only property right in issue is as to which of two factions of the church should have possession and control of the property, which was purchased and devoted to the use of the church for religious purposes generally. *Grant-Jeter Co. v. American Real Estate*

*Co.*, 159 Ga. 80, 125 S.E. 73 (1924) (decided under former Civil Code 1910, § 2835).

**Jurisdiction in equity to prevent diversion of trust.** — While courts are reluctant to interfere in questions affecting the internal affairs of a religious organization, nevertheless, where property has been conveyed in trust for the use and benefit of a church, a court of equity will assume jurisdiction for the purpose of preventing a diversion of the trust. *Dowdell v. Cherry*, 209 Ga. 849, 76 S.E.2d 499 (1953) (decided under former Code 1933, § 22-408).

**Departed majority cannot divert trust.** — Under former Civil Code 1910, § 2835 (see O.C.G.A. § 14-5-45) it has been held that if the majority of the church depart from its organization and doctrines, they do not represent the church, and such majority cannot divest the church property from the trust to which it has been devoted. *Tucker v. Paulk*, 148 Ga. 228, 96 S.E. 339 (1918) (decided under former Code 1910, § 2835).

**Cited in** *Carden v. LaGrone*, 225 Ga. 365, 169 S.E.2d 168 (1969).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 66 Am. Jur. 2d, Religious Societies, § 43.

**C.J.S.** — 10 C.J.S., Beneficial Associations, § 59.

**ALR.** — Determination by the civil courts of property rights between contending factions of an independent or congregational church, 8 ALR 105; 70 ALR 75.

Interference by courts with regulations of associations or societies as to language to be used, 36 ALR 1531.

Suspension or expulsion from church or religious society and the remedies therefor, 20 ALR2d 421.

Change of denominational relations or fundamental doctrines by majority faction of independent or congregational church as ground for award of property to minority, 15 ALR3d 297.

Determination of property rights between local church and parent church body: modern view, 52 ALR3d 324.

**14-5-46. Conveyances to churches or religious societies confirmed.**

All deeds of conveyance executed before April 1, 1969, or thereafter for any lots of land within this state to any person or persons, to any church or religious society, or to trustees for the use of any church or religious society for the purpose of erecting churches or meeting houses shall be deemed to be valid and available in law for the intents, uses, and purposes contained in the deeds of conveyance. All lots of land so conveyed shall be fully and absolutely vested in such church or religious society or in their respective trustees for the uses and purposes expressed in the deed to be held by them or their trustees for their use by succession, according to the mode of church government or rules of discipline exercised by such churches or religious societies. (Laws 1805, Cobb's 1851 Digest, p. 899; Code 1873, § 2343; Code 1882, § 2343; Civil Code 1895, § 2353; Civil Code 1910, § 2826; Code 1933, § 22-409; Code 1933, § 22-5507, enacted by Ga. L. 1968, p. 565, § 1.)

**JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION****CHURCH SCHISMS****1. IN GENERAL****2. PRESUMPTION OF MAJORITY RULE****3. HIERARCHICAL AND CONGREGATIONAL CHURCHES DISTINGUISHED****TRUSTEES****General Consideration**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1882, § 2343, and former Code 1933, § 22-409, are included in the annotations for this Code section.

**There is no implied trust on local church property for the benefit of the general church.** *Presbyterian Church v. Eastern Heights Presbyterian Church*, 225 Ga. 259, 167 S.E.2d 658 (1969), cert. denied, 396 U.S. 1041, 90 S. Ct. 680, 24 L. Ed. 2d 685 (1970).

**Interpretation of language of deeds.** — Where the trustees of a local church obtained property by a deed stating the property was granted to the local church, its successors, and assigns, in fee simple, the language of the deed contemplated successors and assigns, which the parent church, being hierarchical, had become under its disciplinary rule that "The Association (parent church) shall hold all church property, regardless if members vote to change the church to some other faith." *Crumbley v.*

*Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979).

**Adverse possession.** — Possession of property for the use of a church by the constituent membership in possession of the church as such an entity is recognized by statute in this state, and if continued adversely for the prescriptive period, it will support prescriptive title. *Slaughter v. Land*, 194 Ga. 156, 21 S.E.2d 72 (1942); *Bridges v. Henson*, 216 Ga. 423, 116 S.E.2d 570 (1960) (decided under former Code 1933, § 22-409).

**Cited in** *Carden v. LaGrone*, 225 Ga. 365, 169 S.E.2d 168 (1969); *Carnes v. Smith*, 236 Ga. 30, 222 S.E.2d 322 (1976); *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

**Church Schisms****1. In General**

**When local church estopped to deny existence of trust.** — Where the trustees of a local church held church property and par-



ticipated in making the association's (parent church) disciplinary rule that "The Association shall hold all church property, regardless if all members vote to change the church to some other faith," and did not contest its validity for 30 years, the local church could not deny the existence of a trust for the benefit of the general church. *Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979).

**When church documents irrelevant.** — Church documents that speak to resolution of doctrinal disputes and are silent as to which persons have the right to enjoy and to use the church property in the event of a schism at the local level are irrelevant to the question of which factions within the local congregation have the right to control the actions of the title holder, and thereby the use of property. *Jones v. Wolf*, 244 Ga. 388, 260 S.E.2d 84 (1979), cert. denied, 444 U.S. 1080, 100 S. Ct. 1031, 62 L. Ed. 2d 763 (1980).

## 2. Presumption of Majority Rule

**Presumptive rule of majority representation.** — Georgia has adopted for use in church local schism cases a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, which presumption is overcome under Georgia law by an application of "neutral principles" of law, that is, state statutes, corporate charters, relevant deeds, and the organizational constitutions of the denomination. *Jones v. Wolf*, 244 Ga. 388, 260 S.E.2d 84 (1979), cert. denied, 444 U.S. 1080, 100 S. Ct. 1031, 62 L. Ed. 2d 763 (1980).

**Principle of presumptive majority rule in local schism cases may be overcome** by reliance upon neutral statutes, corporate charters, relevant deeds, and the organizational constitutions of the denomination. *Jones v. Wolf*, 244 Ga. 388, 260 S.E.2d 84 (1979), cert. denied, 444 U.S. 1080, 100 S. Ct. 1031, 62 L. Ed. 2d 763 (1980).

## 3. Hierarchical and Congregational Churches Distinguished

**Hierarchical churches** are those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head.

*Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979).

**If church government is hierarchical, "neutral principles of law" determine** whether the local church or parent church has the right to control local property. *Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979).

**"Neutral principles"** are state statutes, corporate charters, relevant deeds, and the organizational constitutions of the denomination. *Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979).

**A congregational church** is one strictly independent of other ecclesiastical associations, and one that so far as church government is concerned, owes no fealty or obligation to any higher authority. *Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979).

**If church government is congregational, a majority of its members control** its decisions and local church property. *Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979).

## Trustees

**Trustees empowered to act regardless of recordation of appointment.** — Deeds to land made to trustees of religious societies are valid, and trustees of such societies, whether original trustees or successor trustees, are empowered to act for such societies in relation to such property whether the appointment of the trustees has been recorded or not. *Jackson v. Oliphant*, 88 Ga. App. 313, 76 S.E.2d 625 (1953) (decided under former Code 1933, § 22-409).

**Trust attaches to office not office holder.** — Where the title to property is conveyed to a bishop for use of the church in fee simple, such trust does not attach to the bishop's person, but to the office of bishop, and passes to the bishop's successor in office. *Beckwith v. Rector*, 69 Ga. 564 (1882) (decided under former Code 1882, § 2343).

**Suits by trustees against holdover tenants.** — Trustees of an unincorporated religious society, holding title in themselves to the society's real property, may bring a dispossessory proceeding (or distress warrant for rent) through their secretary and agent against a tenant in possession of the property who is holding over and beyond

**Trustees** (Cont'd)

625 (1953) (decided under Code 1933, § 22-409).

the term and who refuses to pay rent. Jackson v. Oliphant, 88 Ga. App. 313, 76 S.E.2d

**RESEARCH REFERENCES**

**C.J.S.** — 77 C.J.S., Religious Societies, § 57.

**ALR.** — Consolidation or merger of churches of same denomination as affecting property rights, 66 ALR 177.

Undue influence in nontestamentary gift

to clergyman, spiritual adviser, or church, 14 ALR2d 649.

Determination of property rights between local church and parent church body: modern view, 52 ALR3d 324.

### **14-547. Authority of churches or religious societies over trustees holding land for their use.**

All trustees to whom conveyances are or shall be executed, for the purposes expressed in Code Section 14-546, shall be subject to the authority of the church or religious society for which they hold the same in trust and may be expelled from said trust by such church or society, according to the form of government or rules of discipline by which they may be governed. (Laws 1805, Cobb's 1851 Digest, p. 899; Code 1873, § 2344; Code 1882, § 2344; Civil Code 1895, § 2354; Civil Code 1910, § 2827; Code 1933, § 22-410; Code 1933, § 22-5508, enacted by Ga. L. 1968, p. 565, § 1.)

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-410, are included in the annotations for this Code section.

**Trustee subject to authority of church or society.** — Deeds of conveyance to trustees or other persons for the use of a church or religious society vest the interest conveyed to be held in the church or its trustees for its use according to the mode of church government or rules of discipline exercised by such churches or religious societies, the trustees being subject to the authority of such church or society according to the rules of discipline by which it may be governed. Switzerland Gen. Ins. Co. v. Conoway, 115

Ga. App. 533, 154 S.E.2d 796 (1967) (decided under former Code 1933, § 22-410).

**Trustee's power to convey.** — A trustee of church property ordinarily has no power to convey the trust estate unless such power is conferred by the instrument creating the trust, or under an order of court in a proper proceeding, or where duly authorized by the organic law of the religious society. Switzerland Gen. Ins. Co. v. Conoway, 115 Ga. App. 533, 154 S.E.2d 796 (1967) (decided under former Code 1933, § 22-410).

**Cited in** Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322 (1976); Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

### **14-548. Vacancies in administration of land trusts for use of churches and religious societies; certificate of appointment.**

Every church or religious society is authorized to fill all vacancies which may arise in the administration of the trusts described in Code Section



14-5-46 by the death, removal, or expulsion of a trustee or otherwise. When any vacancy shall be filled, the same shall be certified under the hand of the person presiding in the church or society according to the form of government or discipline practiced by the church or society, which certificate shall express the name of the person appointed to fill the vacancy and the name of the person in whose place he shall be appointed. When the certificate has been recorded in the office of the clerk of the superior court of the county in which the land lies, the person so appointed to fill the vacancy shall be as fully vested with the trust as if he had been a party to and named in the original deed, provided that the failure to have recorded the certificate of appointment shall not operate to disqualify or render incompetent to act in any proceeding any trustee duly appointed by the form of government or discipline practiced by the church or society having the power to appoint trustees. (Laws 1805, Cobb's 1851 Digest, pp. 899, 900; Code 1873, § 2345; Code 1882, § 2345; Ga. L. 1884-85, p. 51, § 1; Civil Code 1895, §§ 2355, 3194; Civil Code 1910, §§ 2828, 3778; Code 1933, § 22-411; Code 1933, § 22-5509, enacted by Ga. L. 1968, p. 565, § 1.)

#### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1895, § 2355 and former Code 1933, § 22-411 are included in the annotations for this Code section.

**Trustees empowered to act regardless of whether appointment is recorded.** — Deeds to land made to trustees of religious societies are valid, and trustees of such societies, whether original trustees or successor trustees, are empowered to act for such societies in relation to such property whether the appointment of the trustees has been recorded or not. *Jackson v. Oliphant*, 88 Ga. App. 313, 76 S.E.2d 625 (1953) (decided

under former Code 1933, § 22-411).

**Trust property liable for debt.** — If trustees hold title to property for a church which has not been incorporated, and where no certificate has been filed as provided by former Civil Code 1895, § 2355 (see O.C.G.A. § 14-5-48), nevertheless the trust property may be subjected, by proper proceedings, to a debt for which it is liable. *Kelsey v. Jackson*, 123 Ga. 113, 50 S.E. 951 (1905) (decided under former Civil Code 1895, § 2355).

**Cited in** *Bagley v. Carter*, 235 Ga. 624, 220 S.E.2d 919 (1975).

#### 14-5-49. Applicability of Code Sections 14-5-46 through 14-5-48 to other societies.

Code Sections 14-5-46 through 14-5-48 shall be so construed as to apply to all societies whether social, charitable, secret, or masonic or by whatever name they may be called; and all criminal laws for the protection of religious societies shall be so construed as to apply to all societies by whatever name they may be called. (Ga. L. 1855-56, p. 272, § 1; Code 1873, § 2346; Code 1882, § 2346; Civil Code 1895, § 2356; Civil Code 1910, § 2829; Code 1933, § 22-412; Code 1933, § 22-5510, enacted by Ga. L. 1968, p. 565, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 22-412, are included in the annotations for this Code section.

**Applicability to unincorporated labor union.** — An unincorporated labor union was such a society as was contemplated by former Code 1933, §§ 22-409 through 22-412 and 22-415 (see O.C.G.A. §§ 14-5-46 through 14-5-48 and O.C.G.A. § 14-5-50), and was not subject to suit as an association

of individuals, the suit not purporting to proceed against the members individually or as partners, and it not having been incorporated and not having had its name, style, objects, and the names of its trustees or officers recorded as required by law. *Smith v. International Ladies Garment Workers Union*, 58 Ga. App. 26, 197 S.E. 349 (1938) (decided under former Code 1933, § 22-412).

## 14-5-50. Corporate rights generally.

The societies referred to in Code Section 14-5-49 shall be bodies politic and corporate for the purposes of receiving in their distinct and proper names by their trustees or officers all property, both personal and real, by purchase, gift, or bequest. They may plead, be impleaded, contract, and be contracted with. When any such society shall have entered the names of its trustees or officers and shall have recorded its name, style, and objects as required by law, it may defend and be defended and shall then be entitled to all the benefits of Code Sections 14-5-46 through 14-5-48. (Ga. L. 1855-56, p. 272, § 2; Code 1873, § 2347; Code 1882, § 2347; Civil Code 1895, § 2357; Civil Code 1910, § 2830; Code 1933, § 22-414; Code 1933, § 22-5511, enacted by Ga. L. 1968, p. 565, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 2830, and former Code 1933, § 22-414, are included in the annotations for this Code section.

**Effect of Code section.** — Former Civil Code 1910, § 2830 (see O.C.G.A. § 14-5-50) converts an unincorporated religious organization into a corporation. *Langford v. Mount Zion Baptist Church*, 22 Ga. App. 696, 97 S.E. 102 (1918) (decided under former Civil Code 1910, § 2830).

**Compliance with Code section.** — Where a plaintiff in its petition designated itself as Tremont Temple Baptist Church, and alleged that it is "a duly organized religious society, and that a certificate of said society has been duly filed and recorded in the office of the clerk of the superior court" of the county in which the church is located, this showed a sufficient compliance with the

provisions of this Code section. *Hartsfield v. Tremont Temple Baptist Church*, 163 Ga. 557, 136 S.E. 550 (1927) (decided under former Civil Code 1910, § 2830).

**Applicability to unincorporated labor union.** — An unincorporated labor union was such a society as was contemplated by former Code 1933, §§ 22-409 through 22-412 and § 22-415 (see O.C.G.A. §§ 14-5-46 through 14-5-48 and § 14-5-50), and was not subject to suit as an association of individuals, the suit not purporting to proceed against the members individually or as partners, and it not having been incorporated and not having had its name, style, objects, and the names of its trustees or officers recorded as required by law. *Smith v. International Ladies Garment Workers Union*, 58 Ga. App. 26, 197 S.E. 349 (1938) (decided under former Code 1933, § 22-414).



**14-5-51. Powers of eleemosynary and religious corporations extended.**

Any eleemosynary or religious corporation created in this state prior to April 1, 1969, or thereafter chartered is by virtue of its existence authorized, in addition, to the propagation of the gospel, to:

- (1) Conduct schools for the training of youth;
- (2) Own and operate for itself or for others printing plants and publishing houses and any desired methods or means for the dissemination of news and information;
- (3) Own and operate hospitals, nursing homes, and any and all kinds of institutions for the alleviation of pain and suffering;
- (4) Own and operate for itself or others orphan asylums, old people's homes, and any and all institutions for the care of the needy and dependent;
- (5) Conduct and carry into effect any plan for the care, maintenance, and support of its workers and employees who may have become disabled, been retired, or otherwise made eligible for the benefits of said plan and, in connection therewith, to conduct a plan for the establishment and payment of annuities; and
- (6) Do anything and everything necessary and proper for the accomplishment of the objects enumerated in this Code section and, in general, to carry on any lawful business necessary or incident to the attainment of these objects. (Ga. L. 1943, p. 1660, § 1; Code 1933, § 22-5512, enacted by Ga. L. 1968, p. 565, § 1; Ga. L. 1982, p. 3, § 14.)

## CHAPTER 6

## CORPORATE TAKEOVERS

14-6-1 through 14-6-15.

Reserved. Repealed by Ga. L. 1986, p. 433, § 1, effective March 28, 1986.

**Editor's notes.** — This chapter was based on Ga. L. 1977, p. 649; Ga. L. 1982, p. 3; Ga. L. 1982, p. 696; Ga. L. 1982, p. 807; Ga. L. 1983, p. 3; Ga. L. 1984, p. 22.



## PROFESSIONAL CORPORATIONS

### CHAPTER 7

## PROFESSIONAL CORPORATIONS

Sec.		Sec.	
14-7-1.	Short title.	14-7-5.	Stock.
14-7-2.	Definitions.	14-7-6.	Name.
14-7-3.	Election to practice as professional corporation; application.	14-7-7.	Standards of practice; standards applicable to professional relationship and legal liabilities.
14-7-4.	Professional services.		

**Administrative rules and regulations.** — Professional corporations for certified public accountants, see Official Compilation of Rules and Regulations of State of Georgia, Rules of State Board of Accountancy, Ch. 20-7. Professional corporations for architects, see Official Compilation of Rules and Regulations of State of Georgia, Rules of State Board for Examination, Qualification, and Registration of Architects, Ch. 50-3.

**Law reviews.** — For survey article on

business associations, see 34 Mercer L. Rev. 13 (1982). For article regarding the federal tax and organizational aspects of "A Partnership of Professional Corporations," see 18 Ga. St. B.J. 108 (1982). For annual survey on business associations, see 35 Mercer L. Rev. 37 (1983). For survey article discussing developments in law of business associations for the period from June 1, 1999 through May 31, 2000, see 52 Mercer L. Rev. 95 (2000).

### JUDICIAL DECISIONS

**Cited in** Dixon v. Georgia Indigent Legal Servs., Inc., 388 F. Supp. 1156 (S.D. Ga. 1974).

### OPINIONS OF THE ATTORNEY GENERAL

**Issuance of professional corporation shares to employee stock ownership plan trustees.** — Professional corporations may issue shares to persons who are trustees of an employees' stock ownership plan so long as all trustees and all beneficiaries are persons licensed by the state to practice the profession for which the corporation was organized. 1975 Op. Att'y Gen. No. 75-61.

**Foreign professional corporation not entitled to certificate of authority to transact**

business in Georgia. 1970 Op. Att'y Gen. No. 70-64.

**Optometrists can be required to use personal names for corporations.** — The State Board of Examiners in Optometry (now the State Board of Optometry) has the authority to require optometrists who incorporate under the Professional Corporation Act (see O.C.G.A. § 14-7-1 et seq.) to use only their personal names in naming the professional corporation. 1971 Op. Att'y Gen. No. 71-180.

### RESEARCH REFERENCES

**ALR.** — Professional corporation stockholders' non-malpractice liability, 50 ALR4th 1276.

**14-7-1. Short title.**

This chapter shall be known and may be cited as the "Georgia Professional Corporation Act." (Ga. L. 1970, p. 243, § 1.)

**RESEARCH REFERENCES**

**ALR.** — Right of corporation to engage in business, trade, or activity requiring license from public, 165 ALR 1098.

**14-7-2. Definitions.**

As used in this chapter, the definitions contained in Chapter 2 of this title apply, and the term:

(1) "Licensed" includes registered, certified, admitted to practice, or otherwise legally authorized under the laws of this state by the appropriate regulating board.

(2) "Profession" means the profession of certified public accountancy, architecture, chiropractic, dentistry, professional engineering, land surveying, law, pharmacy, psychology, medicine and surgery, optometry, osteopathy, podiatry, veterinary medicine, registered professional nursing, or harbor piloting.

(3) "Professional corporation" means a corporation, whether domestic or foreign, organized under Chapter 2 of this title which has elected to become subject to this chapter.

(4) "Regulating board" means any board, commission, court, or governmental authority which, under the laws of this state, is charged with the licensing, registration, certification, admission to practice, or other legal authorization of the practitioners of any profession. (Ga. L. 1970, p. 243, § 2; Ga. L. 1981, p. 976, § 1; Ga. L. 1986, p. 1454, § 10; Ga. L. 1987, p. 3, § 14; Ga. L. 1996, p. 352, § 1.)

**Cross references.** — Professional corporations practicing certified public accounting and public accountancy, § 43-3-21 et seq. Practice of architecture by firms, partnerships, and corporations, § 43-4-10. Professional corporations engaged in practice of professional engineering or land surveying, § 43-15-23. Licensing of corporations engaged in business as an electrical contractor, master plumber or conditioned air contractor, § 43-14-8. Corporations engaged in

practice of professional geology, § 43-19-25. Corporations engaged in business of selling hearing aid devices or instruments at retail, § 43-20-19. Refusal of license to practice medicine for engaging in practice as officer or employee of corporation other than one organized pursuant to this chapter, § 43-34-37. Granting of real estate broker's licenses to corporations or partnerships, § 43-40-10.

**COMMENT****Note to 1986 Amendment**

Paragraph (3) was amended in 1986 to add the phrase "whether domestic or



foreign,” effectively reversing a 1970 Attorney General’s opinion. (Op. Att’y Gen. No. 70-64). That opinion provided that a foreign professional corporation was not entitled to a certificate of authority to transact business in Georgia because the definition of “professional corporation” did not expressly refer to foreign professional corporations. Under the first sentence of § 14-7-3, however, licensure by the proper Georgia authority remains a prerequisite to a valid election to practice as a professional corporation in this State, whether as a Georgia professional corporation or as a foreign professional corporation qualified to do business in Georgia.

### JUDICIAL DECISIONS

**“Professional” defined for malpractice act.** — The legislature intended for the term “professional” as used in O.C.G.A. § 9-11-9.1 to be defined by §§ 14-7-2(2), 14-10-2(2), and 43-1-24. *Gillis v. Goodgame*, 262 Ga. 117, 414 S.E.2d 197 (1992).

O.C.G.A. 9-11-9.1 applies only to those

licensed professions regulated by state examining boards when licensure is predicated upon successful completion of the specialized schooling or training necessary to obtain the expertise to practice that profession. *Harrell v. Lusk*, 263 Ga. 895, 439 S.E.2d 896 (1994).

### OPINIONS OF THE ATTORNEY GENERAL

**The clear intent of the Georgia Professional Corporation Act** (see O.C.G.A. § 14-7-1) is to limit the right to incorporate under the Act to those professions enumerated in the definition of “profession.” 1977 Op. Att’y Gen. No. 77-14.

**Nurse anesthetist may incorporate when licensed to practice.** — Nurse anesthetist may not incorporate under the Georgia Professional Corporation Act (see O.C.G.A. Ch. 7, T. 14) unless also licensed to practice

medicine or one of other professions enumerated in that Act. 1977 Op. Att’y Gen. No. 77-14.

**Real estate salesmen not allowed to practice in corporate form.** — Former Code 1933, § 84-1410 (see O.C.G.A. § 43-40-7) contemplated that real estate brokers may practice in the corporate form, but this power was not extended to salesmen by Ga. L. 1970, p. 243 (see O.C.G.A. § 14-7-2). 1971 Op. Att’y Gen. No. U71-39.

### 14-7-3. Election to practice as professional corporation; application.

A person or a group of persons licensed to practice a profession in this state may elect to practice as a professional corporation by complying with this chapter, irrespective of any law which, on March 11, 1970, prohibited the practice of the profession by a corporation. The articles of incorporation of a professional corporation shall be filed, and the professional corporation shall be organized, under Chapter 2 of this title; and the professional corporation shall pay the fees and costs prescribed therein. The articles shall state that the purpose of the corporation is to practice the profession named in the articles and that the corporation elects to be governed by this chapter. Any corporation organized under the general corporation laws of this state or any professional association organized under Chapter 10 of this title may elect to be governed by this chapter by amending its articles of association so as to make such election and so as to comply with the other requirements of this chapter and with the laws applicable to corporations generally in this state which are not inconsistent with the express provisions of this chapter. A professional corporation and

the shareholders of the corporation in their capacity as shareholders shall enjoy the rights, privileges, and immunities and shall be subject to the obligations and liabilities of other corporations organized for profit under Chapter 2 of this title and those of the shareholders of such corporations, except as changed, restricted, or enlarged by this chapter. Professional associations organized under Chapter 10 of this title are expressly authorized to continue to perform professional services pursuant to that Chapter 10 of this title without electing to comply with this chapter. (Ga. L. 1970, p. 243, § 3.)

**Law reviews.** — For article, "Liability Limbo: Are Incorporated Lawyers in Georgia Really Free from Personal Liability When

Their Fellow Shareholders Misbehave?," see 15 Ga. St. U.L. Rev. 1047 (1999).

### JUDICIAL DECISIONS

**Professional corporation must adhere to general corporate requirements.** — While a professional corporation and its principals labor under some limitations not inherent to other profit-making enterprises, at minimum they must adhere to general corporate requirements. *Quinn v. Cardiovascular Physicians*, 254 Ga. 216, 326 S.E.2d 460 (1985).

**Architectural firm is capable of being liable for professional malpractice.** — The fact that an architectural firm is not a professional corporation does not mean it is incapable of committing and being liable for professional malpractice by and through its individual agents. This is so, because, under O.C.G.A. § 43-4-10(c), a corporation may not be registered to practice architecture but may practice only through registered indi-

viduals. *Housing Auth. v. Gilpin & Bazemore/Architects & Planners, Inc.*, 191 Ga. App. 400, 381 S.E.2d 550, appeal dismissed, 259 Ga. 435, 383 S.E.2d 867 (1989).

**Liability of lawyers as shareholders in professional corporation.** — Lawyers may practice their profession as shareholders in a professional corporation with the same rights and responsibilities as shareholders in other professional corporations; thus, lawyers in a professional corporation were not jointly and severally liable for the professional misconduct of the majority shareholder; overruling *First Bank & Trust Co. v. Zagoria*, 250 Ga. 844, 302 S.E.2d 674 (1983). *Henderson v. HSI Fin. Servs., Inc.*, 266 Ga. 844, 471 S.E.2d 885 (1996).

### OPINIONS OF THE ATTORNEY GENERAL

**The clear intent of the Georgia Professional Corporation Act** (see O.C.G.A. Ch. 7, T. 14) was to limit the right to incorporate to those professions enumerated in the definition of "profession." 1977 Op. Att'y Gen. No. 77-14.

**When nurse anesthetist may incorporate.** — Nurse anesthetist may not incorporate

under the Georgia Professional Corporation Act (see O.C.G.A. Ch. 7, T. 14) unless also licensed to practice medicine or one of other professions enumerated in that Act. 1977 Op. Att'y Gen. No. 77-14.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 194, 195. 18B Am. Jur. 2d, Corporations, § 2120.

**ALR.** — Recovery back of money paid to

unlicensed person required by law to have occupational or business license or permit to make contract, 74 ALR3d 637.

Right of professional corporation to re-



cover damages based on injury or death of attorney or doctor associate, 74 ALR3d 1129.

#### 14-7-4. Professional services.

(a) A professional corporation may practice only one profession, but for the purpose of this chapter, the practice of architecture, professional engineering, and land surveying shall be considered the practice of only one profession to the extent that existing laws permit overlapping practices by members of those specific professions not inconsistent with the ethics of the professions involved.

(b) A professional corporation shall engage in the practice of a profession only through its officers, employees, and agents who are duly licensed or otherwise legally authorized to practice the profession in this state. This restriction shall not, however, prevent the corporation from employing unlicensed persons in capacities in which they are not rendering professional services to the public in the course of their employment.

(c) At least one member of the board of directors and the president of a professional corporation shall be licensed to practice the profession for which the corporation is organized. If the governing board of a professional corporation includes persons not so licensed, the corporation shall, by creation of a standing committee of the board or otherwise, vest the responsibility for decisions relating wholly to professional considerations in persons who are so licensed. (Ga. L. 1970, p. 243, § 4.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 18A Am. Jur. 2d, Corporations, §§ 194, 195. 18B Am. Jur. 2d, Corporations, § 2120.

#### 14-7-5. Stock.

(a) Shares in a professional corporation may only be issued to, held by, or transferred to a person who is licensed to practice the profession for which the corporation is organized and who, unless disabled, is actively engaged in such practice as an active practicing member of the issuing corporation, except as otherwise permitted under this Code section. Each stock certificate shall be appropriately endorsed disclosing this restriction and stating that shares standing in the name of a disqualified or retired person, or in the name of the personal representative of a deceased person, except during the holding period provided in this Code section, are void.

(b) Shares in a professional corporation shall be voted by the holder of record or by another shareholder in the same corporation in accordance with a proxy or an agreement providing for the voting of the shares.

(c) Shares in a professional corporation held by a deceased or retired shareholder shall, within six months after the date of death or retirement of such shareholder, be either redeemed or canceled by the corporation or transferred to a person or persons authorized to hold the shares unless transferred under a written agreement to an authorized shareholder pursuant to subsection (d) of this Code section. The shares held by a shareholder who becomes legally disqualified from practicing the profession for which the corporation is organized or who is disqualified as a shareholder under subsection (a) of this Code section shall be so redeemed, canceled, or transferred within 90 days after the disqualification becomes final. In the absence of an article or bylaw provision or an agreement providing for the redemption or transfer of such shares or, if the shares are not redeemed or transferred pursuant to such a provision or agreement within the required period of time, the corporation is authorized to and shall cancel the shares on its books at the termination of the required period. If valuation and payment terms are not fixed under such an existing provision or agreement and are not agreed upon either prior to or at any time after the termination of the required period, the fair value of the redeemed or canceled shares shall be determined and paid in the same manner as if the personal representative of the deceased shareholder, or the retired or disqualified shareholder, were a shareholder entitled to valuation and payment for his shares under Code Section 14-2-1327. The personal representative of the deceased shareholder, or the retired or disqualified shareholder, shall not be authorized at any time to participate in or vote on any matter concerning the rendering of professional services by the corporation. Upon the actual transfer or redemption or termination of the required holding period, whichever first occurs, the personal representative of the deceased shareholder, or the retired or disqualified shareholder, shall cease to be a holder of record for all purposes and shall deliver the share certificates to the purchaser or to the corporation with any required endorsement.

(d) Shares held in a professional corporation and owned by a shareholder may be transferred under a written agreement to an authorized shareholder which allows the shares to remain outstanding provided that the shares are collateral under a security agreement for the purchase price of the shares. In the event that the purchase price is not paid and the shares held as collateral are returned to the selling shareholder, the selling shareholder shall have a reasonable period of time, not to exceed one year after the return of the shares, to transfer the shares to an authorized shareholder. During that period the shareholder, if an active or inactive member of his profession, may vote the shares.

(e) If a professional corporation at any time ceases to have a shareholder licensed or otherwise authorized to practice and actually practicing, the profession for which the corporation is organized, or if a professional corporation does not redeem, cancel, or transfer the shares of a disquali-



fied, retired, or deceased person in accordance with this Code section, the corporation shall cease to be a professional corporation and shall operate as a corporation for profit organized under Chapter 2 of this title for the sole purpose of liquidation. The corporation may at any time after it ceases to be a professional corporation change its purpose by amending its articles. (Ga. L. 1970, p. 243, § 5; Ga. L. 1988, p. 1369, § 1; Ga. L. 1989, p. 946, § 107.)

**Law reviews.** — For survey article on business associations, see 34 Mercer L. Rev. 13 (1982).

### JUDICIAL DECISIONS

**Nonphysician as shareholder in medical professional corporation.** — Nonphysician cannot be shareholder in medical professional corporation, except under limited circumstances prescribed by law. Sherrer v.

Hale, 248 Ga. 793, 285 S.E.2d 714 (1982).

Cited in Broome v. Ginsberg, 159 Ga. App. 202, 283 S.E.2d 1 (1980); Dougherty, McKinnon & Luby v. Greenwald, 225 Ga. App. 762, 484 S.E.2d 722 (1997).

### OPINIONS OF THE ATTORNEY GENERAL

**Issuance of professional corporation shares to employee stock ownership plan trustees.** — Professional corporations may issue shares to persons who are trustees of an employees' stock ownership plan so long as all trustees and all beneficiaries are persons licensed by the state to practice the profession for which the corporation was orga-

nized. 1975 Op. Att'y Gen. No. 75-61.

A professional corporation is prohibited by state law from issuing stock to an employee stock ownership plan, established as a trust, where some of the beneficiaries of the trust are not licensed in the profession of the corporation. 1995 Op. Att'y Gen. No. U95-4.

### RESEARCH REFERENCES

**ALR.** — Issues pertaining to ownership of professional corporation as affected by res-

ignation from corporate practice by active shareholder, 32 ALR4th 921.

### 14-7-6. Name.

The name of a professional corporation shall satisfy the requirements of Code Section 14-2-401; provided, however, that, in lieu of the use of a word or abbreviation as required by paragraph (1) of subsection (a) of that Code section, the word "associated," the phrase "professional association," the phrase "professional corporation," or an abbreviation of any of them may be used. (Ga. L. 1970, p. 243, § 6; Ga. L. 1989, p. 946, § 108.)

**Administrative rules and regulations.** — Reservation of Corporate Name, Official Compilation of the Rules and Regulations of

the State of Georgia, Office of Secretary of State, Commissioner of Corporations, Chapter 590-7-2.

**14-7-7. Standards of practice; standards applicable to professional relationship and legal liabilities.**

Nothing contained in this chapter shall limit the authority and duty of any regulating board to regulate the several professions including the right to establish and enforce standards of practice, and nothing contained in this chapter shall change the law or existing standards applicable to the relationship between the person furnishing a professional service and the person receiving such service, including, but not by way of limitation, the rules of privileged communication and the contract, tort, and other legal liabilities and professional relationships between such persons. (Ga. L. 1970, p. 243, § 7.)

**RESEARCH REFERENCES**

**ALR.** — What constitutes professional services within meaning of statute preserving individual liability of professional employees of professional corporation, association, or partnership, 31 ALR4th 898.



## PARTNERSHIPS

### CHAPTER 8

## PARTNERSHIPS

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14-8-2.	Definitions.	14-8-28.	Judgment creditor of a partner against debtor partner's interest in partnership.
14-8-3.	"Knowledge" and "notice" defined.	14-8-29.	Cessation of partners' association in carrying on partnership after dissolution.
14-8-4.	Construction with other laws.	14-8-30.	Continuation of dissolved partnership during wind-up of partnership's affairs.
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14-8-15.	Liability of partners.	14-8-40.	Settlement of accounts between partners after dissolution.
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# CORPORATIONS, PARTNERSHIPS, ETC.

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14-8-44.	Law governing foreign limited liability partnership.	14-8-56.	Annual registration of foreign limited liability partnership.
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14-8-47.	Issuance of certificate of authority to foreign limited liability partnership.	14-8-59.	Rules and regulations pertaining to foreign limited liability partnerships.
14-8-48.	Name of foreign limited liability partnership.	14-8-60.	Effect of Secretary of State's filing of documents pertaining to foreign limited liability partnerships.
14-8-49.	Change of name of foreign limited liability partnership.	14-8-61.	Effective date of laws governing foreign limited liability partnership.
14-8-50.	Withdrawal of foreign limited liability partnership from state.	14-8-62.	Limited liability partnership election; recording; fees; contents; procedures and effect; cancellation; dissolution of partnership; amendment of certificate to comply with name requirements.
14-8-51.	Grounds for revocation of certificate of authority of foreign limited liability partnership.	14-8-63.	Name of limited liability partnership.
14-8-52.	Procedure for revocation of certificate of authority of foreign limited liability partnership.	14-8-64.	Recognition of limited liability partnership outside state; internal affairs of partnerships governed by state law.
14-8-53.	Appeal from revocation of certificate of authority by foreign limited liability partnership.		
14-8-54.	Transaction of business without certificate of authority by foreign limited liability partnership.		

**Cross references.** — Prosecution of actions against less than all copartners, § 9-2-26.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1985, § 14-8-10A was redesignated § 14-8-10.1.

**Editor's notes.** — Ga. L. 1984, p. 1439, § 1, effective April 1, 1985, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter, also relating to partnerships, consisted of Code Sections 14-8-1 through 14-8-3, 14-8-20 through 14-8-24, 14-8-40 through 14-8-49, 14-8-60 through

14-8-74, and 14-8-90 through 14-8-92 and was based on Ga. L. 1981, Ex. Sess., p. 8 (Code Enactment Act) and Ga. L. 1982, p. 3, § 14.

**Law reviews.** — For article advocating the Adoption of a Uniform Partnership Act, see 16 Ga. B.J. 52 (1953). For article discussing legal aspects of investments and trade in Georgia by foreign business enterprises, see 27 Mercer L. Rev. 629 (1976). For survey of Georgia cases in the area of business associations from June 1979 through May 1980, see 32 Mercer L. Rev. 1 (1980). For article surveying business associations developments in Georgia from mid-1980 through



mid-1981 concerning partnerships and corporations, see 33 Mercer L. Rev. 19 (1981). For article, "The Uniform Partnership Act as Adopted in Georgia," see 21 Ga. St. B.J. 56 (1984). For annual survey on business associations, see 36 Mercer L. Rev. 91 (1984). For article, "An Analysis of Georgia's New Partnership Law," see 36 Mercer L. Rev. 443 (1985). For article, "Freedom of Contract Among the Owners of a Partnership or Limited Partnership," see 36 Mercer L. Rev. 701 (1985). For article surveying business association law in 1984-1985, see 37 Mercer L. Rev. 103 (1985). For annual survey of cases concerning business associations, see 39 Mercer L. Rev. 53 (1987). For article, "The New Georgia Limited Partnership Act," see 24 Ga. St. B.J. 168 (1988). For survey article on business associations, see 42

Mercer L. Rev. 71 (1990). For survey article on business associations, see 44 Mercer L. Rev. 67 (1992). For annual survey article on business associations, see 45 Mercer L. Rev. 53 (1993). For article discussing developments in law of business associations from June 1, 1996 through May 31, 1997, see 49 Mercer L. Rev. 71 (1997). For survey article discussing developments in law of business associations for the period from June 1, 1999 through May 31, 2000, see 52 Mercer L. Rev. 95 (2000).

For note on 1995 amendments and enactments of sections in this chapter, see 12 Ga. St. U.L. Rev. 65 (1995).

For comment, "Dissolution of General Partnerships: A Comparison of Georgia Law and the Uniform Partnership Act," see 35 Mercer L. Rev. 381 (1983).

## CODE REVISION COMMISSION NOTE ON COMMENTS

The comments appearing in this chapter have been prepared under the supervision of the Joint Committee on the Uniform Partnership Act of the Real Property and Corporate and Banking Law Sections of the State Bar of Georgia and are included in the Official Code of Georgia Annotated at the request of these committees. Neither the General Assembly of Georgia nor the Code Revision Commission of the State of Georgia has participated in the drafting of these comments or has reviewed the comments for their content. The comments should not be considered to constitute a statement of legislative intention by the General Assembly of Georgia nor do they have the force of statutory law.

## NOTES AS TO COMMENTS

The comments in Chapter 8 of Title 14 were prepared for the Joint Committee on the Uniform Partnership Act of the Real Property and Corporate and Banking Law Sections of the State Bar of Georgia by Larry E. Ribstein, Professor of Law, Walter F. George School of Law, Mercer University. Professor Ribstein was Reporter for the Joint Committee. References in the comments to "prior Georgia law" or to a certain specific section of "prior O.C.G.A. § 148—" are to the Georgia partnership law which existed prior to April 1, 1985, the effective date of the Uniform Partnership Act. Citations and references to existing provisions of Georgia law are to the 1984 O.C.G.A. sections.

References in the comments to the "Official UPA" are to the official version of the Uniform Partnership Act (U.L.A.) approved by the National Conference of Commissioners on Uniform State Laws in 1914, as set forth in Volume 6 of Uniform Laws Annotated (West 1969). For additional commentary on the Georgia version of the Uniform Partnership Act, see Revised Report of Joint Committee on the Uniform Partnership Act, published by the Joint Committee on the Uniform Partnership Act of the Real Property and Corporate and Banking Law Sections of the State Bar of Georgia in 1984, and L. Ribstein, "An Analysis of Georgia's New Partnership Law," 36 Mercer L. Rev. 443 (1985).

## JUDICIAL DECISIONS

**Nature of claim for partnership accounting, dissolution, or injunction.** — No provision in the Georgia Uniform Partnership Act, O.C.G.A. § 14-8-1 et seq., or Georgia Limited Partnership Act, O.C.G.A. § 14-9A-1 et seq. changes a claim for an accounting, dissolution, or injunction into a legal action

or grants a partner the right to a jury trial. *Williams v. Tritt*, 262 Ga. 173, 415 S.E.2d 285 (1992).

**Cited in** *Bloise v. Trust Co. Bank*, 170 Ga. App. 405, 317 S.E.2d 249 (1984); *Emory Univ. v. Houston*, 185 Ga. App. 289, 364 S.E.2d 70 (1987).

## RESEARCH REFERENCES

**ALR.** — Conflict of laws as to partnership matters, 29 ALR2d 295.

Partnership or joint-venture matters as subject of declaratory judgment, 32 ALR2d 970.

Insurance on life of partner as partnership asset, 56 ALR3d 892.

Civil liability of one partner to another or to the partnership based on partner's personal purchase of partnership property dur-

ing existence of partnership, 37 ALR4th 494.

Tort action for personal injury or property damage by partner against another partner or the partnership, 39 ALR4th 139.

Joint venture's capacity to sue, 56 ALR4th 1234.

Partnership or joint venture exclusion in contractor's or other similar comprehensive general liability insurance policy, 57 ALR4th 1155.

## 14-8-1. Short title.

This chapter may be cited as the "Uniform Partnership Act." (Code 1981, § 14-8-1, enacted by Ga. L. 1984, p. 1439, § 1.)

## JUDICIAL DECISIONS

**Relationship between two business entities not a partnership.** — Summary judgment was properly granted to sublessors, pursuant to O.C.G.A. § 9-11-56, in a sublessee's multi-claim action arising from agreements entered into between the parties with respect to concert promotion at a particular venue, which was done in order to satisfy a minority business enterprise participation minimum which was imposed by the city; based on the terms of the various documents signed between the parties, there was no

legal partnership pursuant to O.C.G.A. § 14-8-1 et seq., and no joint venture as the sublessors did not share control of the concert promotions, did not share profits or liabilities, the terms used in the agreements were not dispositive on the issue, and the sublessee's assistance was titular only. *Jerry Dickerson Presents, Inc. v. Concert S. Chastain Promotions*, 260 Ga. App. 316, S.E.2d , 2003 Ga. App. LEXIS 355 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 2 et seq.

**ALR.** — What amounts to a joint adventure, 48 ALR 1055; 63 ALR 909; 80 ALR 312; 95 ALR 857; 138 ALR 968.

Validity and effect of chattel mortgage on partner's interest in firm, 54 ALR 534.

Partnership as distinguished from employment (where rights of parties inter se or their privies are concerned), 137 ALR 6.



**14-8-2. Definitions.**

As used in this chapter, the term:

(1) "Bankrupt" means a person who is the subject of:

(A) The entry of an order for relief under Section 303(h) of the Bankruptcy Code (11 U.S.C. Section 303(h)) or the filing of a petition for voluntary bankruptcy under Section 301 of the Bankruptcy Code (11 U.S.C. Section 301) as these provisions may be now or hereafter amended; or

(B) An equivalent order or petition under any successor statute or code of general application; or

(C) An equivalent order or petition under any state insolvency Act.

(2) "Business" includes every trade, occupation, or profession.

(3) "Conveyance" includes every assignment, deed, transfer, lease (including the creation of a usufruct), mortgage or pledge of tangible, intangible, or real property, and also the creation or cancellation of any lien, encumbrance, or security title.

(4) "Court" includes every court and judge having jurisdiction in the case.

(5) "Foreign limited liability partnership" means any limited liability partnership and any limited liability limited partnership formed under the laws of a jurisdiction other than this state.

(6) "Interest" means interest at the legal rate which applies where the rate percent is not named in the contract as provided by Code Section 7-4-2 or any successor statute.

(6.1) "Limited liability partnership" means any partnership governed by this chapter, and any limited partnership that either is organized under Chapter 9 of this title or has elected to be subject to the provisions of Chapter 9 of this title pursuant to subsection (b) of Code Section 14-9-1201, that has become a limited liability partnership under Code Section 14-8-62 and that complies with Code Section 14-8-63.

(7) "Person" includes a natural person, partnership, limited liability partnership, limited partnership (domestic or foreign), trust, estate, association, or corporation. Any person may be a partner unless the person lacks capacity apart from this chapter.

(8) "Real property" includes any estate or interest, including usufructory interests, in, over, or under land, including minerals, structures, fixtures, and other things which by custom, usage, or law pass with a conveyance of land though not described or mentioned in an instrument of conveyance or in a contract to make such a conveyance. (Code

1981, § 14-8-2, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1994, p. 1674, § 1; Ga. L. 1995, p. 470, § 1; Ga. L. 1996, p. 787, § 1; Ga. L. 1997, p. 143, § 14.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1995, paragraph (7.1), which was added by Ga. L. 1995, p. 470, was redesignated as paragraph (6.1).

**Law reviews.** — For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 77 (1994).

## COMMENT

### Note to Uniform Partnership Act

This section sets forth definitions of terms used in the Uniform Partnership Act.

### Prior Georgia Law

There was no comparable provision.

### Official UPA

Only the definition of “business” in paragraph (2) is the same as in the official version.

Paragraph (1) modernizes the official version by referring to the Bankruptcy Code. “Bankrupt” does not refer to an interim order, such as one under § 303(g) of the Bankruptcy Code, which precedes the actual order for relief under § 303(h) or its equivalent.

Paragraph (3) is based on § 1 of the Uniform Fraudulent Conveyance Act.

Paragraph (5) refers to the legal rate applicable where the parties have not agreed to a specific rate of interest.

Paragraph (6), first sentence, is based on § 101(11) of the Revised Uniform Limited Partnership Act.

Paragraph (6), second sentence, is based on § 6-A(2) of the Texas version of the Uniform Partnership Act, Tex. Civ. Stat. Art. 6132b, § 6-A(2) (Vernon, 1970). Similarly expansive definitions of “person” are also found in the Alabama, Kansas and Wisconsin acts.

Paragraph (7) is based on § 1-201(15) of the Uniform Land Transactions Act.

The definitions of “business,” “person,” “conveyance” and “real property” are intended, through the use of “includes,” to be expansive. The definition of “bankrupt,” through the use of the word “means,” is intended to be inclusive.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 2 et seq.

### 14-8-3. “Knowledge” and “notice” defined.

(a) A person has “knowledge” of a fact within the meaning of this chapter not only when such person has actual knowledge thereof, but also



when he has knowledge of such other facts as in the circumstances shows bad faith.

(b) A person has "notice" of a fact within the meaning of this chapter when the person who claims the benefit of the notice:

(1) States the fact to such person; or

(2) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence. (Code 1981, § 14-8-3, enacted by Ga. L. 1984, p. 1439, § 1.)

#### COMMENT

##### Note to Uniform Partnership Act

This section defines "knowledge" and "notice" as these terms are used in the Uniform Partnership Act. "Knowledge" includes both actual knowledge and bad faith ignorance. "Notice" looks to the conduct of the person giving notice rather than to the subjective awareness of the person who receives notice.

##### Prior Georgia Law

There was no comparable provision.

##### Official UPA

This section is the same as the official version.

##### Cross-Reference

When the partnership is charged with knowledge of or notice to a partner: § 14-8-12.

#### RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, § 253.

#### 14-8-4. Construction with other laws.

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(b) The law of estoppel shall apply under this chapter.

(c) The law of agency shall apply under this chapter.

(d) This chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(e) This chapter shall not be construed so as to impair the obligations of any contract existing when this chapter goes into effect, nor to affect any action or proceedings begun or right accrued before this chapter takes effect.

(f) This chapter being a general Act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

(g) The validity of an instrument executed on behalf of the partnership by a partner shall not be affected by the formality with which the partnership contract was executed. (Code 1981, § 14-8-4, enacted by Ga. L. 1984, p. 1439, § 1.)

### COMMENT

#### Note to Uniform Partnership Act

Subsections (a), (d) and (f) state general rules for construing the Uniform Partnership Act. Subsections (b) and (c) make clear that the principles of agency and estoppel are applicable to the matters covered by the Act. Subsection (e) provides that the Act does not affect rights accrued under contracts and conveyances made prior to the effective date. The Act will, however, affect rights accruing after the effective date in dealings among partners and between partnerships and third parties even with respect to partnerships formed prior to the effective date. Thus, for example, in the absence of contrary agreement, the Act will control the rights of the partners in connection with the dissolution of a partnership if the dissolution occurs after the effective date of the Act even if the partnership was formed prior to the effective date of the Act. However, an agreement controlling rights on dissolution that was made prior to the effective date and that is binding under prior law will continue to bind the parties even if it is inconsistent with the provisions of the Act. Subsection (g) provides a limited exception to the "equal dignity" rule.

#### Prior Georgia Law

There was no comparable provision.

#### Official UPA

This section is the same as the official version except for the addition of subsections (f) and (g). Subsection (f) is based on § 1-102(1) of the Uniform Commercial Code. Subsection (g) limits the effect of the "equal dignity rule" codified in O.C.G.A. § 10-6-2 so that the validity of such instruments as deeds and the statement of partnership provided for under § 14-8-10.1 does not depend on the formality of the partnership agreement that created the authority to execute the instrument. Subsection (g) thus reverses the contrary implication in *Hammond v. Chastain*, 230 Ga. 747, 749, 199 S.E.2d 237, 239 (1973).

### JUDICIAL DECISIONS

Cited in *Eassa Properties v. Shearson Lehman Bros.*, 851 F.2d 1301 (11th Cir. 1988).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 27, 29.

**C.J.S.** — 68 C.J.S., Partnership, § 7.



**14-8-5. Governing laws in absence of specific provision in this chapter.**

In any case not provided for in this chapter, the other provisions of this Code and the rules of common law and equity shall govern. (Code 1981, § 14-8-5, enacted by Ga. L. 1984, p. 1439, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 23.

**14-8-6. “Partnership” defined.**

(a) A partnership is an association of two or more persons to carry on as co-owners a business for profit and includes, for all purposes of the laws of this state, a limited liability partnership.

(b) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to the adoption of this chapter; but this chapter shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent with this chapter. (Code 1981, § 14-8-6, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1995, p. 470, § 2.)

**COMMENT****Note to Uniform Partnership Act**

This section sets forth a general definition of partnership. Pursuant to subsection (a), partnership is distinguished from an ordinary principal-agent relationship in that partners are “co-owners” of the business, and from passive co-ownership of property in that partners “carry on ... a business.” Pursuant to subsection (b), the Act does not convert into a partnership any non-partnership that was formed under another statute. The Act does, however, apply to limited partnerships except insofar as the ULPA includes inconsistent provisions.

**Prior Georgia Law**

There was no comparable definition of partnership. For a comparison of the rules for determining the existence of partnership under prior Georgia law and under the Act, see the Comment to § 14-8-7.

**Official UPA**

This section is the same as the official version.

**Cross-References**

Definitions of “business” and “person”: § 14-8-2. Rules for determining the existence of partnership in accordance with the definition set forth in this section: § 14-8-7. Partnership by estoppel: § 14-8-16.

## JUDICIAL DECISIONS

**Issue of law and fact.** — In Georgia, the issue of partnership is generally a mixed question of law and fact and cannot be resolved as a matter of law unless the verdict one way or the other is demanded by the evidence. *Harris v. Escoe* (In re Woolston), 147 Bankr. 279 (Bankr. M.D. Ga. 1992).

**Corporations as partners.** — Several Georgia and Tennessee corporations were partners in the ownership and operation of a hospital, where each corporation had an ownership interest in the hospital, which was operated by the parties as a business for profit. *DM II, Ltd. v. Hospital Corp. of Am.*, 130 F.R.D. 469 (N.D. Ga. 1989).

**Partners in developing mobile home park.** — Parties who agreed to make equal contri-

butions, agreed to share the profits of the mobile home park, and met to discuss development and the business affairs of the mobile home park, were partners. *Harris v. Escoe* (In re Woolston), 147 Bankr. 279 (Bankr. M.D. Ga. 1992).

Cited in *Maryland Cas. Co. v. Benefield*, 664 F. Supp. 1429 (N.D. Ga. 1987); *Lane v. Spragg*, 224 Ga. App. 606, 481 S.E.2d 592 (1997); *Beeson v. Crouch*, 227 Ga. App. 578, 490 S.E.2d 118 (1997); *Peacock v. Chegwiddden*, 238 Ga. App. 328, 518 S.E.2d 760 (1999); *Aaron Rents, Inc. v. Fourteenth St. Venture, L.P.*, 243 Ga. App. 746, 533 S.E.2d 759 (2000), *aff'd*, sub nom. *Accolades Apts., L.P. v. Fulton County*, 274 Ga. 28, 549 S.E.2d 348 (2001).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 2.

**C.J.S.** — 68 C.J.S., Partnership, § 1.

## 14-8-7. Determination of existence of partnership.

In determining whether a partnership exists, the following rules shall apply:

(1) Except as provided by Code Section 14-8-16 persons who are not partners as to each other are not partners as to third persons;

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property;

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;

(4) The receipt by a person of a share of the profits of a business is prima-facie evidence that he is a partner in the business; provided, however, that no such inference shall be drawn if profits were received in payment of the following, even though the amount of payment varies with the profits of the business:

(A) A debt, whether by installments or otherwise;

(B) Wages, salary, or other compensation to an employee or independent contractor;

(C) Rent to a landlord;



(D) An annuity or other payment to a surviving spouse or representative of a deceased partner;

(E) Interest or other payment or charge on a loan;

(F) Consideration for the sale of good will of a business or other property, whether by installments or otherwise. (Code 1981, § 14-8-7, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1994, p. 97, § 14.)

**Law reviews.** — For annual survey article discussing existence of partnerships, see 46 Mercer L. Rev. 71 (1994).

### COMMENT

#### Note to Uniform Partnership Act

This section provides specific rules for determining the existence of partnership. Paragraph (2) distinguishes partnership from various forms of co-ownership of property. Paragraph (4) provides that proof of profit-sharing alone presumptively establishes partnership unless the profits were received in connection with one of the relationships enumerated in subparagraphs (4)(A) through (F). Paragraph (3) clarifies that no such effect is attached to sharing of gross returns as distinguished from the profits of the business. Finally, paragraph (1) provides that the same rules for determination of partnership apply regardless of whether the question arises between purported partners or between purported partners and third parties, except in the partnership-by-estoppel situation governed by § 14-8-16.

#### Prior Georgia Law

Paragraph (1) clearly reverses the implication of prior O.C.G.A. § 14-8-21 that a different test would be applied in cases involving third parties than that in cases among the partners. The Act accords with some case law under the prior Code. See *Camp v. Montgomery*, 75 Ga. 795 (1885); *McCowen v. Aldred*, 85 Ga. App. 373, 69 S.E.2d 660 (1952); *Gnann v. Cameron*, 29 Ga. App. 608, 116 S.E. 338 (1923). Paragraph (2), as well as § 14-8-6, clearly reverses the implication of prior O.C.G.A. § 14-8-20 that partnership can arise from joint ownership of property alone. The Act accords with *Borum v. Deese*, 196 Ga. 292, 26 S.E.2d 538 (1943). Paragraph (4) reverses the implication of prior O.C.G.A. § 14-8-21 that partnership could not arise out of profit-sharing alone, at least in third-party cases. The Act accords with *Callaway v. Waxelbaum Co.*, 128 Ga. 508, 57 S.E. 763 (1907); and *Powell v. Moore, Marsh & Co.*, 79 Ga. 524, 4 S.E. 383 (1887). Finally, there were no prior Code provisions comparable to the presumptions provided for in paragraph (4).

#### Official UPA

Paragraph (4) differs from the official version in that subparagraph (B) has been expanded to include all compensation in connection with an employment relationship and not just “wages of an employee”; subparagraph (4)(D) refers to “surviving spouse” rather than “widow”; and the last phrase of the lead-in to the Georgia version of paragraph (4) was in the official version of subparagraph (4)(E). With respect to the last change, note that if the amount of profits affects the *obligation to repay a debt* and not merely the *amount of each payment*, this may furnish evidence of a partnership rather than a debtor-creditor relationship.

#### Cross-References

See the cross-references to § 14-8-6.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Code 1910, §§ 2626, 3155, 3158, 3184, former Code 1933, §§ 75-101 and 75-102, and former Code Sections 14-8-20 and 14-8-21, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**"Partnership" defined.** — Generally speaking, a partnership is a voluntary agreement between two or more persons to contribute their money, property, or skill to the operation of a joint business or common enterprise for their common benefit and to divide the profits and bear the losses in certain proportions. *Hayes v. Irwin*, 541 F. Supp. 397 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1466 (11th Cir.), *cert. denied*, 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed. 2d 119 (1984) (decided under former Code 1933, §§ 75-101 and 75-102).

If two or more persons put into an enterprise property, money, or other things of value, other than mere personal services, upon an agreement that they shall each have an interest in the profits as such — that the earnings on the investment shall determine the extent of the profits, if any, to be received — it is a partnership. It is not necessary to specify as to the liability for the losses in such cases, for if the business venture proves unsuccessful or unprofitable, the loss occurs as the inevitable concomitant. *Butler v. Frank*, 7 Ga. App. 655, 67 S.E. 884 (1910) (decided under former Code 1910, § 2626).

**Contract granting right to profits not evidence of partnership.** — The terms of contract granting a party the right to profits is not evidence, however, that a partnership, as opposed to a debtor/creditor relationship, existed between the parties. *Barton v. Marubeni Am. Corp.*, 204 Ga. App. 346, 419 S.E.2d 342 (1992).

**Test of partnership is intent of parties.** — As between themselves, "the intent of the parties is the true test of a partnership, which may be created by a contract giving rights or imposing liabilities differing from those from which the law ordinarily infers a partnership." *Allgood v. Feckoury*, 36 Ga. App. 42, 135 S.E. 314 (1926) (decided under former Code 1910, §§ 3155 and 3158).

**More than mere personal services is necessary to create a partnership.** — The parties to a partnership must put into the enterprise property, money, or other thing of value, other than mere personal services. *Escoc v. Johnson*, 110 Ga. App. 252, 138 S.E.2d 330 (1964) (decided under former Code 1933, § 75-102).

**A partnership may be created for a single venture or enterprise.** *Corbin v. Collum*, 173 Ga. 681, 160 S.E. 771 (1931) (decided under former Civil Code 1910, § 3158); *Hayes v. Irwin*, 541 F. Supp. 397 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1466 (11th Cir.), *cert. denied*, 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed. 2d 119 (1984) (decided under former Code 1933, §§ 75-101 and 75-102).

**Legal entity.** — Though a firm or partnership is not a person, it is a legal entity, and for some purposes is recognized as a quasi-person, having powers and functions exercisable by one of the partners severally or all of them jointly. *Borum v. Deese*, 196 Ga. 292, 26 S.E.2d 538 (1943) (decided under former Code 1933, § 75-101).

**Common law joint-stock companies.** — Although it has been held that common law joint-stock companies are regarded as partnerships, such companies are not entirely controlled by the legal rules and principles which govern ordinary partnerships. *Hammond v. Otwell*, 170 Ga. 832, 154 S.E. 357 (1930) (decided under former Civil Code 1910).

**A written contract of partnership need not be attached to the petition.** *Bone v. Faircloth*, 52 Ga. App. 23, 182 S.E. 400 (1935) (decided under former Code 1933, § 75-101).

**The petition need not set out the actual terms and conditions of the parties in the business.** *Bone v. Faircloth*, 52 Ga. App. 23, 182 S.E. 400 (1935) (decided under former Code 1933, § 75-101).

**Contract of partnership is not required to be in writing**, even though land and timber thereon is to become part of its assets to be used in operation of sawmill business. *Bone v. Faircloth*, 52 Ga. App. 23, 182 S.E. 400 (1935) (decided under former Code 1933, § 75-101).

An agreement to form a partnership need not be in writing, for the true determinant of a partnership is the objective intent of the



parties involved. *Hayes v. Irwin*, 541 F. Supp. 397 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1466 (11th Cir.), *cert. denied*, 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed. 2d 119 (1984) (decided under former Code 1933, §§ 75-101 and 75-102).

**A declaration may prove partnership.** — A partnership may be proved by evidence that each of the alleged partners admitted its existence and the partner's membership. *Clarke v. Woodward*, 76 Ga. App. 181, 45 S.E.2d 473 (1947) (decided under former Code 1933, §§ 75-101 and 75-102).

**Except when it is that of another alleged partner.** — The existence of a partnership cannot, as against one denying it, be lawfully shown by declarations of another alleged member of the firm. *Zerounis v. Berry*, 199 Ga. 410, 34 S.E.2d 275 (1945) (decided under former Code 1933).

**Neither partnership nor agency relationship is created by franchise contract** under which one operates type of business on royalty basis. *Whitco Produce Co. v. Bonanza Int'l, Inc.*, 154 Ga. App. 92, 267 S.E.2d 627 (1980) (decided under former law).

**Mere tenancy in common does not create partnership**, and partnership will not be implied from joint ownership or joint purchase of land, even when accompanied by agreement to share profits and losses of selling it; yet tenants in common may become partners, like other persons, where they agree to assume that relation towards each other. *Borum v. Deese*, 196 Ga. 292, 26 S.E.2d 538 (1943) (decided under former Code 1933, § 75-101).

**Inducing extension of credit by representation of self as partner.** — Actual contract by which partnership is formed is not always essential to support liability of one person as partner of another; as to third persons, one may assume such liability by inducing them to extend credit upon faith of representations made by that person, either express or implied, to effect that the person was a partner and, as such, liable. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under former Code 1933, § 75-101).

**Third party representing defendant as partner.** — Where third party, transacting business under a trade name, introduced defendant as a partner to the plaintiff, represented that defendant was backing the

third party in said business, defendant made no denial of these affirmations, and where plaintiff believed this and sustained a loss by endorsing a check for such third party, verdict holding defendant liable was supported by the evidence. *Clarke v. Woodward*, 76 Ga. App. 181, 45 S.E.2d 473 (1947) (decided under former Code 1933, §§ 75-101 and 75-102).

**Partnership or no partnership is generally a mixed question of law and fact**, and cannot be resolved as a matter of law unless verdict one way or the other is demanded by the evidence. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under former Code 1933, §§ 75-101 and 75-102); *Flatau v. Tribble's Shoes, Inc.* (In re Lawrence), 82 Bankr. 157 (Bankr. M.D. Ga. 1988); *Harris v. Escoe* (In re Woolston), 147 Bankr. 279 (Bankr. M.D. Ga. 1992).

**Whether a person has held oneself out as a partner is a question of fact.** *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under former Code 1933, §§ 75-101 and 75-102).

**Whether third party relied upon acts of ostensible partner** is a question of fact. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under former Code 1933, §§ 75-101 and 75-102).

**Authorization for arbitration agreement need not be express.** — Under the general rule established in paragraph (1) of O.C.G.A. § 14-8-9, a partner's actions in furtherance of the business of the partnership bind the partnership, and arbitration agreements mentioned in paragraph (3)(E) of O.C.G.A. § 14-8-9 constitute a specific exception to this general rule only in the absence of authorization from the remaining partners, and nothing in O.C.G.A. Ch. 8, T. 14 mandates that such authorization must be express rather than implied. *Eassa Properties v. Shearson Lehman Bros.*, 851 F.2d 1301 (11th Cir. 1988).

**Evidence of partnership.** — Evidence compelled conclusion that partnership existed between plaintiff and defendant for the purpose of soliciting clients and transacting their investments. *Hayes v. Irwin*, 541 F. Supp. 397 (N.D. Ga. 1982), *aff'd*, 729 F.2d 1466 (11th Cir.), *cert. denied*, 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed. 2d 119 (1984) (decided under former Code 1933, §§ 75-101 and 75-102).

**Partnership found.** — For a case where the contract between the parties was held to constitute a partnership, see *Smith v. Hancock*, 163 Ga. 222, 136 S.E. 52 (1926). (decided under former Civil Code 1910, § 3158). See also *Barrow v. Georgia Chem. Works*, 34 Ga. App. 31, 128 S.E. 14 (1925) (decided under former Civil Code 1910, § 3158); *Nellis & Co. v. Green & Stallworth*, 36 Ga. App. 684, 137 S.E. 843 (1927) (decided under former Civil Code 1910, § 3184).

Parties who agreed to make equal contributions, agreed to share the profits of the mobile home park, and met to discuss development and the business affairs of the mobile home park, were partners. *Harris v. Escoe (In re Woolston)*, 147 Bankr. 279 (Bankr. M.D. Ga. 1992).

**Partnership not found.** — See *Falk v. LaGrange Cigar Co.*, 15 Ga. App. 564, 84 S.E. 93 (1915) (receipt of profits as compensation for services) (decided under former Civil Code 1910, § 3158); *Allgood v. Feckoury*, 36 Ga. App. 42, 135 S.E. 314 (1926) (receipt of profits as compensation for services) (decided under former Civil Code 1910, § 3158); *Sauls v. Scott*, 46 Ga. App. 243, 167 S.E. 311 (1933) (receipt of profits as compensation for services) (decided under former Civil Code 1910, § 3158); *West Lumber Co. v. Chandler*, 46 Ga. App. 408, 167 S.E. 766 (1933) (impoundment of profits as security for loan) (decided under former Civil Code 1910, § 3158); *Smith v. City of Atlanta*, 51 Ga. App. 17, 179 S.E. 558 (1935) (placement of slot machines in stores in return for part of gross amount taken in) (decided under former Code 1933, §§ 75-101 and 75-102); *Beard v. Oliver*, 52 Ga. App. 229, 182 S.E. 921 (1935) (interest in profits as compensation for services) (decided under former Code 1933, §§ 75-101 and 75-102); *Hannifin v. Wolpert*, 56 Ga.

App. 466, 193 S.E. 81 (1937) (interest in profits as compensation for services) (decided under former Code 1933, §§ 75-101 and 75-102); *Benton v. White*, 185 Ga. 286, 194 S.E. 179 (1937) (agreement to do business in concert) (decided under former Code 1933, §§ 75-101 and 75-102); *Borum v. Deese*, 196 Ga. 292, 26 S.E.2d 538 (1943) (property-holding arrangement) (decided under former Code 1933, §§ 75-101 and 75-102); *Evans Motors of Ga., Inc. v. Hamilton*, 82 Ga. App. 735, 62 S.E.2d 390 (1950) (interest in profits but no liability) (decided under former Code 1933, §§ 75-101 and 75-102); *Threads, Inc. v. Williams*, 84 Ga. App. 804, 67 S.E.2d 591 (1951) (receipt of profits as compensation for services) (decided under former Code 1933, §§ 75-101 and 75-102); *Escove v. Johnson*, 110 Ga. App. 252, 138 S.E.2d 330 (1964) (payment of debts despite nonliability) (decided under former Code 1933, §§ 75-101 and 75-102); *Andrews v. Messina*, 206 Ga. App. 742, 426 S.E.2d 641 (1992) (deposit and withdrawal of partnership funds); *Lane v. Spragg*, 224 Ga. App. 606, 481 S.E.2d 592 (1997) (interest as father and co-signor of loans to purchase business).

**Trial court was authorized to give a charge on partnership** since there was evidence that a parol contract of partnership had been executed by the parties to the lawsuit with regard to the completion of the construction. *Combined Contractors v. Welch*, 160 Ga. App. 790, 288 S.E.2d 229 (1982) (decided under former Code 1933, §§ 75-101 and 75-102).

**Cited in Historic Macon Station Ltd. Partnership v. Piedmont-Forrest Corp.**, 152 Bankr. 358 (Bankr. M.D. Ga. 1993); *Peacock v. Chegwidan*, 238 Ga. App. 328, 518 S.E.2d 760 (1999).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 142 et seq.

**C.J.S.** — 68 C.J.S., Partnership, §§ 1, 19 et seq.

**ALR.** — Noncompliance with statute requiring filing of certificate of partnership as affecting right to maintain action arising out of tort, 2 ALR 119.

Law of infant's contract as applied to contract of or by partnership, 58 ALR 1366.

Liability of former partners as such in respect of transactions subsequent to incorporation of their business, 89 ALR 986.

Lease or tenancy agreement as creating partnership relationship between lessor and lessee, 131 ALR 508.



What amounts to joint adventure, 138 ALR 986.

What creates partnership relation between cotenants of property, 150 ALR 1003.

Validity of partnership agreement between husband and wife, 157 ALR 652.

Lessee interest of individual as becoming

partnership asset of firm subsequently formed, 37 ALR2d 1076.

Mining grubstake contracts, 70 ALR2d 904.

Construction of agreement between real-estate agents to share commissions, 71 ALR3d 586.

### 14-8-8. Determination of ownership of property.

(a) Subject to subsection (d) of this Code section, property, whether real or personal, is presumed to be partnership property where:

(1) It is included as such in the agreement of partnership or described in any recorded statement of partnership under Code Section 14-8-10.1; or

(2) It is acquired in the partnership name.

(b) Subject to subsection (d) of this Code section, property is presumed to be partnership property if it is purchased with partnership funds even though the title or other interest is acquired in the name of an individual partner or partners.

(c) Subject to paragraph (1) of subsection (a) and subsection (d) of this Code section, where property is acquired in the name of an individual partner or partners without use of partnership funds the property shall be presumed to be the separate property of that individual partner or partners even though the property was used for partnership purposes.

(d) Real property and other property held of public record otherwise than in the partnership name, the ownership of which is customarily publicly recorded, shall not be deemed to be partnership property to the prejudice of a person who is not a partner and who did not have actual knowledge to the contrary.

(e) Where property was partnership property under a predecessor partnership, the business of which was continued under a new or reconstituted partnership, the presumption of subsection (c) of this Code section shall not be applicable and whether such property is to be considered partnership property of the new partnership or the separate property of the surviving members of the predecessor partnership shall be determined on the basis of the intention of the parties.

(f) Any estate in real property may be acquired in the partnership name and title to any estate so acquired shall vest in the partnership itself rather than in the partners individually. Title may be conveyed in accordance with Code Section 14-8-10.

(g) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless

a contrary intent appears. (Code 1981, § 14-8-8, enacted by Ga. L. 1984, p. 1439, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1985, in paragraph (a)(1) "Code Section 14-8-10.1" was substituted for "Code Section 14-8-10A."

**Law reviews.** — For article surveying busi-

ness associations developments in Georgia from mid-1980 through mid-1981 concerning partnerships and corporations, see 33 Mercer L. Rev. 19 (1981).

## COMMENT

### Note to Uniform Partnership Act

Subsections (a) through (e) set forth rules for determining what property is owned by the partnership. Subsections (a) through (c) provide presumptions based on whether the property is included in the partnership agreement, acquired in the partnership name or purchased with partnership funds. Subsection (d) sets forth special rules concerning property the ownership of which is customarily publicly recorded, in order to permit third parties to rely on the public record. Subsections (f) and (g) provide that the partnership may acquire property in the partnership name and state the effect of such a conveyance.

### Prior Georgia Law

There were no comparable provisions. Subsection (d) is generally consistent with *Morgan Guaranty Trust Co. v. Alexander Equities, Inc.*, 246 Ga. 60, 268 S.E.2d 660 (1980) and *All Florida Sand, Unincorporated v. Lawler Construction Co.*, 209 Ga. 720, 75 S.E.2d 559 (1953). Subsection (f), by providing that title to real property may vest in the partnership, reverses prior Georgia case law. See *Hammond v. Chastain*, 230 Ga. 747, 199 S.E.2d 237 (1973); *Bloodworth v. Bloodworth*, 226 Ga. 898, 178 S.E.2d 198 (1970).

### Official UPA

Subsections (a) through (e) replace the simple presumption set forth in official subsection 8(2) based on purchase with partnership funds with more specific rules for determining partnership ownership of property. Subsections (a) through (c) and (e) are based on the Alabama version of § 8, Ala. Code § 10-8-70 (Michie, 1970). Subsection (d) is based on *Morgan Guaranty Trust Co. v. Alexander Equities, Inc.*, *supra*, and *All Florida Sand Unincorporated v. Lawler Construction Co.*, *supra*, except that it adds the qualification concerning a third party with knowledge contrary to the public record. Subsection (f) differs from official subsection 8(3) in dispelling any doubt that the partnership may acquire and hold title to real property. This specifically reverses the holdings of cases such as *Hammond v. Chastain*, *supra*, that a partnership cannot own real property. Also, subsection (f) provides that conveyances are controlled by § 14-8-10 rather than stating that property acquired in the partnership name can be conveyed only in the partnership name. This avoids any possible conflict between §§ 14-8-8 and 14-8-10. Subsection (g) is the same as official subsection 8(4).

### Cross-References

Conveyance of partnership property: § 14-8-10. Partners' rights in a partnership property: § 14-8-25.

## JUDICIAL DECISIONS

**Separate property used for partnership purposes.** — Where a mobile home park was acquired in the names of the individual partners without use of partnership funds



and there was no "recorded statement of partnership" or written partnership agreement, under O.C.G.A. § 14-8-8(c), the mobile home park is presumed to be the separate property of the individual partners even though it was used for partnership purposes. *Harris v. Escoe (In re Woolston)*, 147 Bankr. 279 (Bankr. M.D. Ga. 1992).

**Ownership for purposes of CERCLA.** —

Where a bank owned a general partnership interest that owned the site in question, the bank owned the site and, thus, was an "owner" for purposes of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) (42 USCS § 9607). *Canadyne-Georgia Corp. v. NationsBank*, 183 F.3d 1269 (11th Cir. 1999).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 329-332.

**C.J.S.** — 68 C.J.S., Partnership, § 70 et seq.

### 14-8-9. Agency of partners for partnership.

Subject to the provisions of Code Section 14-8-10.1:

(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority;

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners in the partnership agreement, at the time of the transaction or at any other time;

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(A) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership;

(B) Dispose of the good will of the business;

(C) Do any other act which would make it impossible to carry on the ordinary business of a partnership;

(D) Confess a judgment;

(E) Submit a partnership claim or liability to arbitration or reference;

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

(Code 1981, § 14-8-9, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1994, p. 97, § 14.)

**Code Commission notes.** — Pursuant to 14-8-10.1" was substituted for "Code Section 14-8-10A" in the introductory language.

## COMMENT

### Note to Uniform Partnership Act

This section sets forth the power of a partner, as an agent of the firm, to bind the partnership in transactions with third parties. Transactions that are "for apparently carrying on in the usual way the business of the partnership" are binding under paragraph (1) unless the third party knows of a restriction on the partner's authority (see paragraph (4)). Pursuant to paragraph (2), transactions that are not "apparently ... usual" are not binding unless specifically authorized by the other partners. Such transactions would include those listed in paragraph (3). By reason of the lead-in to the section, authority may be created or limited by the statement of partnership notwithstanding the provisions of this section.

### Prior Georgia Law

Paragraph (1) is similar to prior O.C.G.A. § 14-8-61, first sentence. Paragraph (2) is similar to prior O.C.G.A. § 14-8-61, second sentence. Paragraph (4) is similar to prior O.C.G.A. § 14-8-60. The only counterpart to paragraph (3) is prior O.C.G.A. § 14-8-64, dealing with guaranties and accommodation endorsements.

### Official UPA

The only differences from the official version are the addition of the lead-in, which clarifies that authority may be created or limited by the statement of partnership notwithstanding § 14-8-9, and the addition of language to paragraph (2) clarifying that authority may be conferred in the partnership agreement as well as at the time of the transaction or at any other time.

### Cross-References

Definition of "knowledge:" § 14-8-3(a). Application of the law of agency: § 14-8-4(c). Partner's authority under the statement of partnership: § 14-8-10.1. Creation of real authority by the partners: §§ 14-8-18(e) [14-8-18(5)] and (h)[(8)]. Partner's power to convey partnership property: § 14-8-10. Other consequences of a partner's agency status: § 14-8-11 et seq. Power of a partner by estoppel to bind other purported partners: § 14-8-16. Authority of a partner of a dissolved partnership: §§ 14-8-33, 14-8-35 and 14-8-37.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Code 1882, § 1904, former Civil Code 1910, former Code 1933, §§ 75-202, 75-302, 75-303, and 75-308, and former Code Sections 14-8-22, 14-8-41, 14-8-42, 14-8-60, 14-8-61, and 14-8-64, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

Code 1933, §§ 75-303 and 75-308 appeared to be merely cautionary, inserted for the purpose of preventing any possible misconception that liability might exist solely because of the partnership relation. *Rogers v. Carmichael*, 184 Ga. 496, 192 S.E. 39 (1937) (decided under Code 1933, §§ 75-303, 75-308).

**In partnership each member speaks and acts as agent of firm**, while this is not true in



a joint-stock company. *Hammond v. Otwell*, 170 Ga. 832, 154 S.E. 357 (1930) (decided under Civil Code 1910).

A partner derives the power to bind the partnership by reason of being a general agent of the firm. *Gilmore v. Hammock*, 72 Ga. App. 35, 32 S.E.2d 844 (1945) (decided under Code 1933, §§ 75-202, 75-302).

**Binding effect of signing of contracts.** — Where contract was signed by partnership composed of two partners, and one of the partners was present and participated in preliminary negotiations, and was present when contract was prepared, other partner was bound by action of this partner. *Mulkey v. Spicer*, 202 Ga. 592, 43 S.E.2d 661 (1947) (decided under Code 1933, §§ 75-202, 75-302).

**Signing name to promissory note.** — Member of commercial partnership can bind it by signing its name to promissory note under seal, in the course of the business of the partnership. *Girtman v. Tanner-Brice Co.*, 54 Ga. App. 682, 188 S.E. 846 (1936) (decided under former Code 1933, §§ 75-202, 75-302).

Partner has power to bind partnership by his execution of promissory note on behalf of partnership. *Tara Apts., Ltd. v. Citizens & S. Nat'l Bank*, 149 Ga. App. 577, 254 S.E.2d 897 (1979) (decided under Code 1933, § 75-202).

**Note executed by one partner cannot bind other without authorization.** — In an action on a note against alleged partners, defendant who did not sign the note would not be liable thereon, even if execution furthered the goals of the partnership, where there was no evidence that defendant ever authorized the partner to create a partnership liability in executing the note at issue. *Willard v. Stewart Title Guar. Co.*, 264 Ga. 555, 448 S.E.2d 696 (1994).

**Responsibility for spouse's debt that was not valid partnership obligation.** — Widow was not liable for repayment of a loan by plaintiff to her deceased husband on the basis of partnership by estoppel in the absence of proof that the debt was a valid obligation of the partnership. *Young v. Higingbotham*, 226 Ga. App. 164, 486 S.E.2d 382 (1997).

**Partnership and members bound by execution in partnership name.** — Execution of a negotiable note in the name of the part-

nership by one partner is within the scope of the partnership business, and binds the firm and individual members thereof. *Haskins v. Throne, Franklin & Adams*, 101 Ga. 126, 28 S.E. 611 (1897) (decided under Civil Code 1895, § 2643); *Griffin v. Colonial Bank*, 7 Ga. App. 126, 66 S.E. 382 (1909) (decided under Civil Code 1895, §§ 2643, 2651); *Girtman v. Tanner-Brice Co.*, 54 Ga. App. 682, 188 S.E. 846 (1936) (decided under former Code 1933, §§ 75-202, 75-302).

**Partnership may be bound on contract of sale.** — A partnership will be bound on a contract of sale made by one partner although the other partners sell the same goods to another person. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 113 Ga. 1142, 39 S.E. 471 (1901) (decided under Civil Code 1895, § 2651).

No allegation that a particular sale is within the scope of the business of a partnership is necessary, in an action on a contract of sale made in the firm name. *Matthews v. American Textile Co.*, 23 Ga. App. 675, 99 S.E. 308 (1919) (decided under Civil Code 1910, §§ 3172, 3180).

**Bill of sale executed by member of partnership,** conveying partnership assets to secure existing debt of the firm, passes title to the creditor, though the other partner has no knowledge of the execution or existence of the instrument. *Denton Bros. v. Hannah*, 12 Ga. App. 494, 77 S.E. 672 (1913) (decided under Civil Code 1910, § 3172).

**One partner cannot execute mortgage binding assets of firm against protest of fellow member.** *Fidelity Banking & Trust Co. v. Kangara Valley Tea Co.*, 95 Ga. 172, 22 S.E. 50 (1894) (decided under Code 1882, § 1904).

**Partner's borrowing money and executing note to pay firm debts.** — Borrowing of money to pay debts of a mercantile partnership and execution of a promissory note therefor are acts which may be done by one of partners within scope of the partnership business, so as to bind the firm and individual members thereof. *Rowland v. Lovett*, 45 Ga. App. 123, 163 S.E. 511 (1932) (decided under Civil Code 1910, § 3162).

**One partner cannot waive individual right to homestead and exemption,** under the law, in real estate belonging to the other partner, for partnership debts. *Winkles v. Simpson Grocery Co.*, 138 Ga. 482, 75 S.E. 640 (1912) (decided under Civil Code 1910, § 3180).

**Acts of partner bind when partnership employed as agent.** — Where an owner of property employs a partnership as the owner's agent to sell it, the owner will be bound by the acts and representations of each of the partners within the real or apparent scope of the agency, although the owner may have dealt with the partnership through one of the partners only. *Lancaster v. Neal*, 41 Ga. App. 721, 154 S.E. 386 (1930) (decided under Civil Code 1910).

**Payment to one partner binds firm.** — One partner may receive payment of a debt to the firm, and such payment will bind the firm. *Brady v. Phillips Mule Co.*, 27 Ga. App. 444, 108 S.E. 809 (1921) (decided under Civil Code 1910, §§ 3172, 3179, 3180).

**Delivery of check to partner.** — A check is "properly payable" when it was made payable to a named payee and delivered to that payee. Delivery to either of the partners of a partnership constitutes delivery to the partnership. *Mustin v. Citizens & S. Nat'l Bank*, 168 Ga. App. 549, 309 S.E.2d 822 (1983).

**One partner can collect debt due to partnership.** *Rushing v. Kicklighter*, 174 Ga. 759, 164 S.E. 49 (1932) (decided under Civil Code 1910).

**Neither partner has right to enter retraxit for firm** without express consent of other partner. *Harvey v. Boyd*, 24 Ga. App. 561, 101 S.E. 708 (1919) (decided under Civil Code 1910).

**Negotiations with contracting party for specific date of performance.** — Where after execution of contract, one of partners, with knowledge of other partners, negotiated and corresponded with other contracting party for purpose of agreeing upon specific date for performance, and agreed with the latter upon specific date within period fixed in contract for performance, the partner who thus agreed upon the fixing of the date was agent for all the partners. *Horner v. Esserman*, 42 Ga. App. 729, 157 S.E. 237 (1931) (decided under Civil Code 1910, §§ 3158, 3180).

**In action for reformation of a contract,** fact that the absent partner later signed the contract in no wise negatives the theory of a mutual mistake as between the plaintiff on the one hand and the partnership on the other. *Mulkey v. Spicer*, 202 Ga. 592, 43 S.E.2d 661 (1947) (decided under Code 1933, §§ 75-202, 75-302).

**Agreements for dissolution or to incorporate.** — See *St. Louis Elec. Lamp Co. v. Marshall & Russell*, 78 Ga. 168, 1 S.E. 430 (1886); *Michael Bros. Co. v. Davidson & Coleman*, 3 Ga. App. 752, 60 S.E. 362 (1908).

**Accommodation endorsement.** — See *American Exch. Nat'l Bank v. Georgia Constr. & Inv. Co.*, 87 Ga. 651, 13 S.E. 505 (1891) (decided under former law); *Sibley v. American Exch. Nat'l Bank*, 97 Ga. 126, 25 S.E. 470 (1895) (decided under former law); *Dillingham v. Cantrell*, 54 Ga. App. 622, 188 S.E. 605 (1936) (decided under Code 1933, §§ 75-303, 75-306).

**Contract to make testamentary disposition to compensate for services.** — Contract by which one of the contracting parties agrees with the other that the party will make a will containing a legacy fully compensating the latter for services to be rendered to the former, and to a partnership of which the former is a member, during the party's lifetime is valid and enforceable. *Gilmore v. Hammock*, 72 Ga. App. 35, 32 S.E.2d 844 (1945) (decided under Code 1933, § 75-302).

**Authorization for arbitration agreement need not be express.** — Under the general rule established in O.C.G.A. § 14-8-9(1), a partner's actions in furtherance of the business of the partnership bind the partnership, and arbitration agreements mentioned in O.C.G.A. § 14-8-9(3)(E) constitute a specific exception to this general rule only in the absence of authorization from the remaining partners, and nothing in O.C.G.A. Ch. 8, T. 14 mandates that such authorization must be express rather than implied. *Eassa Properties v. Shearson Lehman Bros.*, 851 F.2d 1301 (11th Cir. 1988).

**Partner relieved of liability for future transactions by express notice.** — Even before dissolution of a partnership and notice to creditors, a partner may relieve self of liability for future transactions by express notice of dissent to the person about to be contracted with, although otherwise, under Civil Code 1910, § 3180, all partners are bound by acts of any one, within the legitimate business of the partnership. *McMillan v. Gilmour*, 49 Ga. App. 400, 175 S.E. 672 (1934) (decided under Civil Code 1910, § 3180).

Although articles are purchased by a part-



ner for the legitimate use and business of the firm, both partners are not liable therefor where the other partner has notified the vendor of the articles not to extend credit to the partner's associate on the account of the partnership. No liability exists against either the dissenting partner or the firm, but only against the partner entering into the transaction. *Arrington v. Columbia Nitrogen Corp.*, 168 Ga. App. 455, 309 S.E.2d 428 (1983) (decided under former § 14-8-9).

**Partner not participating in nor ratifying illegal act relieved from liability.** — It is not the partner who acts illegally, but those who neither participate in nor legally ratify the unlawful transaction, whom the statute relieves from liability. *Dillingham v. Cantrell*, 54 Ga. App. 622, 188 S.E. 605 (1936) (decided under Code 1933, § 75-303).

**Partnership not liable for partner's act outside scope of business.** — Partnership is not liable on transaction of one partner outside scope of partnership business, and where a partnership is engaged in one type of business and this business, without the knowledge and consent of one of the part-

ners, is enlarged into another type of business by another of the partners, a person dealing with the latter business cannot hold the other partner liable. *Brandt v. Eckman*, 79 Ga. App. 47, 52 S.E.2d 665 (1949) (decided under Code 1933, § 75-303).

**One dealing with firm chargeable with knowing scope of business.** — One dealing with firm is chargeable with notice of character of firm business and with knowledge of whether or not the transaction is within the real or apparent scope of the partnership business. *Brandt v. Eckman*, 79 Ga. App. 47, 52 S.E.2d 665 (1949) (decided under Code 1933, § 75-303).

**Legal effects of partnership are limited to legitimate scope of business of the partnership.** *Retreading Equip., Inc. v. Murphy*, 5 Bankr. 596 (Bankr. N.D. Ga. 1980) (decided under Code 1933, § 75-302).

**Priorities in payment of partnership debts.** — See *Drexel Furn. Co. v. Bank of Dearing*, 178 Ga. 33, 172 S.E. 30 (1933) (decided under former law).

**Cited in** *Stewart Title Guar. Co. v. Coburn*, 211 Ga. App. 357, 439 S.E.2d 69 (1993).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 249-251.

**C.J.S.** — 68 C.J.S., Partnership, § 133 et seq.

**ALR.** — Personal liability to other party to contract of member of firm who, without authority, attempts to bind the firm, 4 ALR 258.

Power of partner to bind firm by bonus agreement, 49 ALR 1315.

Creditor's failure to dissent to retiring partner's notice of noncontinuing liability as assent to his release, 52 ALR 499.

Right to set off claim of firm against indebtedness of individual partner, 60 ALR 584.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 ALR 893.

Discharge or settlement by, or payment to, one partner or co-obligee, as affecting rights of others, 142 ALR 371.

Powers of liquidating partner with respect to incurring of obligations, 50 ALR2d 826.

Necessity and manner of pleading denial of partnership in action by third person against alleged partners, 68 ALR2d 545.

Vicarious liability of attorney for tort of partner in law firm, 70 ALR3d 1298.

Vicarious liability of attorney for acts of associated counsel, 35 ALR5th 717.

## 14-8-10. Conveyance of real property by partners.

(a) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property if the partnership proves that the partner's act did not bind the partnership under the provisions of Code Section 14-8-9, unless such property has been conveyed by the grantee or a person claiming through such grantee to a

holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(b) Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partnership proves that the partners' act did not bind the partnership under the provisions of Code Section 14-8-9, unless the purchaser or his assignee is a holder for value without knowledge.

(c) Where title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership unless the partnership proves that the act was not one within the authority of the partner under the provisions of Code Section 14-8-9.

(d) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. (Code 1981, § 14-8-10, enacted by Ga. L. 1984, p. 1439, § 1.)

**Law reviews.** — For article surveying real property law in 1984-1985, see 37 Mercer L. Rev. 343 (1985).

## COMMENT

### Note to Uniform Partnership Act

This section sets forth rules governing conveyances of real property out of the partnership. Pursuant to subsection (a), where title is held in the partnership name, legal title may be conveyed by any partner, except that the partnership may recover the property back from the immediate grantee or from a knowing subsequent grantee if it proves the conveyance out of the partnership was not authorized. Where the property is held in individual name, subsections (b) through (d) provide that *legal* title may be conveyed only if all title holders join in the conveyance. Pursuant to subsection (b), if some of the partners are not title holders, the partnership may recover the property from a knowing grantee if it proves the conveyance out of the partnership was not authorized. Pursuant to subsection (c), if all the title holders do not join in the conveyance, *equitable*, as distinguished from legal, title passes unless the partnership proves the conveyance out of the partnership was not authorized.

### Prior Georgia Law

There was no comparable provision. Since the partnership could not hold title to real property (see the Comment to § 14-8-8) property could not be conveyed out of the partnership by one or more partners in partnership name. One case held that property held in the names of individual partners could be conveyed by one partner in an authorized transaction. See *Cherry Lake Turpentine Co. v. Lanier Armstrong Co.*, 10 Ga. App. 339, 73 S.E. 610 (1912).

### Official UPA

Subsection (2) of the official version has been omitted, consistently with the Florida version of § 10, Fla. Stat. Ann. § 620.605 (Harrison, 1977). This clarifies that the rights



of one to whom property held in the partnership name has been conveyed in the partnership name are not subject to a conveyance by a partner in his own name. The individual partner's grantee may, however, have rights against the partnership, including an action for damages. The section has also been revised to refer to all of § 14-8-9 and not merely to subsection (1) of that section. Finally, subsections (a) through (c) have been changed from the official version to clarify that the burden of proof with respect to authority is on the partnership.

#### Cross-References

Definitions of "conveyance" and "real property": § 14-8-2. Definition of "knowledge:" § 14-8-3(a). Modification of "equal dignity" rule: § 14-8-4(g). Determination of property owned by partnership: § 14-8-8. Partner's authority as agent of partnership: § 14-8-9. Authority of partner under statement of partnership: § 14-8-10.1. Partner's conveyance of individual interest in partnership property: § 14-8-25. Right to convey property of dissolved partnership: § 14-8-37.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 304-308. **C.J.S.** — 68 C.J.S., Partnership, § 151 et seq.

#### 14-8-10.1. Statement of partnership generally.

(a) A statement of partnership in the name of the partnership, signed by all of the partners and witnessed and notarized, may be recorded in the office of the clerk of the superior court of any county and shall be recorded by such clerk in a book to be kept for that purpose and open to public inspection. If the partnership shall desire to file such a statement in more than one county, a transcript of the statement, duly certified by the clerk in whose office it was originally filed, under such clerk's official seal, shall be filed and recorded in like manner in the office of the clerk of the superior court in every such county. As a prerequisite to such filing, the clerk of each such registry may collect a fee in the amount of the fee then allowed for the filing of certificates of limited partnerships.

(b) A statement of partnership shall state:

- (1) The name of the partnership;
- (2) The location of the principal place of business of the partnership, if any;
- (3) The names and places of residence of all of the partners;
- (4) The term for which the partnership is to exist, or that it is to exist until terminated by law or according to its provisions;
- (5) Any limitations on the authority of one or more partners to act on behalf of the other partners or the partnership, beyond that authority defined in this chapter, which the partnership desires to disclose;
- (6) Any authority beyond that defined in this chapter on the part of one or more partners to act on behalf of the other partners or the partnership which the partnership desires to disclose;

(7) Any property (including real property) belonging to the partnership, which the partnership desires to disclose; provided that, with respect to real property, owned by the partnership but not titled in the name of the partnership, at the time the statement (or any amendment thereto disclosing such real property) is filed, the partnership shall also file and record in the deed records of the county wherein such real property lies a deed or deeds conveying such real property to the partnership filing the statement (or amendment). Title to all real property so conveyed shall be deemed to be held in the partnership name from the date of the filing of such statement (or amendment) and deed or deeds in the county wherein such real property lies;

(8) If the partnership or the partnership business has been continued despite the death or withdrawal of any partner by reason of an agreement provided for in Code Section 14-8-31 or 14-8-38, the statement or any amendment thereto may state the name and date of death or withdrawal of such deceased or withdrawing (whether voluntarily or involuntarily, according to the terms of the agreement) partner and that the partnership or the partnership business was continued despite such death or withdrawal because of the existence of such agreement; and

(9) If a new partner has been admitted to the partnership, the statement or any amendment thereto may state the name and date of admission of such new partner.

(c) A statement of partnership may state such other matters as the partnership may desire to disclose.

(d) The information referred to in subsections (b) and (c) of this Code section may be provided in whole or in part by recording a partnership agreement as the statement of partnership.

(e) A statement of partnership may be amended at any time and for any proper purpose the partners may determine by instrument executed and recorded in the same manner as such statement. Such instrument shall set forth:

(1) The name of the partnership;

(2) The date or dates of filing of the statement of partnership and any prior amendments thereto;

(3) The place or places (by reference to book and page) wherein the statement of partnership and any prior amendments thereto are recorded; and

(4) The amendment to the statement of partnership.

(f) It shall be conclusively presumed against the partnership that all facts stated in the statement of partnership are true. Without limiting the generality of the foregoing, it shall be conclusively presumed against the



partnership that the persons named as partners in a statement of partnership are members of the partnership named, that they are all of the members of the partnership, that the partners have the authority disclosed by this statement, that there are no limitations on this authority beyond those contained in this chapter other than those disclosed in this statement, that any partner stated to be dead is deceased, that any partner stated to have been admitted as a new partner has been admitted to the partnership, and that any partner stated to have withdrawn has withdrawn from the partnership. The conclusive presumption under this subsection or under subsection (g) of this Code section shall not arise with respect to a statement of partnership if and from the date that there is recorded by anyone claiming to be a partner, or a personal representative, whether executor, administrator, guardian, or conservator, of such partner, an affidavit, sworn to by the person executing it, which shall set forth the name of the partnership, a statement that such person claims to be a member of such partnership, or a personal representative of such member, or a statement that any of the persons named in a previously recorded statement of partnership are not members of such partnership, or a statement that any of the other facts stated in a previously recorded statement of partnership are not true. Said affidavit shall not be effective to the prejudice of a person who is not a partner:

(1) In connection with a transaction involving partnership real property, unless the affidavit was recorded in the county in which the property is located; or

(2) In connection with any other transaction if the affidavit was not recorded in a county in which the statement of partnership was recorded, the person relied on a statement of partnership recorded in such county, and the person had no knowledge or notice of the affidavit.

(g) The existence of the facts described in subsection (f) of this Code section shall be conclusively presumed in favor of the partnership and against a grantee from the partnership, or a person claiming through such grantee, of partnership real property located in a county in which a statement of partnership or a certified copy thereof has been recorded. It shall also be conclusively presumed in favor of the partnership and against such a grantee or person that a partner's authority to act for the partnership is limited as provided in a statement of partnership. (Code 1981, § 14-8-10.1, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1985, p. 1436, § 1; Ga. L. 1989, p. 927, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1985, this Code section, which was enacted as § 14-8-10A, was redesignated § 14-8-10.1.

**Law reviews.** — For article, "Creating

Limited Liability for a General Partnership, LLP or LLLP?," see 4 Ga. St. B.J. 8 (1998).

For note on 1989 amendment of this Code section, see 6 Ga. St. U.L. Rev. 188 (1989).

## COMMENT

**Note to Uniform Partnership Act**

This section permits, but does not require, any partnership to execute and record a statement of partnership that discloses anything the partnership wishes to make a matter of public record. The statement may be amended by the partners at any time, and any person claiming to be a partner or the personal representative of a partner may limit the effect of the statement to some extent by executing and recording a counter-affidavit. Pursuant to subsection (f), the facts set forth in the statement are conclusively presumed against the partnership. With respect to partners' authority, not only are the partners conclusively presumed to have the authority set forth in the statement, but they also have the authority provided for in § 14-8-9(1) *unless* their authority is expressly *limited* in the statement. Pursuant to subsection (g), the facts set forth in the statement, including limitations on partners' authority, are conclusively presumed in favor of the partnership and against grantees of partnership real property located in a county in which the statement has been recorded.

**Prior Georgia Law**

There was no comparable provision.

**Official UPA**

There is no comparable provision in the official version. Somewhat analogous but more limited provisions are included in the California and Florida statutes. See Cal. Corp. Code §§ 15010.5-6 (West, 1977); Fla. Stat. Ann. § 620.605 (Harrison, 1977). Subsection (e) is based on § 202 of the Revised Uniform Limited Partnership Act.

**Cross-References**

Determination of partnership property, including the effect of the statement of partnership: § 14-8-8. Partners as agents of the partnership in general: § 14-8-9. Agreements providing for continuation of the partnership business after the death of a partner: §§ 14-8-31 and 14-8-38.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 96 et seq.

**14-8-11. Representation of partnership affairs by partner.**

An admission or representation made by any partner concerning partnership affairs within the scope of his authority is evidence against the partnership. (Code 1981, § 14-8-11, enacted by Ga. L. 1984, p. 1439, § 1.)

## COMMENT

**Note to Uniform Partnership Act**

This section states the extent to which partners' admissions and representations are evidence against the partnership.

**Prior Georgia Law**

There were no comparable provisions. Prior O.C.G.A. § 14-8-61 (general scope of partners' authority) is generally consistent. This section accords with the general rule stated in *Ward-Truitt Co. v. Nicholson*, 23 Ga. App. 672, 99 S.E. 153 (1919).



**Official UPA**

This section is the same as the official version except that the words "as conferred by this act" following "authority" have been deleted to clarify that the Act does not confer authority, but merely provides rules for determining what acts are authorized. This section is identical to the Florida version of § 11, Fla. Stat. Ann. § 620. (Harrison, 1977), and consistent with the Texas version of § 11, Tex. Civ. Stat. Ann. Art. 6132b, § 11 (Vernon, 1970), which substitutes "defined" for "conferred."

**Cross-References**

Authority of partners: §§ 14-8-9, 14-8-10.1 and 14-8-18(8). Binding effect of non-partner admissions: § 14-8-4(c) (law of agency applies).

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Civil Code 1910, § 3180, former Code 1933 and former Code Section 14-8-61, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Statements or admissions of partner binding on partnership when business-related.** — Statements or admissions made by a partner as such, and with reference to matters connected with the business, are binding upon the partnership. *Ward-Truitt Co. v. Nicholson*, 23 Ga. App. 672, 99 S.E. 153 (1919) (decided under former Civil Code 1910, § 3180).

**Effect of testimony of partner's acknowledgement or denial of account.** — Testimony that an account made out against

a partnership was presented to one of the members thereof, and that the partner acknowledged its correctness, is prima facie proof of the correctness of the account, and in case of a denial of account by the partnership is sufficient to make an issue of fact for the jury. *Elliott v. National Union Radio Corp.*, 68 Ga. App. 873, 24 S.E.2d 705 (1943) (decided under Code 1933).

**Jury question as to agency relationship.** — In a medical malpractice action, whether a nurse anesthetist was the agent of an anesthesiology partnership, whether the partnership was the agent of hospital, and whether there were any admissions in the medical records were for the jury to determine. *Doctors Hosp. v. Bonner*, 195 Ga. App. 152, 392 S.E.2d 897 (1990).

Cited in *Stedry v. Mitchell*, 201 Ga. App. 682, 411 S.E.2d 735 (1991).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 754.

**C.J.S.** — 68 C.J.S., Partnership, § 166.

**14-8-12. Notice to or knowledge of the partnership.**

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. (Code 1981, § 14-8-12, enacted by Ga. L. 1984, p. 1439, § 1.)

**COMMENT****Note to Uniform Partnership Act**

This section sets forth rules for determining when the partnership should be charged with notice or knowledge of facts. A partnership has notice or knowledge of a fact not only when notice is given to a partner but also when the fact is known by the responsible partner (even if he learned it before becoming a partner) or by another partner who could have been expected to communicate the fact to the responsible partner.

**Prior Georgia Law**

There were no comparable provisions or cases on point.

**Official UPA**

This section is the same as the official version.

**Cross-References**

Definitions of "notice" and "knowledge": § 14-8-3.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 252.

**C.J.S.** — 68 C.J.S., Partnership, §§ 139, 140.

**14-8-13. Liability of partnership for acts of partners.**

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. (Code 1981, § 14-8-13, enacted by Ga. L. 1984, p. 1439, § 1.)

**COMMENT****Note to Uniform Partnership Act**

This section sets forth rules for determining when the partnership is liable for wrongful acts or omissions of the partners. The partnership is bound by such acts or omissions if they are in the ordinary course of business or are authorized.

**Prior Georgia Law**

Prior O.C.G.A. §§ 14-8-65 (partnership liability for partner's fraud) and 14-8-66 (partnership liability for partners' torts) were generally consistent.

**Official UPA**

This section is the same as the official version.

**Cross-References**

Authority of partners: §§ 14-8-9, 14-8-10.1 and 14-8-18(8). Partnership liability for acts of non-partner employees: § 14-8-4(c) (law of agency applies).



## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Civil Code 1910, § 3187, former Code 1933, § 75-308, and former Code Sections 14-8-65 and 14-8-66, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Predecessor sections appeared to be merely cautionary,** inserted for purpose of preventing any possible misconception that liability might exist solely in virtue of partnership relation. *Rogers v. Carmichael*, 184 Ga. 496, 192 S.E. 39 (1937) (decided under former Code 1933, § 75-308).

**Tort liability for wrongs committed within scope of partnership.** — Partners are not responsible for the torts of each other merely by reason of their relation as partners, and in order for such liability to exist the wrong must have been committed within the legitimate scope of the partnership business. *Rogers v. Carmichael*, 184 Ga. 496, 192 S.E. 39 (1937) (decided under former Code 1933, § 75-308); *Mansour v. Mobley*, 96 Ga. App. 812, 101 S.E.2d 786 (1957) (decided under former Code 1933, § 75-308).

Partners are, in respect to the business in which engaged, agents of each other, and therefore one partner might be liable for the tortious acts of another done in the usual course of business of the firm. *Mansour v. Mobley*, 96 Ga. App. 812, 101 S.E.2d 786 (1957) (decided under former Code 1933, § 75-308).

Where one of the members of a partnership commits a tort, by converting personal property of another who has the right of possession thereof, the partnership and all of the partners are liable to the owner of the property, where the partner in committing the tort was acting for the partnership and not for the partner's individual interest, and where such act was within the scope of the partnership's business. In such a case, the owner of the property can maintain a suit in trover against the partnership or against any one of the members thereof. *Peach Motor Express Co. v. Salmon*, 73 Ga. App. 816, 38 S.E.2d 302 (1946) (decided under former Code 1933, § 75-308).

**Declaring partner an independent contractor not effective to avoid liability.** — A

partner in a joint venture is liable for the wrongful acts of its partner committed in the ordinary course of business of the joint venture and cannot avoid this liability by an agreement between the partners that one of the partners will carry out the business of the joint venture as an independent contractor. *Block v. Woodbury*, 211 Ga. App. 184, 438 S.E.2d 413 (1993).

**Where firm acts as agent.** — Where a member of a partnership breaches the duty owing by it to a principal of which the partnership is an agent, the principal, in a suit against the partnership for such breach of duty, in the event the member establishes a case, will be entitled to a judgment not only against the member who committed the breach, but also against the partnership and all the individual members thereof who are served. *Render & Hammett v. Hartford Fire Ins. Co.*, 33 Ga. App. 716, 127 S.E. 902 (1925) (decided under former Civil Code 1910, § 3187).

**Death of partner committing tort.** — Where the partner who actually committed a tort dies before an action is brought, whether or not such death abates the cause of action as related to individual liability of the dead partner or the partner's estate, it does not affect the liability of the partnership or of the other partner. *Rogers v. Carmichael*, 184 Ga. 496, 192 S.E. 39 (1937) (decided under former Code 1933, § 75-308).

**Allegedly slanderous statements by physician partner.** — Factual question, precluding summary judgment, was raised as to whether physician's allegedly slanderous statements about a nurse-midwife were made either in the ordinary course of the business of a professional partnership or with the authority of the physician's partners. *Sweeney v. Athens Regional Medical Ctr.*, 709 F. Supp. 1563 (M.D. Ga. 1989).

**Liability for fraud of partner.** — *Alexander v. State*, 56 Ga. 478 (1876) (decided under former law); *Thompson v. Harris*, 7 Ga. App. 212, 66 S.E. 629 (1909) (decided under former law); *Hartford Accident & Indem. Co. v. Hartley*, 275 F. Supp. 610 (M.D. Ga. 1967), *aff'd*, 389 F.2d 91 (5th Cir. 1968) (decided under former law).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, opinion under former Code 1933, § 75-308 and former Code Section 14-8-66, in effect prior to the 1984 repeal and reenactment of this chapter, is included in the annotations to this Code section.

**Common law not changed.** — Predecessor

section did not change common law rule that partnership and its members could be held liable for damages resulting from negligent tort committed by one of the partners within scope of partnership business. 1980 Op. Att'y Gen. No. 80-106 (decided under former Code 1933, § 75-308).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 647-672.

**C.J.S.** — 68 C.J.S., Partnership, § 168 et seq.

**ALR.** — Noncompliance with statute requiring filing of certificate of partnership as affecting right to maintain action arising out of tort, 2 ALR 119.

Actions at law between partners and partnerships, 21 ALR 21.

Liability for negligence of intoxicated partner or servant, 55 ALR 1225.

Liability of partners in tort as joint and several, 175 ALR 1310.

Liability for assault by partner or joint adventurer, 30 ALR2d 859.

Dismissal, discontinuance, or nonsuit as to some defendants in contract action against partnership or partners as affecting others, 44 ALR2d 580.

Necessity and manner of pleading denial of partnership in action by third person against alleged partners, 68 ALR2d 545.

Liability of partners or partnership for libel, 88 ALR2d 474.

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 ALR3d 822.

# 14-8-14. Recovery from partnership for loss caused by wrongful act of partner.

The partnership is bound to make good the loss:

(1) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(2) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership. (Code 1981, § 14-8-14, enacted by Ga. L. 1984, p. 1439, § 1.)

## COMMENT

## Note to Uniform Partnership Act

This section states rules for determining when the partnership is liable in connection with misapplication of funds of a third person by a partner.

## Prior Georgia Law

There was no precisely comparable provision. Prior O.C.G.A. §§ 14-8-65 (partnership liability for partners' fraud) and 14-8-66 (partnership liability for partners' torts) were generally consistent.



**Official UPA**

This section is the same as the official version.

**Cross-References**

Apparent authority of partners: § 14-8-9(1). Partnership liability for acts of non-partner employees: § 14-8-4(c) (law of agency applies).

**JUDICIAL DECISIONS**

**Creation of fiduciary relationship.** — O.C.G.A. § 14-8-14, construed with O.C.G.A. § 14-8-21, does not create a fiduciary relationship between partners as contemplated by the federal bankruptcy law provision relating to debts nondischargeable for fraud

or defalcation. Any fiduciary relationship created is in favor of the partnership and not in favor of an individual partner. *Betz v. Gay*, 117 Bankr. 753 (Bankr. M.D. Ga. 1989).

Cited in *Adler v. Hertling*, 215 Ga. App. 769, 451 S.E.2d 91 (1994).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 662-663.

**C.J.S.** — 68 C.J.S., Partnership, §§ 137, 148, 157, 168 et seq.

**14-8-15. Liability of partners.**

(a) Except as provided in subsection (b) of this Code section, all partners are jointly and severally liable for all debts, obligations, and liabilities of the partnership.

(b) Subject to subsection (c) of this Code section and to any contrary agreement among the partners, a partner in a limited liability partnership is not individually liable or accountable either directly or indirectly by way of indemnification, reimbursement, contribution, assessment, or otherwise for any debts, obligations, or liabilities of or chargeable to the partnership or another partner, whether arising in tort, contract, or otherwise, that are incurred, created, or assumed while such partnership is a limited liability partnership, solely by reason of being such a partner or acting or omitting to act in such capacity or otherwise participating in the conduct of the activities of the limited liability partnership. Notwithstanding the provisions of this subsection, a partner may be personally liable for tax liabilities arising from the operation of the limited liability partnership as provided in Code Section 48-2-52.

(c) Subsection (b) of this Code section shall not affect the liability of a partner in a limited liability partnership or the liability of the limited liability partnership for such partner's own errors, omissions, negligence, malpractice, wrongful acts, incompetence, or misconduct.

(d) A partner in a limited liability partnership is not a proper party to a proceeding if the object of the proceeding is to hold such partner liable either directly or indirectly by way of indemnification, reimbursement, contribution, assessment, or otherwise for liabilities for which such partner is not liable by reason of the provisions of this Code section. (Code 1981,

§ 14-8-15, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1995, p. 470, § 3; Ga. L. 2001, p. 984, § 2.)

**The 2001 amendment**, effective April 27, 2001, added the last sentence in subsection (b).

**Law reviews.** — For note on the 2001 amendment to O.C.G.A. § 14-8-15, see 18 Ga. St. U. L. Rev. 294 (2001).

## COMMENT

### Note to Uniform Partnership Act

This section provides that all partners are liable for partnership debts and that the nature of their liability is joint and several.

### Prior Georgia Law

Partners were individually liable for partnership debts pursuant to prior O.C.G.A. § 14-8-22. The nature of the partner's individual liability was not specified.

### Official UPA

Official Section 15 provides for *joint* liability for partnership debts and obligations other than those chargeable to the partnership under §§ 13 and 14. The liability for debts chargeable under the latter two sections is *joint and several*. With respect to the effect of this change, the requirement that all partners be joined in the original suit pursuant to O.C.G.A. § 9-2-26 and 9-13-59 may only apply to joint, rather than joint and several, liability. See *Peach Motor Express Co. v. Salmon*, 73 Ga. App. 816, 38 S.E.2d 302 (1946); *Thompson v. Harris*, 7 Ga. App. 212, 66 S.E. 629 (1909). Also, O.C.G.A. § 13-4-80, which provides for the release of one joint debtor by the release of another may not apply to joint and several obligations. See *Hubert v. Lawson*, 146 Ga. App. 698, 247 S.E.2d 223 (1978). But see *Zimmerman's, Inc. v. McDonough Construction Co.*, 240 Ga. 317, 240 S.E.2d 864 (1977).

### Cross-References

The scope of partnership liability for partnership acts: §§ 14-8-9, 14-8-13 and 14-8-14. Liability of partner by estoppel: § 14-8-16. Liability of incoming partner: §§ 14-8-17 and 14-8-41(c). Partners' rights to indemnification by the partnership: § 14-8-18(2). Partners' duty to contribute toward partnership liabilities: §§ 14-8-18(1), 14-8-40(4)-(7) and 14-8-36(d). Priorities among creditors of the partnership and of individual partners: §§ 14-8-36(d) and 14-8-40(8)-(9). Effect of dissolution on partner's liability: § 14-8-36.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Civil Code 1910, § 4588, former Code 1933, §§ 75-103, 75-104, 75-206 and former Code Sections 14-8-22 and 14-8-41, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Inducing extension of credit by representation of self as partner.** — Whatever may be interest of parties, and whether they be in fact partners under the bargain or not, they will be liable, as such, if they so act as to hold

themselves out to the world as such; thus, credit extended to a firm on faith of representations by a person that the person is interested in same will create debt against the person as a partner. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under former Code 1933, § 75-104).

**Declaring partner an independent contractor not effective to avoid liability.** — A partner in a joint venture is liable for the wrongful acts of its partner committed in the ordinary course of business of the joint venture and cannot avoid this liability by an



agreement between the partners that one of the partners will carry out the business of the joint venture as an independent contractor. *Block v. Woodbury*, 211 Ga. App. 184, 438 S.E.2d 413 (1993).

**Liability for tort committed by partner who died before legal action.** — Where the partner who actually committed a tort dies before action is brought, whether or not such death abates the cause of action as related to individual liability of the dead partner or the partner's estate, it does not affect the liability of the partnership or of the other partner. *Rogers v. Carmichael*, 184 Ga. 496, 192 S.E. 39 (1937) (decided under former Code 1933, § 75-103).

**Allegedly slanderous statements by physician partner.** — Factual question, precluding summary judgment, was raised as to whether physician's allegedly slanderous statements about a nurse-midwife were made either in the ordinary course of the business of a professional partnership or with the authority of the physician's partners. *Sweeney v. Athens Regional Medical Ctr.*, 709 F. Supp. 1563 (M.D. Ga. 1989).

**Right of contribution and set off.** — Where copartnership entailed loss and where none of copartnership debts had

been paid, no right of contribution arose, and no right to set off partnership liabilities against a suit on a note by one of the partners against the other partners. *Brinson v. Franklin*, 177 Ga. 727, 171 S.E. 287 (1933) (decided under Civil Code 1910, § 4588).

**Partner individually liable when partnership discharges in bankruptcy.** — Adjudication of partnership as bankrupt, followed by discharge in bankruptcy, would not relieve or discharge one of partners from the partner's individual liability for partnership debts, since the partner personally was not adjudicated or discharged as bankrupt. *Rowland v. Lovett*, 45 Ga. App. 123, 163 S.E. 511 (1932) (decided under Civil Code 1910).

**Joint judgment.** — If there is joint liability by two or more partners, joint judgment may be rendered, and the respective liabilities of the defendants may be adjudged. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

**Cited in** *Young v. Higingbotham*, 226 Ga. App. 164, 486 S.E.2d 382 (1997); *Southcom Group, Inc. v. Plath*, 257 Ga. App. 46, 570 S.E.2d 341 (2002).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 542 et seq.

**C.J.S.** — 68 C.J.S., Partnership, §§ 148, 167 et seq.

**ALR.** — Actions at law between partners and partnerships, 58 ALR 621; 168 ALR 1088.

**Right of other partners or partnership creditors in respect of insurance on interest of one of the partners**, 61 ALR 1201.

**Liability of special partner who has withdrawn his capital, to creditors of the firm**, 67 ALR 1096.

**Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter**, 124 ALR 893.

**Partnership as distinguished from employment (where rights of parties inter se or**

**their privies are concerned)**, 137 ALR 6.

**Judgment for or against partner as res judicata in favor of or against copartner not a party to the judgment**, 11 ALR2d 847.

**Constructive trust in favor of partnership where one partner purchases real estate with his own funds**, 44 ALR2d 519.

**Dismissal, discontinuance, or nonsuit as to some defendants in contract action against partnership or partners as affecting others**, 44 ALR2d 580.

**Necessity and manner of pleading denial of partnership in action by third person against alleged partners**, 68 ALR2d 545.

**Rights as to business unfinished or fees uncollected upon withdrawal or death of partner in law firm**, 78 ALR2d 280.

**14-8-15.1. Power to sue or be sued.**

A partnership may sue or be sued in its common name. (Code 1981, § 14-8-15.1, enacted by Ga. L. 1987, p. 1444, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 542 et seq.

**C.J.S.** — 68 C.J.S., Partnership, § 184 et seq.

**14-8-16. Liability of person representing himself as a partner.**

(a) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(1) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(2) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(b) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation. (Code 1981, § 14-8-16, enacted by Ga. L. 1984, p. 1439, § 1.)

**COMMENT****Note to Uniform Partnership Act**

This section provides that where one represents himself or consents to being represented as in partnership with another, he is liable to a relying creditor as if the other were his partner and had all of the agency power of an actual partner. If all of the partners of an existing partnership consent to the representation, a partnership liability results and all are liable as if they were actually in partnership with the represented partner. Otherwise, there is only a joint obligation between the person acting and those



consenting to the representation, and the obligation does not bind the existing partnership and its assets.

### Prior Georgia Law

Prior O.C.G.A. § 48-1(2) providing for the liability of an "ostensible partner" was generally consistent. New § 14-8-16 clarifies that the ostensible partner is not liable unless he at least consents to the representation of partnership. This reverses *Shapleigh Hardware Co. v. McCoy & Son*, 23 Ga. App. 265, 98 S.E. 102 (1919). With respect to a purported partner's agency power to bind the partnership, see *The Barnett Line of Steamers v. Blackmar & Chandler*, 43 Ga. 98 (1874) and *Davis v. Citizens' Floyd Bank & Trust Co.*, 37 Ga. App. 275, 139 S.E. 826 (1927). There were no prior Code provisions or cases dealing with the effect of the other partners' lack of consent to the representation or with the rights of creditors of the purported partnership to the assets of a business that is not an existing partnership.

### Official UPA

This section is the same as the official version.

### Cross-References

Rules for determining the existence of an actual partnership: §§ 14-8-6 and 14-8-7. Actual partner's power to create partnership liabilities: §§ 14-8-9, 14-8-13 and 14-8-14. Nature of partner's liability for partnership obligations: § 14-8-15. Priorities among creditors of the partnership and of individual partners: §§ 14-8-36(d) and 14-8-40(8)-(9).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Civil Code 1910, §§ 3157, 3158, Code 1933, § 75-104, and former Code Section 14-8-1, which existed prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**One held out as partner may become liable upon partnership obligations** to one who relied on representation to that person's detriment. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966) (decided under Code 1933).

One may be bound as a partner, though having no interest, but one is liable as a partner only to those persons who have acted on the faith of the truth of the appearance. *American Cotton College v. Atlanta Newspaper Union*, 138 Ga. 147, 74 S.E. 1084 (1912) (decided under Civil Code 1910, §§ 3157, 3158).

**Estopped from denying partnership relationship.** — One who tacitly permits oneself to be held out to the public as a partner, though that person in fact has no interest in the partnership, will be estopped from denying a connection with the firm, and will be

bound where the opposite party was misled by the putative status and acted thereon. *Shapleigh Hdwe. Co. v. McCoy & Son*, 23 Ga. App. 265, 98 S.E. 102 (1919) (decided under Civil Code 1910, § 3157). See also *Roberts v. Curry Grocery Co.*, 18 Ga. App. 53, 88 S.E. 796 (1916) (decided under Civil Code 1910, § 3157).

Where a third party, transacting business under a trade name, introduced the defendant to the plaintiff as the third party's partner and represented that the defendant was backing the third party in the business and the defendant made no denial either of a partnership or of backing such third party, and where the plaintiff, by reason of believing this, sustained a loss by endorsing a check for such third party, verdict holding defendant liable was supported by the evidence. *Clarke v. Woodward*, 76 Ga. App. 181, 45 S.E.2d 473 (1947) (decided under Civil Code 1910, § 3157).

**Inducing extension of credit by representation of self as partner.** — Actual contract by which partnership is formed is not always essential to support liability of one person as partner of another; as to third persons, one

may assume such liability by inducing them to extend credit upon faith of representations made by that person, either express or implied, to effect that the person was a partner and, as such, liable. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under Code 1933, § 75-104).

**Applicability.** — As in a corporate alter ego action or a limited partnership action, a claim under O.C.G.A. § 14-8-16(a) may be available to all creditors without respect to reliance by or course of dealing with any particular creditor or class of creditors. *Stamps v. Knobloch (In re City Communications, Ltd.)*, 105 Bankr. 1018 (Bankr. N.D. Ga. 1989).

O.C.G.A. § 14-8-16 is available only to individual creditors harmed by the representation of a partnership. The latter part of O.C.G.A. § 14-8-16(a), however, makes clear that a continuing course of conduct can result in liability as a general partner even though no express representation was made to a specific creditor. *Stamps v. Knobloch (In re City Communications, Ltd.)*, 105 Bankr. 1018 (Bankr. N.D. Ga. 1989).

**Partnership or no partnership is generally a mixed question of law and fact**, and cannot be resolved as a matter of law unless verdict one way or the other is demanded by evidence. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under Code 1933, § 75-104).

**Whether third party relied upon acts of ostensible partner is question of fact.** *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under Code 1933, § 75-104).

**Whether person has held self out and has been relied upon as partner** is question of fact. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966) (decided under Code 1933, § 75-104); *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under Code 1933, § 75-104).

In a medical malpractice action, in which the appellant physicians contended that the evidence could not support the verdict against them because there was no evidence of partnership and no proof of causation, since it was undisputed that the appellants were members of a professional corporation

and held themselves out to others as partners, the evidence supported a finding of ostensible partnership under such circumstances. *Kaplan v. Gibson*, 192 Ga. App. 466, 385 S.E.2d 103 (1989).

**Consent to being held out as partner required.** — Ostensible partnership of a father and son was not established because the father offered direct evidence that he had no partnership arrangement with his son and never held himself out as his son's partner or consented to be held out as a partner. *Lane v. Spragg*, 224 Ga. App. 606, 481 S.E.2d 592 (1997).

**Creditor must know of ostensible partnership.** — An ostensible partner in a partnership of which one is not a member cannot, by virtue of this relation, become bound for a partnership debt which that person did not contract for unless the creditor had notice of this ostensible relation and believed that the person holding self out as a partner was in fact a member of the partnership when extending credit. *Davis-Washington Co. v. Vickers*, 41 Ga. App. 818, 155 S.E. 92 (1930) (decided under Civil Code 1910, § 3157); *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under Code 1933, § 75-104).

Declarations made by one person after an extension of credit to another to the effect that the former is either a partner or an ostensible partner with the latter, are incompetent to make the declarant liable as an ostensible partner for debt, where the declarations are never communicated to or known by the person who extended the credit. *Davis-Washington Co. v. Vickers*, 41 Ga. App. 818, 155 S.E. 92 (1930) (decided under Civil Code 1910, § 3157).

**Representation must induce timely reliance.** — Where the evidence showed that plaintiff did not meet defendant until after the closing of a residence sale, plaintiff could not have entered into the purchase of the residence in reliance upon defendant's words or conduct. *Andrews v. Messina*, 206 Ga. App. 742, 426 S.E.2d 641 (1992).

**Cited in** *Southeastern Whsle. Supply Co. v. Guevara*, 191 Ga. App. 600, 382 S.E.2d 685 (1989); *Young v. Higingbotham*, 226 Ga. App. 164, 486 S.E.2d 382 (1997).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 673, 674.

**C.J.S.** — 68 C.J.S., Partnership, § 146.

**14-8-17. Liability of incoming partner.**

A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property. (Code 1981, § 14-8-17, enacted by Ga. L. 1984, p. 1439, § 1.)

**Law reviews.** — For article surveying business associations developments in Georgia from mid-1980 through mid-1981 concerning partnerships and corporations, see 33 Mercer L. Rev. 19 (1981).

## COMMENT

**Note to Uniform Partnership Act**

This section provides that one who enters an existing partnership is not thereby rendered personally liable for pre-existing debts. However, such debts may be satisfied out of the incoming partner's share of partnership property.

**Prior Georgia Law**

Prior O.C.G.A. § 14-8-44 provided that an incoming partner was not liable for pre-existing debts in the absence of express assumption. Contrary to new § 14-8-17, this limitation was held to apply not only to the new partner's personal liability, but also to the partner's interest in the firm. See *Wallace & Wingfield v. Hull, Frierson & Co.*, 28 Ga. 68 (1858).

**Official UPA**

This section is the same as the official version.

**Cross-References**

Liability of partners for partnership obligations: § 14-8-15. Ability of partnership creditors to reach the partnership assets after a change in membership: § 14-8-41.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 914, 915.

**C.J.S.** — 68 C.J.S., Partnership, § 234.

**14-8-18. Rights and duties of partners.**

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner shall be repaid his or her contributions, whether by way of capital or advances to the partnership property and share equally

in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and, except as provided in subsection (b) of Code Section 14-8-15, must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his or her share in the profits;

(2) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property;

(3) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance;

(4) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made;

(5) All partners have equal rights in the management and conduct of the partnership business;

(6) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs;

(7) No person can become a member of a partnership without the consent of all the partners;

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners. (Code 1981, § 14-8-18, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1995, p. 470, § 4.)

#### COMMENT

##### Note to Uniform Partnership Act

This section states basic rules regarding financial and management rights and duties as between the partners, subject to their contrary agreement.

##### Prior Georgia Law

Subsection (1): Prior O.C.G.A. § 14-8-45 was generally consistent.

Subsection (2): There was no precisely comparable provision. The general provision regarding contribution, O.C.G.A. § 23-2-71, is consistent, except that it permits the paying partner to recover from individual partners instead of the partnership and applies only to sums actually paid.

Subsection (3): There was no comparable provision. Prior case law was inconsistent. See *McAllister v. Payne*, 108, Ga. 517, 34 S.E. 165 (1899).

Subsection (4): There was no comparable provision. Prior case law was consistent. See *Tutt v. Land*, 50 Ga. 339, 350 (1873).



Subsection (5): There was no comparable provision. Prior O.C.G.A. § 14-8-41 provided generally that partners had "joint possession" of partnership effects. This term was not clearly defined in the case law.

Subsection (6): There was no comparable provision. Prior case law was consistent as to compensation for pre-dissolution services. See *Maynard v. Maynard*, 147 Ga. 178, 93 S.E. 289 (1917).

Subsection (7): Prior O.C.G.A. § 14-8-43 was consistent.

Subsection (8): Prior O.C.G.A. § 14-8-42 was consistent.

### Official UPA

This section is the same as the official version.

### Cross-References

Definition of "interest": § 14-8-2(5). Power of Partners to bind the partnership in transactions with third parties: § 14-8-9. Partner's liability for partnership obligations: § 14-8-15. Partner's management rights as property right of partner: § 14-8-24. Partner's share of profits as interest in partnership: § 14-8-26. Partner's right to contribution with respect to post-dissolution debts: § 14-8-34. Right to control the firm during winding up: § 14-8-37. Assignment of partner's interest in the partnership: § 14-8-27. Right to indemnification where partnership dissolved for fraud: § 14-8-39. Rights of withdrawing or estate of deceased partner to share in profits when partnership continued after dissolution: § 14-8-42.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### LIABILITY FOR LOSSES

#### ACCOUNTING IN EQUITY

#### General Consideration

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Civil Code 1910, §§ 3155 and 3156, former Code 1933, § 75-206 and former Code Sections 14-8-40, 14-8-41, 14-8-43, and 14-8-45, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Agreements between partners as to unequal shares to be given effect.** — If partners have made an agreement that their shares shall be unequal, or that one shall pay to or for another partner a certain sum for acquiring a stated interest in the partnership assets, such an agreement will be given effect in a final settlement and accounting between the partners. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

**Rights subject to agreement.** — The right

of a partner to recover net capital contributions to the partnership upon dissolution was subject to an agreement limiting returnable equity to profits realized upon the initial investments of the parties. *Hayden v. Sigari*, 220 Ga. App. 6, 467 S.E.2d 590 (1996).

**Coequal partner has no right to lien on partnership property.** — Coequal partner does not have right to common-law materialman's or contractor's lien on partnership property. *Stephens v. Clark*, 154 Ga. App. 306, 268 S.E.2d 361 (1980) (decided under Code 1933, § 75-206).

**A partnership which gives security to a partner for a loan cannot enforce the partnership duties owed it by the secured partner if those duties will impair the rights of the secured partner.** *Westminster Properties, Inc. v. Atlanta Assocs.*, 250 Ga. 841, 301 S.E.2d 636 (1983) (decided under former § 14-8-40).

### Liability for Losses

**Existence of partnership not being in dispute, each partner is liable for business losses of the firm.** *Todd v. Waddell*, 120 Ga. App. 20, 169 S.E.2d 351 (1969) (decided under Code 1933, § 75-206).

**Joint judgments possible.** — If there is joint liability by two or more partners, a joint judgment may be rendered, and the respective liabilities of the defendants may be adjudged. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

**Right of contribution and set off.** — Where the business of a copartnership entails loss and where no part of the copartnership debt has been paid, no right of contribution arises, and no right to set off partnership liabilities against a suit on a note by one of the partners against the other partners. The only liability of members is to creditors. *Brinson v. Franklin*, 177 Ga. 727, 171 S.E. 287 (1933) (decided under Civil Code 1910, §§ 3155, 3156).

**Personal judgment rendered when partnership without assets.** — Where after payment of partnership debts no assets remain from which respective debts and interest of partners may be adjusted and paid, it is proper that the final decree fix the amounts

due to and by each partner, and that a personal judgment be rendered against those indebted. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

### Accounting in Equity

**Jurisdiction.** — Court of equity has jurisdiction in all cases of accounting and settlement between partners, where partnership has not been dissolved. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

When equity has assumed jurisdiction of partnership accounting, it will retain jurisdiction so as to afford complete relief between partners as to all controversies growing out of the partnership. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

**After payment of partnership debts,** petitioning partner is entitled to accounting without necessity of showing any exact amount as due, if the petitioning partner alleges and shows facts sufficient to indicate that something will be found to be due to that partner. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 409, 410.

**C.J.S.** — 68 C.J.S., Partnership, § 77 et seq.

**ALR.** — Right of individual partner to exemption in partnership property, 4 ALR 300.

Power of partner to dispose of good will of business, 5 ALR 1182.

Authority of member of farming partnership to execute negotiable paper, 9 ALR 372.

Actions at law between partners and partnerships, 21 ALR 21.

Right to setoff claim of individual partner against claim against partnership, 55 ALR 566.

Right of other partners or partnership creditors in respect of insurance on interest of one of the partners, 61 ALR 1201.

Right of partners inter se in respect of interest, 66 ALR 3.

Relative rank of judgment, attachment, or

execution based on partnership liability and judgment, attachment, or execution based on liability of individual partner, 75 ALR 997.

Partition of partnership real property, 77 ALR 300.

Accountability of partner or joint adventurer for profits earned subsequently to death or dissolution, 80 ALR 12; 55 ALR2d 1391.

Right of one partner in action at law against him by another partner on a personal claim to set up by counterclaim or otherwise claim arising out of partnership transactions, 93 ALR 293.

Right of partner or member of joint adventure to share in misappropriated money or property, or secret profits, for which he is required to account, 118 ALR 640.

Discharge or settlement by, or payment to, one partner or co-obligee, as affecting rights of others, 142 ALR 371.



Provision of partnership agreement giving one partner option to buy out the other, 160 ALR 523.

Liability of partner for failure to perform personal services, 165 ALR 981.

Actions at law between partners and partnerships, 168 ALR 1088.

Duty of former partner, acquiring property occupied by partnership business, to renew lease, 4 ALR2d 102.

Delay as defense to action for accounting between joint adventurers, 13 ALR2d 765.

Powers, duties, and accounting responsibilities of managing partner of mining partnership, 24 ALR2d 1359.

Right of partner or joint adventurer to accounting where firm business or transactions are illegal, 32 ALR2d 1345.

Constructive trust in favor of partnership where one partner purchases real estate with his own funds, 44 ALR2d 519.

When real estate owned by partner before formation of partnership will be deemed to have become asset of firm, 45 ALR2d 1009.

Meaning and coverage of "book value" in partnership agreement in determining value of partner's interest, 47 ALR2d 1425.

Rights in profits earned by partnership or joint adventure after death or dissolution, 55 ALR2d 1391.

Construction and effect of agreement relating to salary of partners, 66 ALR2d 1023.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to partnership agreement, 62 ALR3d 970.

Construction of agreement between real-estate agents to share commissions, 71 ALR3d 586.

Construction and application of expulsion provision in partnership agreement between attorneys, 72 ALR3d 1226.

Evaluation of interest in law firm or medical partnership for purposes of division of property in divorce proceedings, 74 ALR3d 621.

Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 ALR3d 822.

Rights of attorneys leaving firm with respect to firm clients, 1 ALR4th 1164.

Partner's breach of fiduciary duty to co-partner on sale of partnership interest to another partner, 4 ALR4th 1122.

Joint venturers' comparative liability for losses, in absence of express agreement, 51 ALR4th 371.

## 14-8-19. Partnership books.

The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them. (Code 1981, § 14-8-19, enacted by Ga. L. 1984, p. 1439, § 1.)

### COMMENT

#### Note to Uniform Partnership Act

This section assures access by the partners to the partnership books.

#### Prior Georgia Law

There was no comparable provision. The right given in this section is consistent with the general obligation of good faith in prior O.C.G.A. § 14-8-40, and with the partners' right to examine into the affairs of the partnership under prior O.C.G.A. § 14-8-41.

#### Official UPA

This section is the same as the official version.

#### Cross-References

Partners' right to information other than the books: § 14-8-20. Partners' right to a formal accounting: § 14-8-22.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 962 et seq.

**C.J.S.** — 68 C.J.S., Partnership, § 91.

**14-8-20. Responsibility of partners to reveal true information to representative of deceased partner.**

Partners shall render, to the extent the circumstances render it just and reasonable, true and full information of all things affecting the partners to any partner and to the legal representative of any deceased partner or of any partner under legal disability. (Code 1981, § 14-8-20, enacted by Ga. L. 1984, p. 1439, § 1.)

## COMMENT

**Note to Uniform Partnership Act**

This section states the partners' duty of disclosure to the other partners.

**Prior Georgia Law**

There was no precisely comparable provision. This section is generally consistent with the partners' duty of good faith set forth in prior O.C.G.A. § 14-8-40 and with the general duty to communicate in connection with confidential relations and under other appropriate circumstances set forth in O.C.G.A. § 23-2-53. Confidential relations are defined in O.C.G.A. § 23-2-58 to include "the relationship between partners." The duty set forth in § 14-8-20 applies after dissolution of the partnership, as is indicated by the reference to disclosure to the legal representative of any deceased partner.

**Official UPA**

This section differs from the official version in explicitly requiring disclosure without the necessity of a demand; in clarifying that the extent of the required disclosure depends on the circumstances; and in clarifying that the duty to disclose is owed to the legal representative of a disabled partner.

**Cross-References**

Partner's right to examine the partnership books: § 14-8-19. Partner's right to a full accounting of partnership affairs: § 14-8-22.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 410, 425, 431.

**C.J.S.** — 68 C.J.S., Partnership, §§ 77, 263.

**14-8-21. Benefits derived by a partner without the consent of other partners.**

(a) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.



(b) This Code section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. (Code 1981, § 14-8-21, enacted by Ga. L. 1984, p. 1439, § 1.)

### COMMENT

#### Note to Uniform Partnership Act

This section states the partners' liability for deriving unauthorized benefits from the partnership.

#### Prior Georgia Law

There was no precisely comparable provision. This section is consistent with the general provision on acquisition of antagonistic rights in a confidential relationship, O.C.G.A. § 23-2-59. A confidential relationship is defined in O.C.G.A. § 23-2-58 to include "the relationship between partners." Section 14-8-21, by imposing a duty in connection with formation and liquidation, clarifies prior Georgia case law. *Compare Hancock v. Gunter*, 195 Ga. 646, 24 S.E.2d 772 (1943) (no fiduciary duty to speak where partnership had not commenced at the time of the nondisclosure) *with Bennett v. Smith*, 108 Ga. 466, 34 S.E. 156 (1899) (fiduciary duties recognized in connection with dissolution of a partnership). Section 14-8-21 also clarifies prior Georgia law by providing that a partner holds wrongfully appropriated funds as a trustee.

#### Official UPA

This section is the same as the official version.

#### Cross-Reference

Actions against the partners to enforce the right in this section: § 14-8-22(3).

### JUDICIAL DECISIONS

**Construed with § 23-2-59.** — O.C.G.A. § 23-2-59, when construed in conjunction with O.C.G.A. § 14-8-21, applies only to partnership rights acquired by one partner without the consent of the other partners. Thus, where all limited partners and the general partner acquired their rights at the same time by entering into an agreement, there was no breach of fiduciary duty. *Consolidated Equities Corp v. Bird*, 195 Ga. App. 45, 392 S.E.2d 276, cert. denied, 195 Ga. App. 45, 392 S.E.2d 276 (1990).

**Fiduciary relationship favors partnership, not partner.** — O.C.G.A. § 14-8-21, construed with O.C.G.A. § 14-8-14, does not create a fiduciary relationship between partners as contemplated by the federal bankruptcy law provision relating to debts nondischargeable for fraud or defalcation. Any fiduciary relationship created is in favor of the partnership and not in favor of an individual partner. *Betz v. Gay*, 117 Bankr.

753 (Bankr. M.D. Ga. 1989).

**Partner must account to the partnership.** — Since one general partner directly derived benefits from the conduct of the partnership without the other general partner's consent, the trial court did not err in granting to the general partner an accounting as to partnership affairs. *Williams v. Tritt*, 262 Ga. 173, 415 S.E.2d 285 (1992).

**Trust ex maleficio.** — O.C.G.A. § 14-8-21(a) does not establish an express or technical trust. The trust under that statute arises only when the partner derives profits without partnership consent. Thus, the trust created is a trust ex maleficio and does not create a fiduciary relationship within the meaning of the federal bankruptcy law. *Blashke v. Standard*, 123 Bankr. 444 (Bankr. N.D. Ga. 1991).

**Cited in DM II, Ltd. v. Hospital Corp. of Am.**, 130 F.R.D. 469 (N.D. Ga. 1989).

## RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, §§ 410, 431, 443-445.

C.J.S. — 68 C.J.S., Partnership, §§ 98, 106, 107.

**14-8-22. Right to formal accounting of partnership affairs.**

In addition to the remedies or methods of dispute resolution provided for in the partnership agreement, any partner shall have the right to a formal accounting as to partnership affairs:

- (1) If he is wrongfully excluded from the partnership business or possession of its property by his copartners;
  - (2) If the right exists under the terms of any agreement;
  - (3) If the right exists under Code Section 14-8-21; or
  - (4) Whenever other circumstances render it just and reasonable.
- (Code 1981, § 14-8-22, enacted by Ga. L. 1984, p. 1439, § 1.)

## COMMENT

**Note to Uniform Partnership Act**

This section states a partner's right to obtain a formal pre-dissolution account of all partnership affairs in certain situations.

**Prior Georgia Law**

There was no comparable provision. Prior O.C.G.A. § 14-8-41 gave partners the right to inquire into partnership affairs, but did not state that this right included the right to a formal account. With respect to case law supporting the right to an account in situations covered by the various subsections of § 14-8-22, see *Zerounis v. Berry*, 199 Ga. 410, 34 S.E.2d 275 (1945) (subsection (1)); *Giordano v. Kleinmaier*, 210 Ga. 766, 82 S.E.2d 824 (1954) (subsection (2)); and *Miller & Son v. Freeman*, 111 Ga. 654, 36 S.E. 961 (1900) (subsection (4)).

**Official UPA**

This section is the same as the official version except that it validates agreed procedures other than a formal accounting, including arbitration.

**Cross-References**

Partner's access to partnership books: § 14-8-19. Partner's right to disclosure of information: § 14-8-20. Settlement of accounts on dissolution: §§ 14-8-38, 14-8-40 and 14-8-42.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Code 1933, §§ 75-202, 75-206, and former Code Section 14-8-41, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Jurisdiction in equity.** — Court of equity has jurisdiction in all cases of accounting and settlement between partners, where the partnership has not been dissolved. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).



**Equity to retain jurisdiction of partnership accounting.** — When equity has assumed jurisdiction of a partnership accounting, it will retain jurisdiction so as to afford complete relief between the partners as to all controversies growing out of the partnership. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

**Where plaintiff entitled to petition for accounting in equity.** — Where it appears from the petition that a contractual duty rests upon a party defendant to furnish an accounting of the affairs of a partnership, and such party has the books and records in that partner's possession and refuses to produce them, the plaintiff is entitled to bring a petition in equity seeking an accounting. *Giordano v. Kleinmaier*, 210 Ga. 766, 82 S.E.2d 824 (1954) (decided under Code 1933).

**When partner has been wrongfully excluded from partnership,** that partner may maintain suit for accounting, although there has been no dissolution of the partnership. *Zerounis v. Berry*, 199 Ga. 410, 34 S.E.2d 275 (1945) (decided under Code 1933).

Since one general partner directly derived benefits from the conduct of the partnership without the other general partner's consent, the trial court did not err in granting to the general partner an accounting as to partnership affairs. *Williams v. Tritt*, 262 Ga. 173, 415 S.E.2d 285 (1992).

**Petitioning partner entitled to accounting if something is due the partner.** — After payment of partnership debts, petitioning partner is entitled to accounting without necessity of showing any exact amount as due, if the petitioning partner alleges and shows facts sufficient to indicate that something will be found to be due to that partner. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

**Partner's agreement given effect in final settlement and accounting.** — If the partners have made an agreement that their shares shall be unequal, or that one shall pay to or for another partner a certain sum for acquiring a stated interest in the partnership assets, such an agreement will be given effect in a final settlement and accounting between the

partners. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

**Accounting where defendant has no contractual duty to furnish accounting.** — Where there is no contractual duty resting upon the defendant to furnish an accounting of the affairs of a partnership, a petition for an accounting must aver facts sufficient to indicate that something will be due on an accounting by the defendant. *Giordano v. Kleinmaier*, 210 Ga. 766, 82 S.E.2d 824 (1954) (decided under Code 1933).

**Personal judgment rendered when partnership without assets.** — Where after payment of partnership debts no assets remain from which the respective debts and interests of the partners may be adjusted and paid, it is proper that the final decree fix the amounts due to and by each partner, and that a personal judgment be rendered against those indebted. *Johnson v. Townsend*, 192 Ga. 522, 15 S.E.2d 790 (1941) (decided under Code 1933, § 75-206).

**Availability of trover.** — Trover is not an available remedy to the plaintiff to settle matters in dispute between oneself and a copartner, where no accounting or settlement of the partnership had been had, and a balance struck between the partners. *Bush v. Smith*, 77 Ga. App. 329, 48 S.E.2d 582 (1948) (decided under Code 1933, § 75-202).

**Damages for wrongful dissolution.** — In the case of wrongful dissolution of a partnership, a partner who did not wrongfully cause the dissolution is entitled not only to payment for net interest in the partnership (which would be calculated pursuant to an accounting), but also damages for wrongful dissolution. Damages for wrongfully excluding a partner from a partnership business opportunity should include compensation to the ousted partner for that partner's share of the prospective business opportunity. *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698, cert. denied, 199 Ga. App. 906, 405 S.E.2d 698 (1991), aff'd sub nom. *Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).

**Cited in** *DM II, Ltd. v. Hospital Corp. of Am.*, 130 F.R.D. 469 (N.D. Ga. 1989).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1045 et seq.

**C.J.S.** — 68 C.J.S., Partnership, § 336 et seq.

**ALR.** — Lack of partnership accounting as

tolling statute of limitations against actions at law between partners, 77 ALR 426.

When statute of limitations commences to run on right of partnership accounting, 44 ALR4th 678.

### 14-8-23. Continuation of partnership after time of termination.

(a) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(b) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima-facie evidence of a continuation of the partnership. (Code 1981, § 14-8-23, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1994, p. 97, § 14.)

## COMMENT

#### Note to Uniform Partnership Act

This section provides that, in the absence of contrary agreement, the partners' rights and duties continue after the end of a fixed term or completion of a particular undertaking if the partnership is continued, except that the partnership becomes one at will. Continuation of the partnership may be inferred from the continuation of the business without any settlement of partnership affairs.

#### Prior Georgia Law

There was no precisely comparable provision. Prior O.C.G.A. § 14-8-24(b) provided for continuation of a partnership for a term only until the expiration of its term or the death of a partner. However, this section did not explicitly invalidate an agreement to continue the partnership beyond its term or prevent the inference of such an agreement from the continuation of the business of the partnership.

#### Official UPA

This section is the same as the official version.

#### Cross-References

Dissolution of a partnership upon termination of term or undertaking: § 14-8-31(a). Settlement of accounts on dissolution: §§ 14-8-38, 14-8-40 and 14-8-42.

## JUDICIAL DECISIONS

**Editor's notes.** — Some of the cases cited below were decided under former Code 1933, § 75-106.

**Incorporation of partnership formed by oral agreement.** — Where company which

was formed as partnership by oral agreement is incorporated, incorporation terminates partnership and is notice to partner and to all interested persons of its termination. *Baker v. Schneider*, 210 Ga. 493, 80



S.E.2d 783 (1954) (decided under former Code 1933, § 75-106); *Carnes v. McNeal*, 224 Ga. App. 88, 479 S.E.2d 474 (1996).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 93, 94.

**C.J.S.** — 68 C.J.S., Partnership, § 65.

**ALR.** — Right of one partner to maintain action at law against the other for damages from wrongful dissolutions of firm, 4 ALR 158.

Partnership land as real or personal property for purposes of descent and distribution, 25 ALR 389.

Liability of former partners as such in

respect of transactions subsequent to incorporation of their business, 89 ALR 986.

Specific performance of agreement, or provisions thereof, involving partnership at will, 70 ALR2d 618.

Sale or transfer of interest by partner as dissolving partnership, 75 ALR2d 1036.

Construction and application of expulsion provision in partnership agreement between attorneys, 72 ALR3d 1226.

## 14-8-24. Property rights of partner.

The property rights of a partner are:

- (1) His rights in specific partnership property;
- (2) His interest in the partnership; and
- (3) His right to participate in the management. (Code 1981, § 14-8-24, enacted by Ga. L. 1984, p. 1439, § 1.)

### COMMENT

#### Note to Uniform Partnership Act

This section differentiates the three property rights of a partner.

#### Prior Georgia Law

There was no comparable provision.

#### Official UPA

This section is the same as the official version.

#### Cross-References

Partner's management rights: § 14-8-18(5), (7) and (8). Partner's rights in specific partnership property: § 14-8-25. Definition of partner's interest in the partnership: § 14-8-26. Assignment of partner's interest in the partnership: § 14-8-27. Creditor's rights in partner's interest in the partnership: § 14-8-28.

### JUDICIAL DECISIONS

#### ANALYSIS

#### GENERAL CONSIDERATION

#### PARTNERSHIP PROPERTY AS INSURABLE INTEREST

**General Consideration**

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Civil Code 1910, Code 1933, §§ 75-204, 75-206, 75-207 and former Code Sections 14-8-43 and 14-8-45, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Individual interest of a partner in partnership assets** is no more than the partner's interest in the surplus effects of the partnership that remain after all the debts of the partnership have been discharged. *Commercial Bank v. Watt*, 178 Ga. 615, 173 S.E. 394 (1934) (decided under former Code 1933).

**Limitation on purchaser's partnership interest.** — Purchaser can acquire as against other partners no greater interest in a partnership as such than a selling partner would be entitled to upon final accounting had between the original partners. *Stone v. First Nat'l Bank*, 117 Ga. App. 802, 162 S.E.2d 217 (1968) (decided under former Code 1933, § 75-204).

**Joint-stock company contrasted.** — In a joint-stock company there is no *delectus personae* as in an ordinary partnership. *Hammond v. Otwell*, 170 Ga. 832, 154 S.E.

357 (1930) (decided under Civil Code 1910).

**Cited in** *Harris v. Escoe* (In re Woolston), 147 Bankr. 279 (Bankr. M.D. Ga. 1992).

**Partnership Property as Insurable Interest**

**Both partnership and partners have insurable interest** in property of partnership. *Georgia Farm Bureau Mut. Ins. Co. v. Mikell*, 126 Ga. App. 640, 191 S.E.2d 557 (1972) (decided under former Code 1933, §§ 75-206, 75-207).

Partner has an insurable interest in firm property which will support a policy taken out thereon for his own benefit. He has an actual, lawful, and substantial economic interest in preservation of his firm's property. *Georgia Farm Bureau Mut. Ins. Co. v. Mikell*, 126 Ga. App. 640, 191 S.E.2d 557 (1972) (decided under former Code 1933, §§ 75-206, 75-207).

**Insurance apparently made for individual partner** may be shown to have been for benefit of partnership where the parties deal on that basis, or where the entity entitled to the insurance so authorizes or ratifies the action. *Georgia Farm Bureau Mut. Ins. Co. v. Mikell*, 126 Ga. App. 640, 191 S.E.2d 557 (1972) (decided under former Code 1933, §§ 75-206, 75-207).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 383 et seq.

**C.J.S.** — 68 C.J.S., Partnership, § 86 et seq.

**ALR.** — Duty of joint adventurers *inter se* in respect of acquisition or renewal of property rights or interests related to the enterprise, 62 ALR 13.

**14-8-25. Incidents of tenancy in partnership.**

(a) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(b) The incidents of the tenancy are such that:

(1) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners;

(2) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property;



(3) A partner's right in specific partnership property is not subject to attachment, judgment lien, execution, or other enforcement of a claim except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws;

(4) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose;

(5) A partner's right in specific partnership property is not subject to the year's support provided for in Code Sections 53-5-1 and 53-5-2 of the "Pre-1998 Probate Code," if applicable, or Code Sections 53-3-1, 53-3-2, 53-3-4, 53-3-5, and 53-3-7 of the "Revised Probate Code of 1998."

(c) Nothing in Code Section 14-8-24 and this Code section shall modify, affect, or act in derogation of any portion of this chapter concerning the manner of vesting title to property (including, without limitation, real property) in the name of the partnership or the ownership of such property by the partnership. (Code 1981, § 14-8-25, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1998, p. 128, § 14.)

**Law reviews.** — For article surveying real property law in 1984-1985, see 37 Mercer L. Rev. 343 (1985).

## COMMENT

### Note to Uniform Partnership Act

Subsection (a) defines a partner's interest in specific partnership property as a tenancy in partnership. Although this appears to be consistent with ownership by the individual partners rather than by the partnership entity, subsection (b) clarifies that partners do not have individual rights in partnership property by negating with respect to such property each important attribute of individual ownership: Possession (paragraph (b)(1)); assignability (paragraph (b)(2)); rights of creditors of individual partners (paragraph (b)(3), first sentence); partners' claims under the exemption laws (paragraph (b)(3), second sentence); descendability (paragraph (b)(4)); and applicability of the year's support provision (paragraph (b)(5)). Subsection (c) further clarifies that partnership property is owned by the partnership entity rather than by the individual partners by reconfirming that the partnership may own and hold title to partnership property.

### Prior Georgia Law

Subsection (a): There was no comparable provision. Although it has been said that partners own partnership property as tenants in common (see, e.g., *Bloodworth v. Bloodworth*, 226 Ga. 898, 178 S.E.2d 198 (1970)), this has been qualified by an "equitable rule ... designed to give substantial justice between the partners themselves and the firm creditors of the partners, in the adjustment of the partnership affairs." *Taylor v.*

*McLaughlin*, 120 Ga. 703, 706, 48 S.E. 203, 204 (1904). The extent to which the tenancy in common approach was qualified in the prior Georgia cases will appear from the discussion of subsection (b), below.

Paragraph (b)(1): There was no comparable provision. Prior O.C.G.A. § 14-8-41 provided that the partners "have joint possession" but this was not elucidated in the cases.

Paragraph (b)(2): There was no comparable provision. Although the case law has permitted partner assignments of their interests in partnership property, these assignments have been held subject to the claims of partnership creditors. See *Taylor v. McLaughlin*, *supra*; *Shaw v. McDonald*, 21 Ga. 395 (1857); *Carpenter v. Cornwall*, 133 Ga. App. 797, 213 S.E.2d 56 (1975). Thus, the partners were, in effect, permitted to assign what is defined in new § 14-8-26 as their interests in the partnership rather than their interests in specific partnership property.

Paragraph (b)(3): O.C.G.A. § 18-3-6, prohibiting attachment of joint property in cases of joint contractors and partners, and prior O.C.G.A. § 14-8-74, permitting only garnishment of a partner's interest in the partnership, were consistent with the first sentence. However, case law under the exemption provision (Georgia Constitution Article I, section 1, paragraph XXVI and O.C.G.A. § 44-13-1) is inconsistent with the second sentence of paragraph (b)(3). See *Citizen's Bank & Trust Co. v. Pendergrass Banking Co.*, 164 Ga. 302, 138 S.E. 223 (1927); *Blanchard, Williams & Co. v. Paschal*, 68 Ga. 32 (1881); *Harris v. Visscher*, 57 Ga. 229 (1876).

Paragraph (b)(4): Prior O.C.G.A. § 14-8-47 was consistent in providing that control of the partnership property passed upon death of a partner to the surviving partners. However, prior O.C.G.A. § 14-8-48 provided that the surviving partners could convey the property only to the extent necessary to pay debts.

Paragraph (b)(5): There was no comparable provision. Georgia case law under the year's support provisions (O.C.G.A. §§ 53-5-1 and 53-5-2) was consistent in holding that the year's support is payable only out of the surplus after payment of debts — that is, only out of what is defined as the partner's interest in the partnership under § 14-8-26. See *Ferris v. Van Ingen & Co.*, 110 Ga. 102, 35 S.E. 347 (1900); *Loftin v. Dooley*, 68 Ga. App. 203, 22 S.E.2d 612 (1942).

### Official UPA

This section is substantially the same as the official version except for the added references to "judgment lien" and "other enforcement of a claim" in paragraph (b)(3), the substitution in paragraph (b)(5) of the reference to the year's support provisions for "dower, curtesy, or allowances to widows, heirs, or next of kin," and the addition of subsection (c).

### Cross-References

What is partnership, as distinguished from individual property: § 14-8-8(a)-(e). Vesting title and ownership of partnership property in partnership: § 14-8-8(f)-(g). Effect of a conveyance by one or more partners of all of the partnership property: §§ 14-8-9 and 14-8-10. Conveyance of legal title to property held in the name of a deceased partner: § 14-8-10. Assignment of partner's interest in the partnership: § 14-8-27. Creditor's rights in partner's interest in the partnership: § 14-8-28.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION DEATH OF PARTNER



### General Consideration

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Code 1882, § 1907, Civil Code 1895, §§ 2647, 2648, Civil Code 1910, §§ 1010 — 1087, 3162, 3176, 3177, Code 1933, §§ 3-305, 75-202, 75-208, 75-209, 75-210 and former Code Sections 14-8-41, 14-8-47, 14-8-48, and 14-8-74, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Partners equally entitled to possession of partnership assets.** — Where parties are partners, each of them is equally entitled to possession of a car as an asset of the partnership. *Bush v. Smith*, 77 Ga. App. 329, 48 S.E.2d 582 (1948) (decided under Code 1933, § 75-202).

**Partnership real property as personal property.** — At common law, when real estate was conveyed to a partnership, title vested in individual partners as tenants in common, but, in equity real estate of the firm is considered personal property to the extent necessary to pay debts. *Hasty v. Wilson*, 223 Ga. 739, 158 S.E.2d 915 (1967) (decided under former Code 1933, § 75-210).

**Garnishment.** — There is no provision for garnishment of a partner's interest in undivided partnership assets in the hands of a third party. *Grande Carpet Co. v. Bedco Assocs.* No. 1, 171 Ga. App. 33, 318 S.E.2d 767 (1984) (decided under former § 14-8-74, relating to garnishment of partner's interest in partnership assets).

**Cited in** *Harris v. Escoe* (In re *Woolston*), 147 Bankr. 279 (Bankr. M.D. Ga. 1992).

### Death of Partner

**Control by surviving partner.** — Upon death of partner, surviving partner has right to exclusive control of partnership assets and may bring suit on a promissory note, property of the partnership, without joining as party plaintiff the personal representative of the deceased partner. This is true although no debts of the partnership exist at the time of the institution of the suit. *Bone v. Faircloth*, 52 Ga. App. 23, 182 S.E. 400 (1935) (decided under Code 1933, § 75-208).

Upon death of a partner, partnership as-

sets rightfully belong in possession of the surviving partner, and none of the assets can ever belong to the estate of the deceased partner until all debts of the partnership are paid, including what may be due to the surviving partner. *Kinney v. Robinson*, 181 Ga. 837, 184 S.E. 616 (1936) (decided under former Code 1933).

For purpose of winding up affairs of a partnership consisting of two members, one of whom dies, the surviving partner, being primarily liable to creditors of the partnership, has right to control assets belonging to the firm, to exclusion of the legal representative of the deceased partner. *Cook v. Cochran*, 42 Ga. App. 478, 156 S.E. 465 (1931) (decided under Civil Code 1910, §§ 3176, 3177); *Bone v. Faircloth*, 52 Ga. App. 23, 182 S.E. 400 (1935) (decided under Civil Code 1910, §§ 3176, 3177).

On death of partner, title to personal assets of firm is cast upon survivor, who is charged with their administration — first, for payment of partnership debts, and secondly, for paying over deceased partner's share in surplus to the deceased's legal representatives. *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939) (decided under Code 1933, § 75-208).

Surviving partner has right to control assets of firm, to exclusion of administratrix of deceased partner, for payment of debts; and after debts are paid, assets are divided. *Kirk v. Hasty*, 239 Ga. 362, 236 S.E.2d 667 (1977) (decided under Code 1933, § 75-208).

A surviving partner has the entire title and sole control of the property, and represents the power of the former partners. *August v. Calloway*, 35 F. 381 (S.D. Ga. 1888) (decided under Code 1882, § 1907).

**Death of surviving partner.** — Under this section the administrator of a deceased "surviving partner," may collect and distribute partnership assets and this includes choses in action. *Juhan v. Juhan*, 104 Ga. 253, 30 S.E. 779 (1898) (decided under Civil Code 1895, § 2647).

**Appointment of legal representative** gives representative no authority to exercise control of property of other persons or copartnerships; ordinarily it only authorizes seizure of such property of the estate as representative must and is entitled to have for the purpose of paying debts of the estate and expenses of administration. *Kinney v.*

**Death of Partner (Cont'd)**

Robinson, 181 Ga. 837, 184 S.E. 616 (1936) (decided under Code 1933).

**Limitation on suits by representative of deceased partner.** — Until the interest of the deceased partner in partnership assets is ascertained, and his portion is turned over to his representative, the latter can maintain no suit for recovery of joint effects. *Cook v. Cochran*, 42 Ga. App. 478, 156 S.E. 465 (1931) (decided under Civil Code 1910, §§ 3176, 3177); *Bone v. Faircloth*, 52 Ga. App. 23, 182 S.E. 400 (1935) (decided under Civil Code 1910, §§ 3176, 3177).

**Executors of deceased partner as tenants in common with survivors.** — Where executors of a deceased partner, having sufficient power under the will, agree with the surviving partner to hold assets of the partnership as tenants in common, the executors, in the absence of fraud, accident, or mistake, cannot thereafter question the right of the surviving partner to convey the partner's undivided interest in the property to secure that partner's own preexisting debt nor can they enjoin the grantee from exercising power or sale contained in the security deed, on the ground that the partnership property should be first devoted to the payment of partnership debts. *Fagan v. Gress*, 179 Ga. 616, 176 S.E. 763 (1934) (decided under Code 1933).

**Reasonable time for settling accounts.** — One year is reasonable time within which to settle partnership accounts. *Huggins v. Huggins*, 117 Ga. 151, 43 S.E. 759 (1903) (decided under Civil Code 1895, §§ 2647, 2648).

**Refusal of administrator of deceased partner to accept settlement** is no excuse for delay. The surviving partner should settle the debts and proceed as provided by statute. *Huggins v. Huggins*, 117 Ga. 151, 43 S.E. 759 (1903) (decided under Civil Code 1895, §§ 2647, 2648).

**Surviving partner's power to transfer property to assignee.** — The surviving partner has, at least in case of insolvency, the power to transfer property to an assignee for the benefit of the partnership creditors, in order to wind up the partnership. However, the surviving partner cannot make an assignment with preferences unless both the surviving partner and the partnership are insol-

vent. *August v. Calloway*, 35 F. 381 (S.D. Ga. 1888) (decided under Code 1882, § 1907).

**Disposal of real estate by surviving partner.** — Real estate of the partnership may be disposed of by the surviving partner to the extent necessary to pay debts. *Kirk v. Hasty*, 239 Ga. 362, 236 S.E.2d 667 (1977) (decided under Code 1933, § 75-210).

**Trustee status.** — Surviving partner is trustee for share of deceased partner's interest after payment of debts. *Bone v. Faircloth*, 52 Ga. App. 23, 182 S.E. 400 (1935) (decided under Code 1933, §§ 75-208, 75-209).

**Estate not chargeable with year's support.** — Unless there is surplus, none of assets of partnership constitute any part of estate of deceased partner, and consequently are not chargeable with year's support allowed to widow. *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939) (decided under Code 1933, §§ 75-208, 75-209).

Year's support awarded to partner's widow could only be carved out of or set aside or apart from the estate, or assets of the estate, of the decedent, and his estate would derive none of the assets of the partnership except by proper distribution after it appeared that a surplus existed. *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939) (decided under Code 1933, §§ 75-208, 75-209).

**Statute of limitations.** — After the dissolution of a partnership by death of one of the partners, the statute of limitations does not commence to run in favor of the surviving partner against the estate of the deceased partner as long as there are debts due by the partnership to be paid, or debts due it to be collected, or until a sufficient time has elapsed since the dissolution of the firm to raise the presumption that all debts due from the partnership have been paid, and that all debts due to it have been collected. *Purvis v. Johnson*, 163 Ga. 698, 137 S.E. 50 (1927) (decided under Civil Code 1910, §§ 3176, 3177).

It will be presumed that, before the expiration of a period of nine years, all debts due by the firm had been paid and those due to the firm had been collected; and tolling from the statute of limitations the five years allowed for the taking out of administration upon the estate of the deceased partner, the suit as to an accounting for the personal assets of the partnership, which was not brought within four years of the expiration



of the five-year period, was barred. *Purvis v. Johnson*, 163 Ga. 698, 137 S.E. 50 (1927) (decided under Civil Code 1910, §§ 3176, 3177).

**Personal representative as party to suit.** — There is no validity to the contentions that the control of the assets by the surviving partner must be both for the purpose of "paying debts" and "making distribution," and where there are no debts, the surviving partner has no right to sue on a chose in action of the partnership without making the personal representative of the deceased partner a party thereto. *Bone v. Faircloth*, 52 Ga. App. 23, 182 S.E. 400 (1935) (decided under Code 1933, §§ 75-208, 75-209).

**Suit in partnership name not fatally defective.** — Assuming that after death of one partner it would be technically proper to bring or prosecute the action only in the name of the surviving partner, where suit is brought in the partnership name, the suit is not fatally defective for failure to observe such formality, since it can be corrected by amendment. *Central of Ga. Ry. v. George P. Greene & Co.*, 41 Ga. App. 794, 154 S.E. 809 (1930) (decided under Civil Code 1910, § 3176).

**No limitation on bringing action individually against surviving partner.** — In an action, brought individually, by the wife of a

deceased partner against the surviving partner, on a promissory note of the partnership, signed in the name of the partnership by both partners, and payable on demand to the wife of the deceased partner, it is no defense to her action against the surviving partner that no administrator of the estate of the deceased partner has been appointed and joined as a party defendant in the action. She is at liberty to proceed against the surviving partner alone at her election. *Florence v. Montgomery*, 89 Ga. App. 363, 79 S.E.2d 431 (1953) (decided under Code 1933, § 3-305).

**Fact that *fieri facias* is issued against partnership** instead of against surviving partner is immaterial; for if, after the death of a partner, the business is continued by the surviving partner, it is properly listed for taxation in the firm name. *Ledbetter v. Farrar Lumber Co.*, 177 Ga. 779, 171 S.E. 374 (1933) (decided under Civil Code 1910, §§ 1010 — 1087, 3162).

**Where set off disallowed.** — Surviving partner cannot set off against the wife, suing as an individual creditor of the partnership, the eventual liability of the deceased partner's estate for contribution on the partnership debt. *Florence v. Montgomery*, 89 Ga. App. 363, 79 S.E.2d 431 (1953) (decided under Code 1933, § 3-305).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 384.

**C.J.S.** — 68 C.J.S., Partnership, §§ 86, 88.

**ALR.** — Partnership land as real or personal property for purposes of descent and distribution, 25 ALR 389.

Remedy where additional assets or liabilities are discovered after settlement of partnership affairs as at law or in equity, 41 ALR 1454.

Partner's lien on or interest in assets of partnership as affected by dissolution agreement, 43 ALR 95.

Right of partnership creditor to proceed against estate of deceased partner, 61 ALR 1410.

Validity, construction, and effect of agreement for disposition of interest in partnership in event of death of partner, 73 ALR 983.

Power of surviving partner or member of

joint adventure to grant or sell oil and gas lease or other mineral rights covering land belonging to partnership or joint adventure, 89 ALR 588.

Right to judgment, levy, or lien against individual in action under statute permitting persons associated in business under a common name to be sued in that name, 100 ALR 997.

Construction and application of statute requiring surviving partner to give bond as condition of his right to manage and settle partnership affairs, 121 ALR 860.

Death of one of two or more judgment creditors under a joint or partnership judgment as affecting judgment, 122 ALR 752.

Waiver or estoppel predicated upon surviving partner's surrender of possession of partnership property to personal representative of deceased partner, 137 ALR 1024.

Applicability of statute of nonclaim or

limitation statute as between surviving partner and estate of deceased partner, 157 ALR 1114.

Meaning and coverage of "book value" in partnership agreement in determining value of partner's interest, 47 ALR2d 1425.

Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him, 50 ALR2d 1268.

Rights in profits earned by partnership or joint adventure after death or dissolution, 55 ALR2d 1391.

Rights as to business unfinished or fees uncollected upon withdrawal or death of partner in law firm, 78 ALR2d 280.

Relative rights of surviving partner and the estate of the deceased partner in proceeds of life insurance acquired pursuant to partnership agreement, 83 ALR2d 1347.

Partner's breach of fiduciary duty to co-partner on sale of partnership interest to another partner, 4 ALR4th 1122.

## 14-8-26. Interest of partner in partnership.

A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property. (Code 1981, § 14-8-26, enacted by Ga. L. 1984, p. 1439, § 1.)

### COMMENT

#### Note to Uniform Partnership Act

This section describes the partner's interest in the partnership entity, as distinguished from his interest in specific partnership property.

#### Prior Georgia Law

There was no comparable provision. As is discussed in the Comment to § 14-8-25, prior Georgia law recognized that a partner's interest was in the partnership entity rather than in specific partnership property with respect to assignability, the rights of creditors of individual partners to reach partnership property, and the application of the year's support provision. However, prior O.C.G.A. § 14-8-48 was inconsistent with this section in providing that partnership real estate is considered personal property in equity only to the extent necessary to pay debts.

#### Official UPA

This section is the same as the official version.

#### Cross-References

Partner's right to share in the profits and surplus: §§ 14-8-18(1) and 14-8-40(1)-(3). Definition and description of a partner's interest in specific partnership property: § 14-8-25.

### JUDICIAL DECISIONS

**Profits means net, and not gross, income.** *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698, cert. denied, 199 Ga. App. 906, 405 S.E.2d 698 (1991), *aff'd sub nom. Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).

which was indebted to defendant in the amount of \$524,030 had no "profits and surplus." *Tidwell v. Central Sav. Bank (In re Hunt)*, 154 Bankr. 1016 (Bankr. M.D. Ga. 1993).

Cited in *DM II, Ltd. v. Hospital Corp. of Am.*, 130 F.R.D. 469 (N.D. Ga. 1989).

**No profits and surplus.** — Partnership



## RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, §§ 383, 385-387.

C.J.S. — 68 C.J.S., Partnership, § 94.

### 14-8-27. Conveyance of partnership interest; dissolution of partnership.

(a) Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part.

(b) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(c) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account pursuant to Code Section 14-8-43 from the date only of the last account agreed to by all the partners. (Code 1981, § 14-8-27, enacted by Ga. L. 1984, p. 1439, § 1.)

## COMMENT

#### Note to Uniform Partnership Act

This section states that a partner's interest in the partnership (as distinguished from his interest in specific partnership property) is assignable unless otherwise agreed. The section also provides for the effect of the assignment and the rights of the assignee.

#### Prior Georgia Law

There was no comparable provision. Prior O.C.G.A. § 14-8-43 provided that an assignment *that introduces a new partner* must, unless the partners have agreed otherwise, be consented to by the other partners. Similarly, dictum in *Stone v. First National Bank*, 117 Ga. App. 802, 803, 162 S.E.2d 217 (1968) that an assignment "*may constitute proof of the dissolution of the partnership by withdrawal of the selling party*" (emphasis added) is not inconsistent with the statement in new § 14-8-27 that assignment "*does not of itself dissolve the partnership*" (emphasis added).

#### Official UPA

Subsection 14-8-27(a) is new and is derived from § 702 of the Revised Uniform Limited Partnership Act. Subsection (c) has been revised to clarify that the assignee's right to an account exists pursuant to, and is governed by, new § 14-8-43.

#### Cross-References

Admission of new partners: § 14-8-18(7). Assignment of partner's interest in specific partnership property: § 14-8-25(b)(2). Judicial dissolution upon application by assignee: § 14-8-32(b). Assignee's rights to obtain winding up by the court: § 14-8-37. Determination of a partner's interest upon dissolution: §§ 14-8-38 and 14-8-40. Assignee's right to an account: § 14-8-43.

## JUDICIAL DECISIONS

**Editor's notes.** — The case cited below was decided under former Code 1933, § 75-204 and former § 14-8-48.

**Effect of sale of partner's interest without consent of other partners.** — Where a partner without consent of other partners sells all or part of that partner's interest in the partnership as such, as distinguished from specific firm assets, it might be that such facts constitute proof of the dissolution of the partnership by withdrawal of the selling

party; yet the partnership may continue for the purpose of accounting and settlement and the party purchasing such partnership interests purchases them subject to any such accounting between the partners, particularly so where such sale was made without the consent of, and without notice to, the other partners. *Stone v. First Nat'l Bank*, 117 Ga. App. 802, 162 S.E.2d 217 (1968) (decided under former Code 1933, § 75-204).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 388-398.

**C.J.S.** — 68 C.J.S., Partnership, §§ 223, 224.

### 14-8-28. Judgment creditor of a partner against debtor partner's interest in partnership.

(a) On due application to a competent court by any judgment creditor of a partner or of any assignee of an interest in the partnership, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner or such assignee with payment of the unsatisfied amount of such judgment debt with interest thereon and may then or later appoint a receiver of his share of the profits, and of any other money or other assets due or to fall due to him in respect of the partnership, and, subject to subsection (b) of this Code section, make all other orders, directions, accounts, and inquiries which the debtor partner or such assignee might have made, or which the circumstances of the case may require.

(b) An interest charged pursuant to subsection (a) of this Code section is not liable to be seized and sold by the judgment creditor under execution.

(c) The interest charged may be redeemed or purchased without thereby causing a dissolution:

(1) With separate property, by any one or more of the partners; or

(2) With the partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(d) Nothing in this chapter shall be held to deprive a partner of his right, if any, under the exemption law, as regards his interest in the partnership.

(e) In addition to the remedy conferred by subsection (a) of this Code section, the interest of a partner in the partnership may be reached by a



judgment creditor by process of garnishment served on the firm, provided that the complaint upon which the judgment was obtained was personally served upon such partner.

(f) Subject to subsection (b) of this Code section, the remedies conferred by subsections (a) and (e) of this Code section shall not be deemed exclusive of others which may exist. (Code 1981, § 14-8-28, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1987, p. 1444, § 2.)

### COMMENT

#### Note to Uniform Partnership Act

This section provides a procedure by which an individual partner's creditor may reach the partner's interest in the partnership, as distinguished from his interest in specific partnership property. Specifically, the creditor may obtain a charging order against the partner's interest, and thereby obtain money or other assets due the partner from the partnership. The partner's interest is protected against creditor claims under the exemption laws. While creditors may not foreclose on a partner's interest, the other partners may redeem the interest.

#### Prior Georgia Law

The garnishment procedure made available under prior O.C.G.A. § 14-8-74 is similar to the charging order under new § 14-8-28, except that § 14-8-28 permits appointment of a receiver and other appropriate court action. Pursuant to new § 14-8-28(e), the garnishment remedy under the general garnishment statute, O.C.G.A. §§ 18-4-40, et seq., will remain available, except that, as under prior O.C.G.A. § 14-8-74, pre-judgment garnishment is not permitted.

#### Official UPA

Subsection (a) is slightly more expansive than the official version in granting rights to creditors of assignees and subjecting "other assets" in addition to "money" to the charging order. The former change is consistent with the Texas and Mississippi versions of § 28, Tex. Civ. Stat. Ann., Art. 6132b, § 28 (Vernon, 1970) and Miss. Code Ann. § 79-12-55 (Supp. 1982). The latter change is consistent with the Alabama version of § 28, Ala. Code § 10-8-42 (Michie, 1975) and with O.C.G.A. § 18-4-20, which subjects "all property, money or effects" to garnishment.

#### Cross-Reference

Creditors' rights regarding the partner's interest in the partnership: § 14-8-25(b)(3).

### JUDICIAL DECISIONS

**Foreclosure of charged interest of limited partner.** — The prohibition against sale of a charged interest by O.C.G.A. § 14-8-28 is inconsistent with the charging remedy provisions of § 14-9A-52 of the Uniform Limited Partnership Act and does not apply to

prohibit foreclosure of the charged interest of a limited partner. *Nigri v. Lotz*, 216 Ga. App. 204, 453 S.E.2d 780 (1995).

**Cited in** *Prodigy Centers/Atlanta v. T-C Assocs.*, 269 Ga. 522, 501 S.E.2d 209 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 790, 795-797.

**C.J.S.** — 68 C.J.S., Partnership, § 215 et seq.

### 14-8-29. Cessation of partners' association in carrying on partnership after dissolution.

Upon dissolution of a partnership the partners cease to be associated in the carrying on of the partnership. The partnership shall continue until termination pursuant to Code Section 14-8-30 and until termination the partners shall be associated in the winding up of the partnership. (Code 1981, § 14-8-29, enacted by Ga. L. 1984, p. 1439, § 1.)

#### COMMENT

##### Note to Uniform Partnership Act

This section defines dissolution as the point in time when the partners become associated in the "winding up" rather than the "carrying on" of the partnership.

##### Prior Georgia Law

There was no comparable provision.

##### Official UPA

The section has been changed from the official version to state only the *effect* of dissolution rather than a *cause* of dissolution (dissociation of a partner). This rephrasing avoids a possible conflict between this section and § 14-8-31(a)(5) which provides that death of a partner does not cause dissolution if the partners so agree. Partner withdrawal is a cause of dissolution under § 14-8-31(a)(2).

##### Cross-References

Causes of dissolution: § 14-8-31. Consequences of dissolution: § 14-8-33 et seq.

#### JUDICIAL DECISIONS

**Editor's notes.** — Some of the cases cited below were decided under former Civil Code 1910, § 3176 and Civil Code 1895, § 2647.

**Where surviving partners continue to do business as partnership.** — Although a partnership may be dissolved by the death of one of the partners, yet where on the death of one of the members, the surviving partners, instead of treating the partnership as dissolved, continue to do business as a partnership in the same manner and for the same purpose as before, they will be estopped to deny the existence of the partnership as to debts subsequently incurred within the legitimate business of the partnership as thus

continued by them. *Rowland v. Lovett*, 45 Ga. App. 123, 163 S.E. 511 (1932) (decided under former Civil Code 1910, § 3176).

If a surviving partner continues the business beyond the time allowed by law, the final account with the administrator should be stated as of the day when the settlement should have been made, the administrator being entitled to the sum then due, with interest; or at the administrator's option the estate may take such principal sum with the estate's proportion of the profits. *Huggins v. Huggins*, 117 Ga. 151, 43 S.E. 759 (1903) (decided under former Civil Code 1895, § 2647).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 809, 888, 889.

**C.J.S.** — 68 C.J.S., Partnership, §§ 318, 319.



### 14-8-30. Continuation of dissolved partnership during wind-up of partnership's affairs.

On dissolution the partnership is not terminated, but continues until the winding up of the partnership affairs is completed. (Code 1981, § 14-8-30, enacted by Ga. L. 1984, p. 1439, § 1.)

#### COMMENT

##### Note to Uniform Partnership Act

This section distinguishes between dissolution, winding up and termination.

##### Prior Georgia Law

Prior O.C.G.A. § 14-8-92 was generally consistent.

##### Official UPA

This section is the same as the official version.

##### Cross-References

Rights and powers of partners during winding up: §§ 14-8-35(1)(a) [14-8-35(a)(1)] and 14-8-37. Continuation of partnership business after dissolution: §§ 14-8-38(b)(2) and 14-8-41.

#### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues covered by the provisions, decisions under former Civil Code 1910, §§ 3162, 3176, Code 1933, §§ 75-107, 75-208 and former Code Sections 14-8-47, 14-8-90, and 14-8-92, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Continuation of partnership until debts extinguished.** — Upon the death of a partner, the partnership still continues until all debts of the partnership for its past obligations, or for those necessarily assumed in winding up of the partnership, are extinguished. *Ledbetter v. Farrar Lumber Co.*, 177 Ga. 779, 171 S.E. 374 (1933) (decided under Civil Code 1910, § 3176).

**Continuation of business in order to liquidate.** — Though a partnership is dissolved by the death of one of its members, the surviving partner may continue the business in order to liquidate and conclude the partnership. *Ledbetter v. Farrar Lumber Co.*, 177 Ga. 779, 171 S.E. 374 (1933) (decided under Civil Code 1910, § 3176).

**Continuation of business by surviving partners.** — Where, on the death of one of

the members, the surviving partners, instead of treating the partnership as dissolved, continue to do business as a partnership in the same manner and for the same purpose as before, they will be estopped to deny the existence of the partnership as to debts subsequently incurred within the legitimate business of the partnership as thus continued by them. *Rowland v. Lovett*, 45 Ga. App. 123, 163 S.E. 511 (1932) (decided under Civil Code 1910, § 3162); *Carnes v. Mobley's Tire & Recap Serv., Inc.*, 134 Ga. App. 913, 216 S.E.2d 703 (1975) (decided under Code 1933, § 75-107).

**When dissolution absolute.** — "Dissolution" of a partnership caused by the death of a partner is not absolute until the partnership becomes extinct by a complete winding up of all its affairs by the surviving partner or partners. *Ledbetter v. Farrar Lumber Co.*, 177 Ga. 779, 171 S.E. 374 (1933) (decided under Code 1933, § 75-107).

**Limitation on surviving partner in concluding partnership business.** — Upon the death of a partner, a partnership is dissolved, and in the absence of agreement, the surviving partner in concluding the partnership business has the right only to convert the

assets of the partnership into cash, pay the debts of the firm, and make a distribution to the administrator of the estate of the deceased partner. *Richter v. Richter*, 202 Ga. 554, 43 S.E.2d 635 (1947) (decided under Code 1933, § 75-208).

**Assets remain partnership's until partnership debts paid.** — Upon death of a partner, partnership assets rightfully belong in possession of the surviving partner, and none of the assets could ever belong to the estate of the deceased partner until all debts of the partnership are paid, including what may be due to the surviving partner. *Kinney v. Robinson*, 181 Ga. 837, 184 S.E. 616 (1936) (decided under Code 1933, § 75-107).

On the death of a partner, title to personal assets of the firm is cast upon the survivor, who is charged with their administration. This entails payment of partnership debts and paying over deceased partner's share in the surplus to the deceased's legal representatives. *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939) (decided under Code 1933, § 75-208).

**Deceased partner's estate not entitled to partnership assets.** — Unless there is surplus, none of partnership assets constitute any part of deceased partner's estate. *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939) (decided under Code 1933, § 75-208).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 809, 889.

**C.J.S.** — 68 C.J.S., Partnership, § 318, 319.

**ALR.** — Right of one partner to maintain action at law against the other for damages from wrongful dissolutions of firm, 4 ALR 158.

Right of solvent partner to close firm business upon bankruptcy or insolvency of copartner, 29 ALR 45.

Partner's lien on or interest in assets of partnership as affected by dissolution agreement, 43 ALR 95.

Accountability of partner or joint adventurer for profits earned subsequently to death or dissolution, 80 ALR 12; 55 ALR2d 1391.

Dissolution of partnership as affecting efficacy of service on single partner in action against a partnership or partners before partnership affairs have been wound up, 136 ALR 1071.

Applicability of statute of nonclaim or limitation statute as between surviving partner and estate of deceased partner, 157 ALR 1114.

Provision of partnership agreement giving one partner option to buy out the other, 160 ALR 523.

Agency conferred upon partners as affected by dissolution of the partnership, 170 ALR 512.

Right to use firm name on dissolution of partnership, 173 ALR 444.

Rights in profits earned by partnership or joint adventure after death or dissolution, 55 ALR2d 1391.

Accountability for good will on dissolution of partnership, 65 ALR2d 521.

Rights as to business unfinished or fees uncollected upon withdrawal or death of partner in law firm, 78 ALR2d 280.

### 14-8-31. Causation of dissolution.

(a) Dissolution is caused:

(1) By the termination of the definite term or particular undertaking specified in the agreement;

(2) By the express will or withdrawal of any partner;

(3) By the expulsion of any partner from the business in accordance with the terms of the agreement between the partners;



(4) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(5) By the death of any partner, unless there is a written agreement between the partners expressly providing otherwise;

(6) By decree of court under Code Section 14-8-32;

(7) In other circumstances as provided in the agreement between the partners.

(b) Unless otherwise provided in the partnership agreement, dissolution is not caused solely by admission of a new partner.

(c) Subject to contrary agreement of the partners, a dissolution is not in contravention of the partnership agreement if it is caused at any time by the express will of all of the partners who have not assigned their interests or suffered them to be charged for their separate debts. (Code 1981, § 14-8-31, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1985, p. 1436, § 2.)

#### COMMENT

##### Note to Uniform Partnership Act

This section states the events that cause dissolution, as well as one non-cause of dissolution — admission of a partner.

##### Prior Georgia Law

Paragraph (a)(1): This cause was specified in prior O.C.G.A. § 14-8-24(b).

Paragraph (a)(2): This is inconsistent with prior Georgia law, which permitted dissolution by express will of a partner only in a partnership at will, and then only upon three months notice (prior O.C.G.A. § 14-8-24(a)) or with the consent of all of the other partners (prior O.C.G.A. § 14-8-90).

Paragraph (a)(3): There was no comparable provision. Prior case law was consistent. See *Heard v. Carter*, 159 Ga. App. 801, 285 S.E.2d 146 (1981).

Paragraph (a)(4): There was no comparable provision or case law.

Paragraph (a)(5): This cause was specified in prior O.C.G.A. §§ 14-8-24(b) and 14-8-90. The latter provision, like new paragraph (a)(5), provided that the partners could avoid dissolution by contrary agreement.

Paragraph (a)(6): See the Comment to § 14-8-32.

Paragraph (a)(7): There was no comparable provision or case law.

Subsection (b): There was no comparable provision and prior case law was apparently inconsistent. See *Fenner & Beane v. Nelson*, 64 Ga. App. 600, 13 S.E.2d 694 (1941).

Subsection (c): There was no comparable provision.

An additional cause of dissolution under prior Georgia case law but not under new § 14-8-31 was bankruptcy of a partner or of the partnership. See *Meinhard, Schaul & Co. v. Folsom Bros.*, 3 Ga. App. 251, 59 S.E. 830 (1907).

**Official UPA**

This section has been substantially changed from the official version. The distinction between causes in contravention of the partnership agreement and those not in contravention has been deleted, in order to clarify that the parties' agreement and not the Act should control. Accordingly, the lead-in to official subsection 31(1), official subsections 31(1)(c) and 31(2), and the reference to "definite term or particular undertaking" in official subsection 31(1)(b) have been deleted, since all of this language was relevant only to whether the dissolution was "in contravention." However, subsection (c) has been added in order to clarify that, in the absence of contrary agreement, a dissolution is not in contravention when it is opposed only by assigned or charged partners. The reference to partner withdrawal has been added to paragraph (a)(2). Bankruptcy of a partner or of the partnership has been deleted as a cause of dissolution. Paragraph (a)(5) has been changed from official subsection 31(4) to permit the partners to avoid dissolution upon death of a partner. Paragraph (a)(7) has been added. Finally, subsection (b) has been added in order to specifically reverse the contrary implication in *Fenner & Beane v. Nelson*, *supra*.

**Cross-References**

Continuation of partnership after expiration of agreed term: § 14-8-23. Assignment of partnership interest as not causing dissolution: § 14-8-27(b). Definition of dissolution: § 14-8-29. Dissolution distinguished from termination and winding up: § 14-8-30. Grounds of dissolution by decree of court: § 14-8-32. Consequences of dissolution: § 14-8-33 et seq.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the issues covered by the provisions, decisions under former Civil Code 1910, § 3176, Code 1933, § 75-107, and former Code Sections 14-8-47 and 14-8-90, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**When "dissolution" is absolute.** — "Dissolution" of partnership caused by the death of a partner, as the term is used, is not absolute until the partnership becomes extinct by complete winding up of all its affairs by the surviving partner or partners. *Ledbetter v. Farrar Lumber Co.*, 177 Ga. 779, 171 S.E. 374 (1933) (decided under Civil Code 1910, § 3176).

**Stipulation that partnership is not dissolved by partner's death.** — Every partnership is dissolved by the death of one of the partners unless the partnership articles stipulate otherwise, or the terms of a valid will clearly and unambiguously show a contrary intention, and such is satisfactory to the surviving partner. *Kinney v. Robinson*, 181

Ga. 837, 184 S.E. 616 (1939) (decided under Code 1933, § 75-107).

**Liability for wrongful dissolution.** — Although a partnership may be dissolved by the express will or withdrawal of any partner, a partner may be liable for wrongful dissolution. The power of a partner to dissolve the partnership at will, like any other power held by a fiduciary, must be exercised in good faith. A partner may not "freeze out" a co-partner and appropriate the business to the partner's own use. *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698, cert. denied, 199 Ga. App. 906, 405 S.E.2d 698 (1991), *aff'd sub nom. Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).

One partner's exercise of the right to terminate the partnership, if done in bad faith for the purpose of appropriating to that partner's benefit the prosperity of the partnership, would be a violation of the partnership agreement and would constitute wrongful dissolution of the partnership. *Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 810, 812-846.

**C.J.S.** — 68 C.J.S., Partnership, § 303 et seq.

**ALR.** — Right of solvent partner to close firm business upon bankruptcy or insolvency of copartner, 29 ALR 45.

Misconduct of or dissensions among partners or joint adventurers as ground for dis-

solution by court, 118 ALR 1421.

Sale or transfer of interest by partner as dissolving partnership, 75 ALR2d 1036.

Construction and application of expulsion provision in partnership agreement between attorneys, 72 ALR3d 1226.

Construction and application of expulsion provision in medical partnership agreement, 87 ALR3d 328.

**14-8-32. Dissolution of partnership by court decree.**

(a) On application by or for a partner the court shall decree a dissolution whenever:

(1) A partner has been declared mentally incapacitated in any judicial proceeding or is shown to be of unsound mind;

(2) A partner becomes in any other way incapable of performing his part of the partnership contract;

(3) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business;

(4) A partner willfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him;

(5) Other circumstances render a dissolution equitable.

(b) On the application of the purchaser of a partner's interest under Code Section 14-8-27, the court shall decree a dissolution:

(1) After the termination of the specified term or particular undertaking;

(2) At any time if the partnership was a partnership at will when the interest was assigned. (Code 1981, § 14-8-32, enacted by Ga. L. 1984, p. 1439, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1986, a misspelling

in the word "willfully" in paragraph (a)(4) was corrected.

## COMMENT

**Note to Uniform Partnership Act**

This section specifies the grounds of dissolution by decree of court.

**Prior Georgia Law**

Paragraph (a)(1): Prior O.C.G.A. § 14-8-90 provided for dissolution in the event of a partner's "insanity" but did not require a court decree.

Paragraph (a)(2): There was no comparable provision.

Paragraphs (a)(3) and (4): Prior O.C.G.A. § 14-8-90 provided for dissolution by decree of court in the event of "misconduct of any partner," and for dissolution without a decree in the event of a partner's felony conviction.

Paragraph (a)(5): There was no comparable provision.

Subsection (b): There was no comparable provision.

### Official UPA

"Mentally incapacitated" has been substituted for "lunatic" in paragraph (a)(1). The former term is drawn from O.C.G.A. § 29-5-1-(1), which deals with the appointment of a guardian. Official subsection 32(1)(e), permitting dissolution solely because the business is generating losses, has been deleted. The reference to § 28 has been deleted from the official version of subsection (b) because new § 14-8-28, unlike Official § 28, does not permit a partner's creditor to foreclose on and purchase the partner's interest. Finally, "the court shall decree a dissolution" has been added as a housekeeping change to the lead-in to subsection (b).

### Cross-Reference

Decree of court as cause of dissolution: § 14-8-31(a)(6).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 847-871.

**C.J.S.** — 68 C.J.S., Partnership, §§ 316, 317.

**ALR.** — Right of one partner to maintain action at law against the other for damages from wrongful dissolutions of firm, 4 ALR 158.

Ex parte appointment of receiver for partnership, 169 ALR 1127.

Appointment of receiver in proceedings

arising out of dissolution of partnership or joint adventure, otherwise than by death of partner or at instance of creditor, 23 ALR2d 583.

Venue of action for partnership dissolution, settlement, or accounting, 33 ALR2d 914.

Inability of partnership to operate at profit as justification for court-ordered dissolution, 20 ALR4th 122.

## 14-8-33. Limitation of authority of partner to act for dissolved partnership.

Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership:

(1) With respect to the partners, as declared in Code Section 14-8-34; and

(2) With respect to persons not partners, as declared in Code Section 14-8-35. (Code 1981, § 14-8-33, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1985, p. 1436, § 3.)

### COMMENT

#### Note to Uniform Partnership Act

This section introduces the effect of dissolution on a partner's authority. This subject is discussed in the following two sections.



**Prior Georgia Law**

There was no comparable provision.

**Official UPA**

Paragraph (1) has been redrafted to shift coverage of contribution when the dissolution is not by the act or death of a partner to § 14-8-34. See the Comment to § 14-8-34.

**Cross-References**

Effect of new promise to pay debt by a partner after dissolution of partnership, § 9-3-115. Partner's right to contribution from other partners with respect to post-dissolution transactions: § 14-8-34. Partner's power to bind partnership to third persons after dissolution: § 14-8-35.

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the issues covered by the provisions, decisions under former Code 1873, §§ 1910, 1917; Code 1882, §§ 1896, 1910; Civil Code 1895, §§ 2652, 2659; and Civil Code 1910, §§ 3164, 3181, 3188 are included in the annotations to this Code section.

**Effect of dissolution.** — After dissolution, a partner has no power to bind the firm by a new contract, nor to revive one for any cause extant, nor to renew or continue an existing liability, nor change its dignity or its nature. *Louderback, Gilbert & Co. v. Lilly & Wood*, 75 Ga. 855 (1885) (decided under Code 1882, § 1896).

One partner cannot, therefore, execute the partnership note or an unpaid firm debt. *Bennett v. Watson*, 31 Ga. App. 367, 120 S.E. 802 (1923) (decided under Civil Code 1910, § 3164).

After dissolution of a partnership by the retirement of one of the partners, the continuing partner has no power to bind the retiring partner by a new agreement, or, as to the retiring partner, renew or continue a liability of the firm. In such case the retiring partner becomes a surety to the copartner to the debts of the partnership before dissolution. *MacIntyre v. Massey*, 11 Ga. App. 458, 75 S.E. 814 (1912) (decided under Civil Code 1910, § 3188).

A creditor of a partnership, with notice of its dissolution and with notice of an agreement by the continuing partner to assume the debts of the partnership, is bound thereafter to accord to the retiring partner all the rights of a surety. *MacIntyre v. Massey*, 11 Ga. App. 458, 75 S.E. 814 (1912) (decided under Civil Code 1910, § 3188).

If, without the knowledge or consent of the retiring partner, the creditor of the partnership, upon a sufficient consideration, extends the time of payment of the firm indebtedness, the retiring partner is released from the indebtedness, and the creditor must thereafter look only to the firm assets and to the individual assets of the continuing partner. *MacIntyre v. Massey*, 11 Ga. App. 458, 75 S.E. 814 (1912) (decided under Civil Code 1910, § 3188).

The receipt from the continuing partner by the holder of the partnership note of any part of the principal of the note or of any part of the interest in advance of the time when due, without the knowledge or consent of the retiring partner, as a consideration for an extension of the time of payment of the note, would amount in law to a release of the latter's liability on the note. *MacIntyre v. Massey*, 11 Ga. App. 458, 75 S.E. 814 (1912) (decided under Civil Code 1910, § 3188).

**Dissolution by operation of law ends all executory contracts.** *Lesser v. Gray*, 8 Ga. App. 605, 70 S.E. 104 (1911), *aff'd*, 236 U.S. 70, 35 S. Ct. 227, 59 L. Ed. 471 (1915) (decided under Civil Code 1910).

**Partner cannot endorse new draft in substitution.** — After dissolution, one partner cannot endorse a new draft and substitute it for an old one endorsed by the firm. *First Nat'l Bank v. Ells*, 68 Ga. 192 (1881) (decided under Code 1873, § 1917).

**Partners may be estopped to deny note executed by one partner.** — Although after dissolution there is no power in one partner to execute a note in the firm name, the

other surviving partners may be estopped by acquiescence. *Joseph A. Roberts & Co. v. Barrow*, 53 Ga. 314 (1874) (decided under Code 1873, § 1917).

**Nonconsenting partners discharged when note accepted by creditor with knowledge.**

— If a creditor with knowledge of dissolution accepts a note made by one of the former partners in the firm name, the other members who do not consent are discharged. *First Nat'l Bank v. Ells*, 68 Ga. 192 (1881) (decided under Code 1873, § 1917);

*First Nat'l Bank v. Cody*, 93 Ga. 127, 19 S.E. 831 (1894) (decided under Code 1873, § 1917); *Mims v. Brook & Co.*, 3 Ga. App. 247, 59 S.E. 711 (1907) (decided under Civil Code 1895, § 2659).

**Liability for past transactions.** — Under this section, the dissolution of a partnership does not absolve the partners from liability upon past transactions. *First Nat'l Bank v. Cody*, 93 Ga. 127, 19 S.E. 831 (1894) (decided under Code 1873, § 1917).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 934-938, 1145.

**C.J.S.** — 68 C.J.S., Partnership, § 322 et seq.

**ALR.** — Powers of liquidating partner with respect to incurring of obligations, 60 ALR2d 826.

### 14-8-34. Liability of partners to copartners for actions following dissolution of partnership.

Subject to contrary agreement of the partners, each partner is liable to his or her copartners for his or her share of any liability created by any partner acting for the partnership after dissolution as if the partnership had not been dissolved; provided, however, that a partner shall not be liable to the partner acting for the partnership after dissolution where:

- (1) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution;
- (2) The dissolution being by the death of a partner, the partner acting for the partnership had knowledge or notice of the death;
- (3) The dissolution is not by the act or death of a partner; or
- (4) The liability is for a debt or obligation for which the partner is not liable as provided in subsection (b) of Code Section 14-8-15. (Code 1981, § 14-8-34, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1985, p. 1436, § 4; Ga. L. 1995, p. 470, § 5.)

### COMMENT

#### Note to Uniform Partnership Act

This section provides that a partner is entitled to contribution with respect to liabilities created in post-dissolution transactions as if the partnership had not been dissolved, except in certain situations in which the partner who is seeking contribution was the acting partner and knew, had notice or should have known of the dissolution.

#### Prior Georgia Law

There was no comparable provision.



**Official UPA**

The official version has been changed by the addition of "after dissolution" after "acting for the partnership" in two places. Also, the proviso was added to the opening paragraph so that the rights of a non-acting partner would not be affected merely because the acting partner knew or should have known of the dissolution. Finally, paragraph (3) was added so that the section, including the proviso just discussed, covers all post-dissolution transactions, and not merely dissolution caused by a partner's act or death.

**Cross-References**

Indemnification by partnership for pre-dissolution liabilities: § 14-8-18(2). Partner's duty to contribute toward pre-dissolution liabilities: § 14-8-40(4)-(7). Indemnification where the partnership is dissolved for fraud: § 14-8-39. Definitions of "knowledge" and "notice": § 14-8-3.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 934, 935.

**C.J.S.** — 68 C.J.S., Partnership, § 324 et seq.

**14-8-35. Actions which can bind a dissolved partnership; liability of partners.**

(a) After dissolution a partner can bind the partnership except as provided in subsection (c) of this Code section:

(1) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(2) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction:

(A) Was a creditor of the partnership at the time of dissolution or had extended credit to the partnership within two years prior to dissolution and, in either case, had no knowledge or notice of such partner's want of authority;

(B) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(b) The liability of a partner under paragraph (2) of subsection (a) of this Code section shall be satisfied out of partnership assets alone when such partner had been prior to dissolution:

(1) Unknown as a partner to the person with whom the contract is made; and

(2) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(c) The partnership is in no case bound by any act of a partner after dissolution:

(1) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs;

(2) Where the partner has become bankrupt; or

(3) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who:

(A) Was a creditor of the partnership at the time of dissolution or had extended credit to the partnership within two years prior to dissolution and, in either case, had no knowledge or notice of such partner's want of authority;

(B) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of such partner's want of authority, the fact of such partner's want of authority had not been advertised in the manner provided for advertising the fact of dissolution in subparagraph (a)(2)(B) of this Code section.

(d) Nothing in this Code section shall affect the liability under Code Section 14-8-16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business. (Code 1981, § 14-8-35, enacted by Ga. L. 1984, p. 1439, § 1.)

#### COMMENT

##### Note to Uniform Partnership Act

This section provides that a partner can bind the partnership after dissolution (1) by acts within his winding-up authority (unless the partner has become bankrupt) and (2) in other transactions that would have bound the partnership prior to dissolution where the third party had no knowledge or the specified notice of the dissolution or the acting partner's lack of winding up authority, *except* where the partnership was dissolved for illegality or the acting partner has become bankrupt. Dormant partners as described in subsection (b) are not personally liable for post-dissolution transactions.

##### Prior Georgia Law

Prior O.C.G.A. § 14-8-92 was consistent regarding a partner's winding-up authority. Prior O.C.G.A. §§ 14-8-68 and 14-8-92 appeared to eliminate all other post-dissolution power to bind. However, case law under prior O.C.G.A. § 14-8-92, which required the giving of notice of dissolution, was generally consistent with new § 14-8-35. See *Bush & Hattaway v. McCarty Co.*, 127 Ga. 308, 56 S.E. 430 (1907) (creditor can recover for a post-dissolution transaction if he had no notice of dissolution, and non-creditor can recover if the firm has failed to publish notice of dissolution); *Austin v. Appling*, 88 Ga. 54, 13 S.E. 955 (1891) (dormant partner is not personally liable to post-dissolution



creditor who was unaware of such partner's association with the firm). Prior case law was, however, inconsistent with § 14-8-35 in holding that notice of dissolution was unnecessary when dissolution was caused by death of a partner. Also, there were no prior provisions or case law comparable to paragraphs (c)(1) and (2).

#### Official UPA

Subparagraphs (a)(2)(A) and (c)(3)(A) have been changed to provide that the partnership is bound for a post-dissolution debt to a pre-dissolution creditor who lacked knowledge or notice of the dissolution only if the creditor had extended credit within two years prior to the dissolution. This is based on the Texas version of § 35, Tex. Civ. Stat. Art. 6132b, § 35 (Vernon, 1970).

#### Cross-References

Definition of "bankrupt": § 14-8-2(1). Definitions of "knowledge" and "notice": § 14-8-3. Partner's power to bind the partnership in pre-dissolution transactions: §§ 14-8-9 and 14-8-18(8). Partner's liability for pre-dissolution transactions: § 14-8-15. Partnership by estoppel: § 14-8-16.

### JUDICIAL DECISIONS

#### ANALYSIS

#### GENERAL CONSIDERATION NOTICE TO CREDITORS

##### General Consideration

**Editor's notes.** — In light of the similarity of the issues covered by the provisions, decisions under former Code 1882, § 1895; Civil Code 1895, § 2634; Civil Code 1910, §§ 3163, 3164, 3176; Code 1933, §§ 75-108, 75-208, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Tax liability.** — Surviving partner is liable for burden of taxes upon partnership property within the partner's possession and control until the partnership has become extinct by a complete "winding up" of all its affairs. *Ledbetter v. Farrar Lumber Co.*, 177 Ga. 779, 171 S.E. 374 (1933) (decided under Civil Code 1910, §§ 1010 — 1087, 3162).

**Liability for tort committed by surviving partner.** — Where conversion is committed by a surviving partner, whose firm received goods for storage, the firm would not be liable for such tort by the surviving partner. *Blanchard v. Farmers State Bank*, 158 Ga. 780, 124 S.E. 695 (1924) (decided under Civil Code 1910, § 3164).

##### Notice to Creditors

**What creditors included.** — The word "creditors," as employed in Civil Code 1895,

§ 2634 (formerly § 14-8-91), was not limited to persons who are creditors at the time of the dissolution. A person who had previously sold goods and given credit to the firm during its continuance was within its meaning. *Bush & Hattaway v. McCarty Co.*, 127 Ga. 308, 56 S.E. 430, 9 Ann. Cas. 240 (1907) (decided under Civil Code 1895, § 2634); *Mims v. Brook & Co.*, 3 Ga. App. 247, 59 S.E. 711 (1907).

**Sufficient notice.** — Under Code 1882, § 1895 (formerly § 14-8-91) the notice which a creditor has to have is actual. The world would be bound by such notice as a publication in a public gazette. *Ewing & Gaines v. Trippe*, 73 Ga. 776 (1884) (decided under Code 1882, § 1895).

Fair and reasonable publication in a public gazette circulated in the locality in which the business of the partnership has been conducted was generally sufficient; and any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard, were proper to be considered on the question of such notice. *Askew v. Silman*, 95 Ga. 678, 22 S.E. 573 (1895) (decided under Code 1882, § 1895); *Bush & Hattaway v. McCarty Co.*, 127 Ga. 308, 56 S.E. 430, 9 Ann. Cas. 240 (1907) (decided under Civil Code 1895, § 2634).

**Notice to Creditors (Cont'd)**

**Notice may be given to agent of creditor.** *Franklin Buggy Co. v. Carter*, 21 Ga. App. 576, 94 S.E. 820 (1918) (decided under Civil Code 1910, § 3163); *Bennett v. Watson*, 31 Ga. App. 367, 120 S.E. 802 (1923) (decided under Civil Code 1910, § 3163).

**Notice to customer who is not creditor.** — Personal notice is not necessary as to one who has never been a creditor but has only purchased goods from the firm. *Askew v. Silman*, 95 Ga. 678, 22 S.E. 573 (1895) (decided under Code 1882, § 1895); *Skeffington v. Daniel*, 18 Ga. App. 262, 89 S.E. 458 (1916) (decided under Civil Code 1910, § 3163).

**Predecessor statute not applicable to creditors of individual partner.** — Civil Code 1910, § 3163 (formerly § 148-91) applied only to the creditors of the partnership, and not to the creditors of an individual partner. *First Nat'l Bank v. Wade*, 25 Ga. App. 132, 102 S.E. 836 (1920) (decided under Civil Code 1910, § 3163).

**Death of partner.** — When one of partners dies, it was not necessary that notice be given to third persons or to the world of dissolution of the partnership. The death of a partner supplied such notice. *Hammond v. Otwell*, 170 Ga. 832, 154 S.E. 357 (1930) (decided under Civil Code 1910, § 3164); *Russell v. Strain*, 69 Ga. App. 654, 26 S.E.2d 460 (1943) (decided under Civil Code 1933, § 75-108).

**Retiring partner not liable for future transactions.** — Where a sales agency contract is entered into between a company and partners, under which the company furnishes merchandise to the partners to be sold and proceeds remitted to it, and where the partnership is thereafter dissolved by withdrawal of one of the partners with notice to the company, the retiring partner is not liable for the proceeds of the sale of any merchandise thereafter furnished by the company to the other partner, but occupies the position of a surety for the proceeds of all merchandise which had been furnished to the partners prior to the dissolution but which had not been sold by them and the proceeds remitted. *Terrell Elec. Co. v. Miller*, 66 Ga. App. 727, 19 S.E.2d 208 (1942) (decided under Code 1933, § 75-108).

**Partner liable for partnership debts where no notice given of his leaving.** — Plaintiff

was still a copartner in the business and liable for its debts, where, when plaintiff sold out to plaintiff's brother, plaintiff gave other partners no notice, nor did plaintiff give creditors and depositors any notice of plaintiff's leaving the company. *Nants v. Martin*, 41 Ga. App. 453, 153 S.E. 440 (1930) (decided under Civil Code 1910, § 3163).

**Insufficient notice of dissolution.** — A mercantile partnership may sell its entire stock of goods and retire from active business and still preserve its partnership entity for purposes of liquidation; and where such a partnership did both, a notice that the "store" had been "sold out," given by a partner to one of its creditors during the existence of the partnership as above indicated and before the creditor took a note executed in its name by another partner in renewal of a partnership debt, was insufficient as notice to the creditor of a dissolution of the partnership, even if the sale amounted to such a dissolution. *Williams v. Madison County Bank*, 33 Ga. App. 507, 126 S.E. 895 (1925) (decided under Civil Code 1910, § 3163).

**Effect of insufficient notice.** — The fact that a creditor may not have had sufficient notice of the dissolution of the partnership does not affect the actual right of one of the erstwhile members to contract on behalf of the partnership. It would merely estop the other partner from denying the authority of the person who undertook to bind the partner. *Citizens Nat'l Bank v. Jennings*, 35 Ga. App. 553, 134 S.E. 114 (1926) (decided under Civil Code 1910, § 3164).

**Partner may be relieved of liability by express notice of dissent.** — Even before dissolution of a partnership and notice to creditors, a partner might relieve oneself of liability for future transactions by "express notice of dissent to the person about to be contracted with," although otherwise, under former Civil Code 1910, § 3180 (formerly § 14-8-61), "all the partners are bound by the acts of any one, within the legitimate business of the partnership." *McMillan v. Gilmour*, 49 Ga. App. 400, 175 S.E. 672 (1934) (decided under Civil Code 1910, § 3180).

Partner not executing renewal note is nevertheless bound thereon in absence of express notice to creditor of objection by that partner to the execution of the renewal



note. *Williams v. Madison County Bank*, 33 Ga. App. 507, 126 S.E. 895 (1925) (decided under Civil Code 1910, § 3163).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 800 et seq.

**C.J.S.** — 68 C.J.S., Partnership, § 322 et seq.

**ALR.** — Right of solvent partner to close firm business upon bankruptcy or insolvency of copartner, 29 ALR 45.

Creditor's failure to dissent to retiring

partner's notice of noncontinuing liability as assent to his release, 52 ALR 499.

Liability of former partners as such in respect of transactions subsequent to incorporation of their business, 89 ALR 986.

Powers of liquidating partner with respect to incurring of obligations, 60 ALR2d 826.

### 14-8-36. Effect of dissolution of partnership on existing liability of partners.

(a) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(b) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor, and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(c) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who knowing of the agreement, and without the consent of the partners whose obligations have been assumed, consents to a material alteration in the nature or time of payment of such obligations.

(d) The individual property of a deceased partner shall be liable for those obligations of the partnership incurred while the deceased partner was a partner and for which he or she was liable under Code Section 14-8-15, but subject to the prior payment of his or her separate debts. (Code 1981, § 14-8-36, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1995, p. 470, § 6.)

**Law reviews.** — For survey article on business associations, see 34 Mercer L. Rev. 13 (1982).

### COMMENT

#### Note to Uniform Partnership Act

This section provides that a partner or his estate remains personally liable after dissolution for pre-dissolution partnership debts unless the creditor expressly or impliedly agrees to discharge the partner or, knowing of an assumption by the successor

owners, consents to alteration of the obligation. Individual creditors of a deceased partner have priority over partnership creditors as to the deceased's individual property.

### Prior Georgia Law

Prior O.C.G.A. § 14-8-92 provided, consistently with subsection (a), that dissolution does not absolve partners' liabilities "for ... transactions that are past." Georgia case law is consistent with subsections (b) and (c). See *Venable & Heyman v. Stevens*, 94 Ga. 281, 21 S.E. 516 (1894) (subsection (b)); *Preston v. Gerrard*, 120 Ga. 689, 48 S.E. 118 (1904) (subsection (c)). Prior O.C.G.A. § 14-8-69 was inconsistent with subsection (d) in according individual creditors of the deceased partner only a sufficient priority as to assets of the estate vis a vis partnership creditors to equalize total payments to the two groups of creditors.

### Official UPA

This section is the same as the official version except for the addition of the clause following "agreement" in subsection (c). This change is consistent with the rule stated in the prior Georgia case law. See *Preston v. Garrard*, *supra*.

### Cross-References

Definition of "knowledge": § 14-8-3(a). The rights of pre-dissolution creditors against partnership property and successor owners: §§ 14-8-17 and 14-8-41. Rights of post-dissolution creditors: § 14-8-35.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1882, § 1896; Civil Code 1910, §§ 3162, 3164, 3176, 3178, and 3180; and Code 1933, § 75-109, in effect prior to the 1984 repeal and reenactment of this chapter, have been included in the annotations for this Code section.

**Dissolution by operation of law ends all executory contracts.** *Lesser v. Gray*, 8 Ga. App. 605, 70 S.E. 104 (1911), *aff'd*, 236 U.S. 70, 35 S. Ct. 227, 59 L. Ed. 471 (1915) (decided under Civil Code 1910).

**Dissolution not absolute until complete winding up.** — "Dissolution" of a partnership caused by the death of a partner is not absolute until the partnership becomes extinct by a complete winding up of all its affairs by the surviving partner or partners. *Ledbetter v. Farrar Lumber Co.*, 177 Ga. 779, 171 S.E. 374 (1933) (decided under Civil Code 1910, §§ 3162, 3176, 3178).

Partnership continues until all past debts of partnership, or those necessarily assumed in winding up of the partnership, are extinguished. *Ledbetter v. Farrar Lumber Co.*, 177 Ga. 779, 171 S.E. 374 (1933) (decided under Civil Code 1910, §§ 3162, 3176, 3178).

**Liability for past transactions.** — Under former Code 1882, § 1896, the dissolution of a partnership does not absolve the partners from liability upon past transactions. *First Nat'l Bank v. Cody*, 93 Ga. 127, 19 S.E. 831 (1894) (decided under Code 1882, § 1896).

**Liability for tort committed by surviving partner.** — Where conversion is committed by a surviving partner, whose firm received goods for storage, the firm would not be liable for such tort by the surviving partner. *Blanchard v. Farmers State Bank*, 158 Ga. 780, 124 S.E. 695 (1924) (decided under Civil Code 1910, § 3164).

**Partner may be relieved of liability by express dissent before dissolution.** — Even before dissolution of a partnership and notice to creditors, a partner may relieve oneself of liability for future transactions by "express notice of dissent to the person about to be contracted with," although otherwise, under former Civil Code 1910, § 3180 (formerly § 14-8-61), "all the partners are bound by the acts of any one, within the legitimate business of the partnership." *McMillan v. Gilmour*, 49 Ga. App. 400, 175 S.E. 672 (1934) (decided under Civil Code 1910, § 3180).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 886 et seq.

**C.J.S.** — 68 C.J.S., Partnership, § 320.

**ALR.** — Liability of former partners as such in respect of transactions subsequent to incorporation of their business, 89 ALR 986.

### 14-8-37. Rights of partners in winding up partnership affairs.

Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs, including the right to convey any real property of the partnership; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court. (Code 1981, § 14-8-37, enacted by Ga. L. 1984, p. 1439, § 1.)

## COMMENT

#### Note to Uniform Partnership Act

This section determines who may conduct partnership affairs during the winding up period.

#### Prior Georgia Law

Prior O.C.G.A. § 14-8-47 was consistent in giving the right to wind up to surviving partners as against the representatives of the deceased partners. There was no provision specifying which of the surviving partners may wind up. With respect to winding up by court-appointed receivers upon cause shown, see *Bennett v. Smith*, 108 Ga. 466, 34 S.E. 156 (1899); *Boyce v. Burchard*, 21 Ga. 74 (1857).

#### Official UPA

This section is the same as the official version except for the added reference to the right to convey real property. This change is based on the Nebraska version of § 37, Neb. Rev. Stat. § 67-337 (1981).

#### Cross-References

Right to control the partnership prior to dissolution: §§ 14-8-18(5) and (8). Compensation for winding up services: § 14-8-18(6). Fiduciary duties during winding up: § 14-8-21. Surviving partners' right to control deceased partner's interest in partnership property: § 14-8-25(b)(2). Right to contribution for post-dissolution liabilities: § 14-8-34. Partner's power to bind the partnership in post-dissolution transactions: § 14-8-35.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1100 et seq.

**C.J.S.** — 68 C.J.S., Partnership, §§ 322 et seq., 360, 364.

**14-8-38. Application of partnership property to satisfy obligations upon rightful dissolution; rights of partners following wrongful dissolution.**

(a) Unless otherwise agreed by the partners in the partnership agreement, at the time of the transaction, or at any other time, including, but not limited to, an agreement to continue the business of the partnership, when dissolution is caused in any way, other than wrongfully either in contravention of the partnership agreement or as a result of other wrongful conduct of a partner, any partner, or the legal representative of the estate of a deceased partner, as against his copartners and all persons claiming through them in respect of their interests in the partnership, may have the partnership property applied to discharge its liabilities and the surplus applied to pay in cash or its equivalent the net amount owing to the respective partners. The foregoing provision shall not apply if dissolution is caused by expulsion of a partner in accordance with the terms of a partnership agreement. Unless otherwise agreed by the partners, in the event of such expulsion the expelled partner shall receive the net amount due him from the partnership and the partners who continue the business shall obtain his discharge or appropriately hold him harmless from all present or future partnership liabilities.

(b) Unless otherwise agreed by the partners in the partnership agreement at the time of the transaction or at any other time, when dissolution is caused wrongfully either in contravention of the partnership agreement or as a result of other wrongful conduct of a partner, the rights of the partners shall be as follows:

(1) Each partner who has not caused dissolution wrongfully shall have:

(A) All the rights specified in subsection (a) of this Code section; and

(B) The right, as against each partner who has caused the dissolution wrongfully, to damages for such wrongful dissolution and to any other right or remedy provided for in the partnership agreement;

(2) The partners who have not caused the dissolution wrongfully may, if they all so agree at the time of the transaction or if the partnership agreement so provides, continue the business in the same name, either by themselves or jointly with others, and for that purpose may possess the partnership property. If the partners continue the business, they shall pay to any partner who has caused the dissolution wrongfully the value of his interest in the partnership at the dissolution less any damages or other amounts recoverable under subparagraph (B) of paragraph (1) of this subsection and obtain his discharge or appropriately hold him harmless from all present or future partnership liabilities;



(3) A partner who has caused the dissolution wrongfully shall have:

(A) If the business is not continued under the provisions of paragraph (2) of subsection (b) of this Code section, all the rights of a partner under subsection (a) of this Code section, subject to subparagraph (B) of paragraph (1) of this subsection;

(B) If the business is continued under paragraph (2) of subsection (b) of this Code section the right, as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages or other amounts recoverable under subparagraph (B) of paragraph (1) of this subsection, ascertained and paid to him and to have the partners who continue the business obtain his discharge or appropriately hold him harmless from all present or future partnership liabilities; but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered. (Code 1981, § 14-8-38, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1985, p. 1436, § 5; Ga. L. 1987, p. 1444, § 3; Ga. L. 1989, p. 927, § 2; Ga. L. 1994, p. 97, § 14.)

**Law reviews.** — For note on 1989 amendment of this Code section, see 6 Ga. St. U.L. Rev. 188 (1989).

## COMMENT

### Note to Uniform Partnership Act

This section states the rights of the partners to compel liquidation or continuation of the business of the partnership after dissolution. Pursuant to subsection (a), subject to contrary agreement, when the dissolution has not been caused wrongfully any partner may compel liquidation (except that an expelled partner has only the right to be paid the amount due him and to be protected from partnership liabilities). Pursuant to subsection (b), subject to contrary agreement, in the event of a wrongful dissolution, all of the partners who did not wrongfully cause dissolution may unanimously agree to continue the partnership, in which event a partner who caused the dissolution is entitled only to receive the value of his interest less damages and excluding goodwill, and to be protected from partnership liabilities. The continuation rights granted by this section and by partnership agreements authorized by this section are the antidote to the ability of any partner to dissolve the partnership entity by express will at any time pursuant to § 14-8-31(2).

### Prior Georgia Law

There was no comparable provision or case law differentiating between situations in which partners may continue or compel liquidation of the partnership business, or providing for the rights of the partners in these situations.

### Official UPA

This section has been extensively changed from the official version. The following is a summary of the important changes:

(1) The lead-ins to subsections (a) and (b) have been changed to clarify that the applicability of each subsection depends not only on whether dissolution was "in contravention of the partnership agreement" but on whether dissolution was caused in an otherwise wrongful manner (for example, by a court decree based on partner misconduct pursuant to subsections 14-8-32(1)(c) and (d)).

(2) The rights and duties of the partners have been made more flexible in several respects. First, subsection (b), as well as subsection (a), has been made subject to contrary agreement of the partners, and subsections (a) and (b) validate continuation agreements made at the time of the transaction as well as continuation provisions in the partnership agreement. Second, the Georgia version does not include absolute requirements concerning the form of payment to expelled or wrongfully dissolving partners or protection of such partners from liabilities. Finally, language has been added to subparagraph (b)(1)(B) permitting the partners to agree to rights and remedies in addition to those provided for in the section.

(3) Subsection (a) has been revised to clarify that the right to application of partnership property is available to "the legal representative of the estate of a deceased partner." This is consistent with prior Georgia case law (see *Murphy v. Murphy*, 214 Ga. 602, 106 S.E.2d 280 (1958)) and with the Nebraska version of § 38, Neb. Rev. Stat. § 67-338 (1981).

(4) Paragraph (b)(2) has been revised to clarify that satisfaction of the claims of the departing partner is not a precondition to the right of the remaining partners to continue the partnership.

(5) Paragraph (b)(2) deletes the limitation on the duration of continuation to "the agreed term for the partnership." Thus, the non-"wrongful" partners may continue the partnership business upon expiration of an agreed term or termination of an agreed undertaking (see § 14-8-23) and the wrongful partner cannot compel liquidation at this time.

### Cross-References

Continuation of partnership after expiration of term or completion of undertaking: § 14-8-23. Causes of dissolution: § 14-8-31. Grounds for dissolution by decree of court: § 14-8-32. Right to wind up partnership affairs: § 14-8-37. Settlement of partnership affairs after dissolution: § 14-8-40. Rights of pre-dissolution creditors when business continued after dissolution: § 14-8-41. Rights of retiring partners and estates of deceased partners when business is continued after dissolution: § 14-8-42.

## JUDICIAL DECISIONS

**Liability for wrongful dissolution.** — Although a partnership may be dissolved by the express will or withdrawal of any partner, a partner may be liable for wrongful dissolution. The power of a partner to dissolve the partnership at will, like any other power held by a fiduciary, must be exercised in good faith. A partner may not "freeze out" a co-partner and appropriate the business to own use. *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698, cert. denied, 199 Ga. App. 906, 405 S.E.2d 698 (1991), aff'd sub nom. *Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).

In the case of wrongful dissolution of a partnership, a partner who did not wrongfully cause the dissolution is entitled not only to payment for net interest in the partnership (which would be calculated pursuant to an accounting), but also damages for wrong-

ful dissolution. Damages for wrongfully excluding a partner from a partnership business opportunity should include compensation to the ousted partner for that partner's share of the prospective business opportunity. *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698, cert. denied, 199 Ga. App. 906, 405 S.E.2d 698 (1991), aff'd sub nom. *Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).

One partner's exercise of the right to terminate the partnership, if done in bad faith for the purpose of appropriating to that partner's benefit the prosperity of the partnership, would be a violation of the partnership agreement and would constitute wrongful dissolution of the partnership. *Wilensky v. Blalock*, 262 Ga. 95, 414 S.E.2d 1 (1992).

**Dissolution of deceased partner's interest.** — Legal representative of deceased partner



was entitled to liquidate partnership assets upon dissolution and Court of Appeals erred in holding that surviving partner did not owe fiduciary duty to the representative during winding up of partnership business. *Chaney v. Burdett*, 274 Ga. 805, 560 S.E.2d 21 (2002).

**Plaintiffs failed to present evidence of**

**damages.** — The trial court properly granted the defendant's motion for directed verdict because the plaintiffs failed to present any evidence from which the jury could determine the remaining assets in the partnership in order to assess damages. *Nunley v. Nunley*, 248 Ga. App. 208, 546 S.E.2d 330 (2001).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 564-570, 890-892, 1120, 1125.

**C.J.S.** — 68 C.J.S., Partnership, §§ 110, 325, 396, 398.

#### 14-8-38.1. Vesting of property of dissolved partnership in partnership continuing business.

When a partnership is dissolved for any reason, either pursuant to the provisions of this chapter or the partnership agreement or otherwise, and the business is continued as a partnership, the title to any real property or other property vested in such dissolved partnership shall, by operation of law, be vested in the partnership continuing the business without reversion or impairment and without further act or deed or other instrument of transfer or conveyance. (Code 1981, § 14-8-38.1, enacted by Ga. L. 1989, p. 927, § 3.)

**Law reviews.** — For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 188 (1989).

#### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of issues covered by the provisions, decisions under former Civil Code 1910, §§ 3162, 3177 and Code 1933, § 75-209, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Title to survivor.** — On death of partner, title to personal assets of firm is given to survivor, who is charged with their administration: first, for the payment of the partnership debts; and, secondly, for paying over deceased partner's share in surplus to the deceased's legal representatives. *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939) (decided under Code 1933, § 75-209).

If remaining members continue the business it is new entity, but title to personal property shall vest in surviving partners, who have right to dispose thereof for paying

debts and making distribution. *Fenner & Beane v. Nelson*, 64 Ga. App. 600, 13 S.E.2d 694 (1941) (decided under Code 1933, § 75-209).

**Where death of partner occurs after execution of note sued on,** title to note vests in surviving partner. *Cook v. Cochran*, 42 Ga. App. 478, 156 S.E. 465 (1931) (decided under Civil Code 1910, § 3177).

**As long as liabilities exist, property is still partnership property.** — Lien for taxes upon partnership property in surviving partner's possession and control is debt for which surviving partner is liable. *Ledbetter v. Farrar Lumber Co.*, 177 Ga. 779, 171 S.E. 374 (1933) (decided under Civil Code 1910, §§ 1010 — 1087, § 3162).

**Death of partner who committed tort before action brought.** — Where partner who actually committed tort died before an action was brought, whether or not such death

abated cause of action as related to individual liability of dead partner or the partner's estate, it would not affect liability of partnership or of other partner. *Rogers v. Carmichael*, 184 Ga. 496, 192 S.E. 39 (1937) (decided under Code 1933, § 75-209).

**Assets not chargeable with year's support to widow.** — Unless there is surplus, none of assets of partnership constitute any part of estate of the deceased partner, and consequently they are not chargeable with year's support allowed to his widow. *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939) (decided under Code 1933, § 75-209).

The year's support awarded to partner's widow could only be carved out of or set aside or apart from estate, or assets of estate, of decedent, and his estate would derive none of assets of partnership except by proper distribution after it appeared that surplus existed. *Roberts v. First Nat'l Bank*, 61 Ga. App. 284, 6 S.E.2d 88 (1939) (decided under Code 1933, § 75-209).

**Limitation on surviving partner in concluding partnership business.** — Upon death of partner, partnership is dissolved, and in absence of agreement, surviving partner in concluding partnership business has right only to convert assets of partnership into cash, pay debts of firm, and make

distribution to administrator of estate of deceased partner. *Richter v. Richter*, 202 Ga. 554, 43 S.E.2d 635 (1947) (decided under Code 1933, § 75-209).

**Surviving partner is trustee of deceased partner's interest and fiduciary relation exists between the surviving partner and representative of deceased partner's estate.** *Richter v. Richter*, 202 Ga. 554, 43 S.E.2d 635 (1947) (decided under Code 1933, § 75-209).

**Surviving partner's sale of personal property to himself set aside.** — Equity will set aside bill of sale of personal property from surviving partner to that partner personally on proper application of administrator of deceased partner. *Richter v. Richter*, 202 Ga. 554, 43 S.E.2d 635 (1947) (decided under Code 1933, § 75-209).

**Surviving partner must involve deceased partner's representative in suit.** — There is no validity to contentions that the control of assets by surviving partner must be both for purpose of "paying debts" and "making distribution," and where there are no debts, surviving partner has no right to sue on chose in action of partnership without making personal representative of deceased partner party thereto. *Bone v. Faircloth*, 52 Ga. App. 23, 182 S.E. 400 (1935) (decided under Code 1933, § 75-209).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1142-1144.

**ALR.** — Partnership land as real or personal property for purposes of descent and distribution, 25 ALR 389.

Remedy where additional assets or liabilities are discovered after settlement of partnership affairs as at law or in equity, 41 ALR 1454.

Power of surviving partner or member of joint adventure to grant or sell oil and gas lease or other mineral rights covering land belonging to partnership or joint adventure, 89 ALR 588.

Applicability of statute of nonclaim or limitation statute as between surviving partner and estate of deceased partner, 157 ALR 1114.

## 14-8-38.2. Vesting of property of dissolved partnership prior to July 1, 1989.

In every instance prior to July 1, 1989, where a partnership has been dissolved for any reason, either pursuant to the provisions of this chapter or the partnership agreement or otherwise, and the business is continued as a partnership, but no deed or other instrument of transfer or conveyance for any real property or other property to the partnership continuing the business has been duly executed and properly recorded, title to such real property or other property shall, by operation of law, be vested in such



partnership continuing the business without reversion or impairment and in as valid and effectual a manner in every case as if a deed or other instrument of transfer or conveyance from such dissolved partnership to such partnership continuing the business had been duly executed and properly recorded. (Code 1981, § 14-8-38.2, enacted by Ga. L. 1989, p. 927, § 3.)

**Law reviews.** — For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 188 (1989).

### **14-8-39. Rescission of partnership agreement following fraud or misrepresentation.**

Where a partnership agreement is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto the party entitled to rescind is, without prejudice to any other right, entitled:

(1) To a lien on, or a right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him;

(2) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(3) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. (Code 1981, § 14-8-39, enacted by Ga. L. 1984, p. 1439, § 1.)

#### **COMMENT**

##### **Note to Uniform Partnership Act**

This section defines the rights of a partner who has been misled into partnership by the fraud of a copartner. The defrauded partner is entitled to the return out of partnership property of payments he has made to the partnership and to others, subject only to the rights of third party creditors; protection as against his copartners from the burden of all partnership liabilities; reimbursement from the partnership and the other partners of amounts paid by him to creditors; and indemnification by the defrauding partner. Note that the defrauded partner's rights to return of payments and reimbursement are prior to the rights of both the defrauding and innocent partners.

##### **Prior Georgia Law**

There was no comparable provision or case law.

##### **Official UPA**

This section is the same as the official version except that "agreement" is substituted for "contract."

**Cross-References**

Partners' liability for partnership obligations: § 14-8-15. Partners' right to indemnification: § 14-8-18(2). Partners' duty to disclose: § 14-8-20. Partners' duty of contribution: § 14-8-40(4)-(7).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 132, 613, 871, 903.

**C.J.S.** — 68 C.J.S., Partnership, § 18.

**14-8-40. Settlement of accounts between partners after dissolution.**

In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(1) The assets of the partnership are:

(A) The partnership property;

(B) The contributions of the partners specified in paragraph (4) of this Code section;

(2) The liabilities of the partnership shall rank in order of payment, as follows:

(A) Those owing to creditors other than partners;

(B) Those owing to partners other than for capital and profits;

(C) Those owing to partners in respect of capital;

(D) Those owing to partners in respect of profits;

(3) The assets shall be applied in the order of their declaration in paragraph (1) of this Code section to the satisfaction of the liabilities;

(4) Except as provided in subsection (b) of Code Section 14-8-15:

(A) The partners shall contribute, as provided by paragraph (1) of Code Section 14-8-18, the amount necessary to satisfy the liabilities; and

(B) If any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities;

(5) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in paragraph (4) of this Code section;

(6) Any partner or his legal representative shall have the right to enforce the contributions specified in paragraph (4) of this Code section,



to the extent of the amount which he has paid in excess of his share of the liability;

(7) The individual property of a deceased partner shall be liable for the contributions specified in paragraph (4) of this Code section;

(8) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, subject to the rights of lien or secured creditors;

(9) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

(A) Those owing to separate creditors;

(B) Those owing to partnership creditors;

(C) Those owing to partners by way of contribution. (Code 1981, § 14-8-40, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1995, p. 470, § 7.)

**Code Commission notes.** — Pursuant to substituted for a comma at the end of the Code Section 28-9-5, in 1995, a colon was introductory language of paragraph (4).

## COMMENT

### Note to Uniform Partnership Act

This section sets forth rules governing settlement of the partners' accounts on dissolution. Since liabilities include partner capital contributions under paragraph (2), the effect of paragraphs (1)-(4) is that the burden of partnership debts to third parties is shared by the partners in proportion to their profit shares, rather than partly according to their capital contributions. Paragraphs (5)-(7) provide for enforcement of the partners' contribution obligation. Paragraphs (8)-(9) state the "dual priority" or "jingle" rule pursuant to which partnership creditors have priority as to partnership assets and individual creditors as to individual assets.

### Prior Georgia Law

Prior O.C.G.A. §§ 14-8-45 and 14-8-46 were generally consistent with paragraph (4) in requiring the partners to contribute toward losses. However, there was no provision stating clearly how property was to be distributed upon dissolution. Prior O.C.G.A. § 14-8-47, which applied in cases of dissolution caused by death, required only "a fair appraisal and division" of the assets. Prior O.C.G.A. § 14-8-45, which provided that "partners shall have equal interests" in partnership assets, was variously interpreted by the courts. *Compare Bryan v. Maddox*, 249 Ga. 762, 295 S.E.2d 60 (1982) (each partner entitled to equal share regardless of amount of capital contributions) with *Jackson v. Jackson*, 150 Ga. App. 87, 256 S.E.2d 631 (1979) (method of apportionment was a jury issue). Prior O.C.G.A. § 14-8-69 was inconsistent with paragraphs (8) and (9) in giving individual creditors only a limited priority with respect to an individual partner's assets. See the Comment to § 14-8-36.

### Official UPA

This section is the same as the official version.

### Cross-References

Determination of partnership property: § 14-8-8. Partners' liability for partnership obligations: § 14-8-15. Partners' profit and loss shares: § 14-8-18(1). Partners' right to indemnification by partnership: § 14-8-18(2). "Dual priorities" rule with respect to the individual property of a deceased partner: § 14-8-36(d). Rights where partnership dissolved for fraud: § 14-8-39.

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Code Section 14-8-45, in effect prior to the 1984 repeal and reenactment of this chapter, are included in the annotations to this Code section.

**Rights subject to agreement.** — The right of a partner to recover net capital contributions to the partnership upon dissolution was subject to an agreement limiting returnable equity to profits realized upon the initial investments of the parties. *Hayden v. Sigari*, 220 Ga. App. 6, 467 S.E.2d 590 (1996).

**Dissolving partner's rights after dissolution.** — Where partners continued operating plaintiff's business after dissolution without distributing plaintiff's share to plaintiff, then the plaintiff was additionally entitled to a one-third share of profits earned until final

accounting. *Bryan v. Maddox*, 249 Ga. 762, 295 S.E.2d 60 (1982) (decided under former § 14-8-45).

Where defendants failed in their duty to wind up business and account to dissolving partner, they were subject to plaintiff's right to choose interest on plaintiff's share of assets, or plaintiff's share of profits earned while defendants wrongfully withheld plaintiff's assets. *Bryan v. Maddox*, 249 Ga. 762, 295 S.E.2d 60 (1982) (decided under former § 14-8-45).

**Receiver bound by jury verdict.** — Jury verdict that partners each owned 50% of the business was binding on court-appointed receiver. The receiver was empowered only to maintain the property and to carry out the jury verdict. The receiver was not empowered to alter the jury verdict. *Rhodes v. Hoke*, 262 Ga. 5, 412 S.E.2d 825 (1992).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1200-1222.

**C.J.S.** — 68 C.J.S., Partnership, §§ 174 et seq., 344 et seq.

### 14-8-41. Relations with creditors following withdrawal, expulsion, or death of existing partners or assignment of partnership rights to third parties.

(a) When any partner withdraws, is expelled, or dies and the business of the dissolved partnership is continued by one or more of the partners, either alone or with others, without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the person or partnership continuing the business.

(b) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.



(c) The liability of a third person becoming a partner in the partnership continuing the business, under this Code section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(d) When the business of a partnership after dissolution is continued under any conditions set forth in this Code section the creditors of the dissolved partnership, as against the separate creditors of the withdrawing or deceased partner or the representative of the deceased partner, have a prior right to any claim of the withdrawn partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the withdrawn or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(e) Nothing in this Code section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(f) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership. (Code 1981, § 14-8-41, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1985, p. 1436, § 6.)

#### COMMENT

##### Note to Uniform Partnership Act

Subsection (a) permits pre-dissolution creditors to share on an equal basis with post-dissolution creditors in the assets of a new partnership carried on by one or more members of the old firm even without an assignment of assets or consent by the new partnership. Pursuant to subsection (b), where the business is carried on by wholly new owners (which would include continuation by a corporate entity) the assets of the new firm are not subject to pre-dissolution debts unless the new owners consent. Subsection (c) provides that incoming partners are not personally liable for old firm debts unless they expressly assume such liability. Subsection (d) provides that where a retiring partner or estate of deceased partner continues to receive payments as a creditor of the firm (see new § 14-8-42), he is subordinated to the other creditors of the firm. Subsection (e) preserves such creditors' rights as those arising under the Uniform Fraudulent Conveyance Act. Finally, subsection (f) provides that an estate of a deceased partner does not become liable for post dissolution debts merely because the deceased partner's name is used as part of the firm's name.

##### Prior Georgia Law

Prior O.C.G.A. § 14-8-44 was consistent with new subsection (c) to the extent that it provides that a new partner is not personally liable for pre-existing debts. Prior case law was consistent with new subsection (b). See *Taylor Lumber Co. v. Clark Lumber Co.*, 33 Ga. App. 815, 127 S.E. 905 (1925). Prior Georgia law was inconsistent with subsection (a). See the Comment to new § 14-8-17. There were no provisions or cases on point with respect to the matters covered by subsections (d)-(f).

##### Official UPA

The section has been changed from the official version by the coverage in subsection (a) of all of the situations covered by official subsections 41(1)-(3) and (5)-(6). The

effect of this change, apart from simplification, is to preserve the rights of pre-dissolution creditors against the assets of a new firm carried on by one or more of the old members regardless of whether the new firm consented or whether there was an assignment of property rights.

#### Cross-References

Partners' liability for post-dissolution debts: §§ 14-8-16 and 14-8-35. Liability of incoming partner: § 14-8-17. Changes in membership as causes of dissolution: § 14-8-31. Personal liability of partners of pre-dissolution firm for pre-dissolution debts: § 14-8-36. Retired partner or estate of deceased partner as creditor of new partnership: § 14-8-42.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 913-919, 1132, 1136, 1140.

**C.J.S.** — 68 C.J.S., Partnership, §§ 174 et seq., 262 et seq., 324.

#### 14-8-42. Continuation of business after withdrawal or death of a partner.

When any partner withdraws or dies, and the business is continued under any of the conditions set forth in subsection (a) of Code Section 14-8-41 or paragraph (2) of subsection (b) of Code Section 14-8-38, without any settlement of accounts as between the withdrawn partner or the legal representative of the estate of a deceased partner and the persons or partnership continuing the business, unless otherwise agreed:

(1) Such persons or partnership shall obtain the discharge of the withdrawn partner or the legal representative of the estate of the deceased partner, or appropriately hold him harmless from all present or future partnership liabilities, and shall ascertain the value of his interest at the date of dissolution; and

(2) The withdrawn partner or legal representative of the estate of the deceased partner shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership, provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the withdrawn or deceased partner, shall have priority on any claim arising under this Code section, as provided by subsection (d) of Code Section 14-8-41. (Code 1981, § 14-8-42, enacted by Ga. L. 1984, p. 1439, § 1; Ga. L. 1985, p. 1436, § 7; Ga. L. 1990, p. 257, § 33.)

#### COMMENT

##### Note to Uniform Partnership Act

This section provides that where the partnership is continued by some of the former partners after dissolution, the retiring partner, or the estate of a deceased partner, is entitled, in the absence of contrary agreement, to receive from the partnership as a subordinate creditor the value of the retiring or deceased partner's interest plus either interest on this amount or profits attributable to the use of the partner's property right by the new firm.



**Prior Georgia Law**

There was no comparable provision. Case law supported a right to post-dissolution "profits" (without defining this term) where the partnership was not seasonably wound up, computed from the time settlement should have been made. See *Bryan v. Maddox*, 249 Ga. 762, 295 S.E.2d 60 (1982); *Huggins v. Huggins*, 117 Ga. 151, 43 S.E. 759 (1902).

**Official UPA**

The reference to § 14-8-41 has been changed from the official version to reflect the changes made in the official § 41. See the Comment to § 14-8-41. The effect of referring to the changed § 14-8-41 in § 14-8-42 is to make the latter section applicable even if the retiring partner or estate fails to consent to continuation of the business. This is *contra* the holding in *Blut v. Katz*, 13 N.J. 374, 99 A.2d 785 (1953). Section 14-8-42 also differs from the official version in giving all withdrawing partners and estates of deceased partners the same protection from partnership debts that is afforded wrongfully withdrawing partners under new § 14-8-38(b).

**Note to 1990 Amendment**

The 1990 amendment corrected an erroneous cross-reference.

**Cross-References**

Definition of "interest": § 14-8-2(5). Continued partnership status of retiring or deceased partner: §§ 14-8-6, 14-8-7, and 14-8-16. Partner's pre-dissolution profit share: § 14-8-18(1). Right to continue partnership business after dissolution: § 14-8-38. Retiring partner or estate of deceased partner as creditor of partnership: § 14-8-41(d).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1127.

**C.J.S.** — 68 C.J.S., Partnership, §§ 232 et seq., 273 et seq.

### **14-8-43. Rights of partners to accounting of interest in partnership upon dissolution.**

The right to an account of his interest shall accrue to any partner, his assignee, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary. (Code 1981, § 14-8-43, enacted by Ga. L. 1984, p. 1439, § 1.)

**COMMENT****Note to Uniform Partnership Act**

Under this section, the statute of limitations on a partner's right to an accounting begins to run at the time of dissolution. This section also identifies who may enforce the right to account.

**Prior Georgia Law**

There was no comparable provision. Georgia case law was inconsistent in holding that the four year limitations period under O.C.G.A. § 9-3-25 (governing actions on accounts) begins to run after partnership affairs have been settled rather than at the earlier time of dissolution. See *Prentice v. Elliott*, 72 Ga. 154 (1883).

**Official UPA**

This section is the same as the official version except that the right to sue for an account is given not only to the partner or his legal representative, but also to a partner's assignee. This is consistent with new subsection 14-8-27(c) (assignee has right to an account from the date of last account agreed to by the partners); § 14-8-37 (assignee may obtain winding up by the court); and § 14-8-32(b) (assignee may sue for dissolution).

**Cross-References**

Assignee's right to account: § 14-8-27(c). When dissolution occurs: § 14-8-31. Right to wind up the partnership after dissolution: § 14-8-37. Right to application of property after dissolution: § 14-8-38. Rules for distribution of property after dissolution: § 14-8-40. Rights to profits or interest when business continued after dissolution: § 14-8-42.

**JUDICIAL DECISIONS**

**Cited in** *Arford v. Blalock*, 199 Ga. App. 434, 405 S.E.2d 698 (1991).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 814, 968, 1079, 1176.

**C.J.S.** — 68 C.J.S., Partnership, §§ 263, 336 et seq., 338.

**ALR.** — When statute of limitations commences to run on right of partnership accounting, 44 ALR4th 678.

**14-8-44. Law governing foreign limited liability partnership.**

(a) The laws of the jurisdiction under which a foreign limited liability partnership is organized govern its organization and internal affairs and the liability of its partners, regardless of whether the foreign limited liability partnership procured or should have procured a certificate of authority under this chapter.

(b) A foreign limited liability partnership may not be denied a certificate of authority by reason of any difference between the laws of the jurisdiction under which the foreign limited liability partnership is organized and the laws of this state. (Code 1981, § 14-8-44, enacted by Ga. L. 1994, p. 1674, § 2; Ga. L. 1995, p. 470, § 8.)

**Editor's notes.** — Former Code Sections 14-8-44 through 14-8-92 were based on Laws 1840, Cobbs 1851 Digest, p. 589, 590; org. Code 1863, §§ 1900-1904, 1907-1921, 3495; Code 1868, §§ 1888-1892, 1895-1908, 1921, 3518; Code 1873, §§ 1884-1886, 1901-1918, 3576; Code 1882, §§ 1894-1899, 1901-1919, 3576; Code 1895, §§ 2637-2641, 2644-2660, 5346; Civil Code 1910, §§ 3162-3170,

3173-3190, 5941; Code 1933, §§ 75-107, 75-109, 75-203 — 75-210, 75-301 — 75-315, 110-309; and Ga. L. 1982, p. 3, § 14 and were repealed by Ga. L. 1984, p. 1439, § 1, effective April 1, 1985.

**Law reviews.** — For note on the 1994 amendment of Code Sections 14-8-44 to 14-8-61, see 11 Ga. St. U.L. Rev. 77 (1994).



**14-8-45. Certificate of authority requirement for foreign limited liability partnerships; contents of application for certificate; activities not constituting transacting business in state.**

(a) A foreign limited liability partnership transacting business in this state shall procure a certificate of authority to do so from the Secretary of State. In order to procure a certificate of authority to transact business in this state, a foreign limited liability partnership shall submit to the Secretary of State an application for a certificate of authority as a foreign limited liability partnership, signed by a person duly authorized to sign such instruments by the laws of the jurisdiction under which the foreign limited liability partnership is organized, setting forth:

(1) The name of the foreign limited liability partnership and, if different, the name under which it proposes to qualify and transact business in this state;

(2) The name of the jurisdiction under whose laws it is organized;

(3) Its date of organization and period of duration;

(4) The street address and county of its registered office in this state and the name of its registered agent at that office;

(5) A statement that the Secretary of State is appointed the agent of the foreign limited liability partnership for service of process if no agent has been appointed under subsection (a) of Code Section 14-8-46 or, if appointed, the agent's authority has been revoked or the agent cannot be found or served by the exercise of reasonable diligence;

(6) The address of the office required to be maintained in the jurisdiction of its organization by the laws of that jurisdiction or, if no such office is required, its principal office;

(7) The address of the office at which is kept a list of the names and addresses of its partners, together with an undertaking by it to keep those records until its registration in this state is canceled or revoked; and

(8) The name and a business address of a partner who has substantial responsibility for managing its business activities.

(b) Without excluding other activities which may not constitute transacting business in this state, a foreign limited liability partnership shall not be considered to be transacting business in this state, for the purpose of qualification under this chapter, solely by reason of carrying on in this state any one or more of the following activities:

(1) Maintaining or defending any action or administrative or arbitration proceeding or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its partners or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts, share accounts in savings and loan associations, custodial or agency arrangements with a bank or trust partnership, or stock or bond brokerage accounts;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of partnership interests in it or appointing and maintaining trustees or depositaries with relation to such interests;

(5) Effecting sales through independent contractors;

(6) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance outside this state before becoming binding contracts and where such contracts do not involve any local performance other than delivery and installation;

(7) Making loans or creating or acquiring evidences of debt, mortgages, or liens on real or personal property or recording the same;

(8) Securing or collecting debts or enforcing any rights in property securing the same;

(9) Effecting transactions in interstate or foreign commerce;

(10) Owning or controlling another entity organized under the laws of, or transacting business within, this state;

(11) Conducting an isolated transaction not in the course of a number of repeated transactions of like nature; or

(12) Serving as trustee, executor, administrator, or guardian or, in like fiduciary capacity, where permitted so to serve by the laws of this state.

(c) The list of activities in subsection (b) of this Code section is not exhaustive.

(d) This Code section shall not be deemed to establish a standard for activities that may subject a foreign limited liability partnership to taxation or to service of process under any of the laws of this state. (Code 1981, § 14-8-45, enacted by Ga. L. 1994, p. 1674, § 2; Ga. L. 1995, p. 470, § 9.)

**Editor's notes.** — For repeal of former Code Section 14-8-45 in 1984, see editor's notes following Code Section 14-8-44.



**14-8-46. Registered office and registered agent required for foreign limited liability partnership; Secretary of State as agent for service of process; venue.**

(a) Each foreign limited liability partnership that is required to procure a certificate of authority to do business in this state shall continuously maintain in this state a registered office and a registered agent at such registered office for service of process on the foreign limited liability partnership.

(b) A registered agent must be an individual resident of this state, a domestic corporation, or a foreign corporation authorized to do business in this state.

(c) A foreign limited liability partnership may change its registered office or its registered agent, or both, by indicating any such change on its annual registration statement filed pursuant to Code Section 14-8-56 or by executing and delivering to the Secretary of State for filing a statement setting forth:

- (1) The name of the foreign limited liability partnership;
- (2) The street address and county of its then registered office;
- (3) If the address of its registered office is to be changed, the new street address and county of the registered office;
- (4) The name of its then registered agent; and
- (5) If its registered agent is to be changed, the name of its successor registered agent.

(d) If the Secretary of State finds that such statement conforms to subsection (c) of this Code section, the Secretary of State shall file such statement in his or her office; and upon such filing, the change of address of the registered office or the change of the registered agent, or both, as the case may be, shall become effective.

(e) A registered agent of a foreign limited liability partnership may resign as such agent upon filing a written notice thereof with the Secretary of State. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Secretary of State. There shall be attached to such notice an affidavit of such agent, if an individual, or of an officer thereof, if a corporation, that at least ten days prior to the date of filing such notice a written notice of the agent's intention to resign was mailed to the person, and at the address, indicated in its most recently filed annual registration statement pursuant to paragraph (5) of subsection (a) of Code Section 14-8-56, or, if no annual registration statement has been filed, in its application for a certificate of authority to transact business pursuant to paragraph (8) of subsection (a) of Code Section 14-8-45. Upon

such resignation becoming effective, the address of the office of the resigned registered agent shall no longer be the address of the registered office of the foreign limited liability partnership.

(f) A registered agent may change the agent's office and the address of the registered office of any foreign limited liability partnership of which the agent is the registered agent to another place within this state by filing a statement as required in subsection (c) of this Code section, except that it need be signed only by the registered agent and need not be responsive to paragraph (5) of subsection (c) of this Code section and must recite that a copy of the statement has been mailed to the person, and at the address, indicated in its most recently filed annual registration statement pursuant to paragraph (5) of subsection (a) of Code Section 14-8-56, or, if no annual registration statement has been filed, in its application for a certificate of authority to transact business pursuant to paragraph (8) of subsection (a) of Code Section 14-8-45.

(g) The registered agent of one or more foreign limited liability companies may resign and appoint a successor registered agent by filing a statement with the Secretary of State stating that the agent resigns and stating the name, street address, and county of the office of the successor registered agent. There shall be attached to such statement a statement executed by each affected foreign limited liability partnership ratifying and approving such change of registered agent. Upon such filing, the successor registered agent shall become the registered agent of each such foreign limited liability partnership as has ratified and approved such substitution, and the successor registered agent's office, as stated in such statement, shall become the registered office in this state of each such foreign limited liability partnership. The Secretary of State shall furnish to the successor registered agent a certified copy of the statement of resignation.

(h) The registered agent of a foreign limited liability partnership authorized to transact business in this state is an agent of the foreign limited liability partnership on whom may be served any process, notice, or demand required or permitted by law to be served on the foreign limited liability partnership.

(i) Whenever a foreign limited liability partnership required to procure a certificate of authority to do business in this state shall fail to appoint or maintain a registered agent in this state, or whenever its registered agent cannot with reasonable diligence be found at the registered office, the Secretary of State shall be an agent of such foreign limited liability partnership upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with the Secretary of State or with any persons designated by the Secretary of State to receive such service two copies of such process, notice, or demand. The plaintiff or his or her attorney shall certify in writing to the Secretary of State that the foreign



limited liability partnership failed either to maintain a registered office or appoint a registered agent in this state and that he or she has forwarded by registered mail or statutory overnight delivery such process, service, or demand to the last registered agent at the last registered office listed on the records of the Secretary of State and that service cannot be effected at such office.

(j) The Secretary of State shall keep a record of all processes, notices, and demands served upon him or her under this Code section and shall record therein the time of such service and his or her action with reference thereto.

(k) This Code section does not prescribe the only means, or necessarily the required means, of serving any process, notice, or demand required or permitted by law to be served on a foreign limited liability partnership.

(l) Venue in proceedings against a foreign limited liability partnership shall be determined in accordance with the pertinent constitutional and statutory provisions of this state in effect on July 1, 1994, or thereafter. For purposes of determining venue, the residence of each foreign limited liability partnership authorized to transact business in this state shall be determined in accordance with Code Section 14-2-510 as though such foreign limited liability partnership were a foreign corporation. (Code 1981, § 14-8-46, enacted by Ga. L. 1994, p. 1674, § 2; Ga. L. 1995, p. 10, § 14; Ga. L. 2000, p. 1589, § 4.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

For repeal of former Code Section 14-8-46 in 1984, see editor's notes following Code Section 14-8-44.

#### **14-8-47. Issuance of certificate of authority to foreign limited liability partnership.**

(a) If the Secretary of State finds that an application for a certificate of authority conforms to law and all requisite fees and any penalty due pursuant to Code Section 14-8-52 have been paid, the Secretary of State shall:

- (1) Stamp or otherwise endorse his or her official title and the date and time of receipt on the application;
- (2) File in his or her office a copy of the application; and
- (3) Issue a certificate of authority to transact business in this state.

(b) The certificate of authority must be returned to the person who filed the application or such person's representative.

(c) If the certificate of authority is issued by the Secretary of State, a foreign limited liability partnership shall be deemed authorized to transact

business in this state from the time of filing its application for the certificate of authority. (Code 1981, § 14-8-47, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-47 in 1984, see editor's notes following Code Section 14-8-44.

#### **14-8-48. Name of foreign limited liability partnership.**

(a) A foreign limited liability partnership may apply for a certificate of authority with the Secretary of State under any name, whether or not it is the name under which it is registered in its jurisdiction of organization; provided, however, that such name:

(1) Must contain the words "limited liability partnership" or "limited liability limited partnership" (it being permitted to abbreviate the word "limited" as "Ltd.") or the abbreviation "L.L.P." or "L.L.L.P." or the designation "LLP" or "LLL.P.";

(2) Must be distinguishable on the records of the Secretary of State from the name of any corporation, nonprofit corporation, limited partnership, foreign limited liability partnership, professional corporation, professional association, limited liability company, or limited liability partnership on file with the Secretary of State pursuant to this title; and

(3) May not contain any words indicating that the business is organized other than as a limited liability partnership.

(b) Whenever a foreign limited liability partnership is unable to procure a certificate of authority to transact business in this state because its name does not comply with paragraph (2) of subsection (a) of this Code section, it may nonetheless apply for authority to transact business in this state by adding in parentheses to its name in such application a word, abbreviation, or other distinctive and distinguishing element such as the name of the jurisdiction where it is organized. If in the judgment of the Secretary of State the name of the foreign limited liability partnership with such addition would comply with subsection (a) of this Code section, subsection (a) of this Code section shall not be a bar to the issuance to such foreign limited liability partnership of a certificate of authority to transact business in this state. In such case, any such certificate issued to such foreign limited liability partnership shall be issued in its name with such additions, and the foreign limited liability partnership shall use such name with such additions in all its dealings with the Secretary of State. (Code 1981, § 14-8-48, enacted by Ga. L. 1994, p. 1674, § 2; Ga. L. 1995, p. 470, § 10; Ga. L. 1996, p. 787, § 2; Ga. L. 1997, p. 143, § 14.)

**Editor's notes.** — For repeal of former Code Section 14-8-48 in 1984, see editor's notes following Code Section 14-8-44.



**14-8-49. Change of name of foreign limited liability partnership.**

A foreign limited liability partnership authorized to transact business in this state must procure an amended certificate of authority from the Secretary of State if it changes its name or its jurisdiction of organization. The requirements of Code Sections 14-8-45 and 14-8-47 for procuring an original certificate of authority shall apply to procuring an amended certificate under this Code section. (Code 1981, § 14-8-49, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-49 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-50. Withdrawal of foreign limited liability partnership from state.**

(a) A foreign limited liability partnership authorized to transact business in this state may not withdraw from this state until it obtains a certificate of withdrawal from the Secretary of State.

(b) A foreign limited liability partnership authorized to transact business in this state may apply for a certificate of withdrawal by delivering to the Secretary of State for filing an application that sets forth:

(1) The name of the foreign limited liability partnership and the name of the jurisdiction under whose laws it is organized;

(2) That it is not transacting business in this state and that it surrenders its authority to transact business in this state;

(3) That it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state;

(4) A mailing address to which a copy of any process served on the Secretary of State pursuant to paragraph (3) of this subsection may be mailed under subsection (c) of this Code section; and

(5) A commitment to notify the Secretary of State in the future of any change in the mailing address provided pursuant to paragraph (4) of this subsection.

(c) After the withdrawal of the foreign limited liability partnership is effective, service of process on the Secretary of State under this Code section is service on the foreign limited liability partnership. Any party that serves process on the Secretary of State in accordance with this subsection shall also mail a copy of the process to the foreign limited liability partnership at the mailing address provided pursuant to subsection (b) of this Code section. (Code 1981, § 14-8-50, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-50 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-51. Grounds for revocation of certificate of authority of foreign limited liability partnership.**

The Secretary of State may commence a proceeding under Code Section 14-8-52 to revoke the certificate of authority of a foreign limited liability partnership authorized to transact business in this state if:

- (1) The foreign limited liability partnership does not deliver its annual registration to the Secretary of State within 60 days after it is due;
- (2) The foreign limited liability partnership does not pay within 60 days after they are due any fees, taxes, or penalties imposed by this chapter or other law;
- (3) The foreign limited liability partnership is without a registered agent or registered office in this state for 60 days or more;
- (4) The foreign limited liability partnership does not inform the Secretary of State under Code Section 14-8-46 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuation;
- (5) A partner or agent of the foreign limited liability partnership signed a document such person knew was false in a material respect with intent that the document be delivered to the Secretary of State for filing;  
or
- (6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of records in the jurisdiction under whose law the foreign limited liability partnership is organized stating that it has been dissolved, terminated, or disappeared as a result of a merger. (Code 1981, § 14-8-51, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-51 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-52. Procedure for revocation of certificate of authority of foreign limited liability partnership.**

(a) If the Secretary of State determines that one or more grounds exist under Code Section 14-8-51 for revocation of a certificate of authority, the Secretary of State shall provide the foreign limited liability partnership with written notice of such determination by mailing a copy of the notice, first-class mail, to the person and at the address indicated in its most



recently filed annual registration statement pursuant to paragraph (5) of subsection (a) of Code Section 14-8-56 or, if no annual registration statement has been filed, in its application for a certificate of authority to transact business pursuant to paragraph (8) of subsection (a) of Code Section 14-8-45 or to the registered agent.

(b) If the foreign limited liability partnership does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after the notice is provided to the foreign limited liability partnership, the Secretary of State may revoke the foreign limited liability partnership's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date.

(c) The authority of a foreign limited liability partnership to transact business in this state ceases on the date shown on the certificate revoking its certificate of authority.

(d) The Secretary of State's revocation of a foreign limited liability partnership's certificate of authority appoints the Secretary of State as the foreign limited liability partnership's agent for service of process in any proceeding based on a cause of action which arose during the time the foreign limited liability partnership was authorized to transact business in this state. Service of process on the Secretary of State under this subsection is service on the foreign limited liability partnership. Any party that serves process on the Secretary of State shall also mail a copy of the process to the person and at the address indicated in its most recently filed annual registration statement pursuant to paragraph (5) of subsection (a) of Code Section 14-8-56 or, if no annual registration statement has been filed, in its application for a certificate of authority to transact business pursuant to paragraph (8) of subsection (a) of Code Section 14-8-45 or to the registered agent. This subsection does not prescribe the only means, or necessarily the required means, of serving any process, notice, or demand required or permitted by law to be served on a foreign limited liability partnership.

(e) Revocation of a foreign limited liability partnership's certificate of authority does not terminate the authority of the registered agent of the foreign limited liability partnership. (Code 1981, § 14-8-52, enacted by Ga. L. 1994, p. 1674, § 2.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1994, "subsection" was substituted for "paragraph" in subsection (d).

**Editor's notes.** — For repeal of former Code Section 14-8-52 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-53. Appeal from revocation of certificate of authority by foreign limited liability partnership.**

(a) A foreign limited liability partnership may appeal the Secretary of State's revocation of its certificate of authority to the Superior Court of Fulton County within 30 days after service of the certificate of revocation is perfected under Code Section 14-8-52. The foreign limited liability partnership appeals by petitioning the court to set aside the revocation and attaching to the petition copies of its certificate of authority and the Secretary of State's certificate of revocation.

(b) The court may summarily order the Secretary of State to reinstate the certificate of authority or may take any other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (Code 1981, § 14-8-53, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-53 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-54. Transaction of business without certificate of authority by foreign limited liability partnership.**

(a) A foreign limited liability partnership transacting business in this state may not maintain an action, suit, or proceeding in a court of this state until it is authorized to transact business in this state.

(b) The failure of a foreign limited liability partnership to procure a certificate of authority does not impair the validity of any contract or act of the foreign limited liability partnership or prevent the foreign limited liability partnership from defending any action, suit, or proceeding in any court of this state.

(c) A foreign limited liability partnership that transacts business in this state without registering as required by this chapter shall be liable to the state:

(1) For all fees which would have been imposed by this chapter upon such foreign limited liability partnership had it registered as required by this chapter; and

(2) If it has not been authorized to transact business in this state within 30 days after the first day on which it transacts business in this state, for a penalty of \$500.00 for each year or part thereof during which it so transacts business. (Code 1981, § 14-8-54, enacted by Ga. L. 1994, p. 1674, § 2.)



**Editor's notes.** — For repeal of former Code Section 14-8-54 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-55. Action to restrain foreign limited liability partnership from transacting business in state.**

The Attorney General may maintain an action to restrain a foreign limited liability partnership from transacting business in this state in violation of this chapter. (Code 1981, § 14-8-55, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-55 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-56. Annual registration of foreign limited liability partnership.**

(a) Each foreign limited liability partnership authorized to transact business in this state shall deliver to the Secretary of State for filing an annual registration that sets forth:

(1) The name of the foreign limited liability partnership and the jurisdiction under whose laws it is organized;

(2) The street address and county of its registered office in this state and the name of its registered agent at that office;

(3) The address of the office it is required to maintain in the jurisdiction of its organization by the laws of that jurisdiction or, if no such office is required to be maintained, of its principal office;

(4) The address of the office at which is kept a list of the names and addresses of the partners and other owners of the foreign limited liability partnership;

(5) The name and a business address of a partner who has substantial responsibility for managing the business activities of the foreign limited liability partnership; and

(6) Any additional information that is necessary to enable the Secretary of State to carry out the provisions of this chapter.

(b) Information in the annual registration must be current as of the date the annual registration is executed on behalf of the foreign limited liability partnership.

(c) The first annual registration must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the year following the calendar year in which the foreign limited liability partnership was authorized to

transact business in this state. Subsequent annual registrations must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the following calendar years.

(d) If an annual registration does not contain the information required by this Code section, the Secretary of State shall promptly notify the reporting foreign limited liability partnership in writing and return the report to it for correction. If the report is corrected to contain the information required by this Code section and delivered to the Secretary of State within 30 days after the effective date of notice, it is deemed to be timely filed. (Code 1981, § 14-8-56, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-56 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-57. Filing fees pertaining to foreign limited liability partnerships.**

The Secretary of State shall collect the following fees and penalties when the documents described below are delivered to the Secretary of State for filing pursuant to the chapter:

<u>Document</u>	<u>Fee</u>
(1) Application for certificate of authority to transact business .....	\$ 200.00
(2) Statement of change of registered office or registered agent .....	5.00 per foreign limited liability partnership, but not less than 20.00
(3) Registered agent's statement of resignation pursuant to subsection (e) of Code Section 14-8-46 .....	No fee
(4) Annual registration .....	25.00
(5) Any other document required or permitted to be filed by this chapter .....	20.00

(Code 1981, § 14-8-57, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-57 in 1984, see editor's notes following Code Section 14-8-44.



**14-8-58. Administrative power of Secretary of State pertaining to foreign limited liability partnership laws.**

The Secretary of State shall have the power and authority reasonably necessary to enable him or her to administer this chapter efficiently and to perform the duties imposed upon him or her pursuant to this chapter, including, without limitation, the power and authority to employ from time to time such additional personnel as in his or her judgment are required for such purposes. (Code 1981, § 14-8-58, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-58 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-59. Rules and regulations pertaining to foreign limited liability partnerships.**

The Secretary of State may promulgate such rules and regulations, not inconsistent with the provisions of this chapter, which are incidental to and necessary for the implementation and enforcement of such provisions of this chapter as are administered by the Secretary of State. Such rules and regulations shall be promulgated in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 14-8-59, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-59 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-60. Effect of Secretary of State's filing of documents pertaining to foreign limited liability partnerships.**

The Secretary of State's duty to file documents under this chapter is ministerial. The Secretary of State's filing or refusing to file a document does not:

- (1) Affect the validity or invalidity of the document in whole or part;
- (2) Relate to the correctness or incorrectness of information contained in the document; or
- (3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect. (Code 1981, § 14-8-60, enacted by Ga. L. 1994, p. 1674, § 2.)

**Editor's notes.** — For repeal of former Code Section 14-8-60 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-61. Effective date of laws governing foreign limited liability partnership.**

Code Sections 14-8-44 through 14-8-60 and this Code section shall become effective on July 1, 1994, and shall govern all foreign limited liability partnerships transacting business in this state on or after July 1, 1994. (Code 1981, § 14-8-61, enacted by Ga. L. 1994, p. 1674, § 2; Ga. L. 1995, p. 10, § 14.)

**Editor's notes.** — Prior to the 1995 amendment declaring an effective date of July 1, 1994, this Code section stated that Code Sections 14-8-44 through 14-8-60 and this Code section became effective April 1, 1994, Section 3 of Ga. L. 1994, p. 1674, was amended in committee to provide that the

Act as a whole would have an effective date of July 1, 1994. Further, the Governor did not sign the Act until April 19, 1994.

For repeal of former Code Section 14-8-61 in 1984, see editor's notes following Code Section 14-8-44.

**14-8-62. Limited liability partnership election; recording; fees; contents; procedures and effect; cancellation; dissolution of partnership; amendment of certificate to comply with name requirements.**

(a) To become and to continue as a limited liability partnership, a partnership shall record in the office of the clerk of the superior court of any county in which the partnership has an office a limited liability partnership election. Such election shall be recorded by such clerk in a book to be kept for that purpose, which may be the book in which are recorded statements of partnership recorded pursuant to Code Section 14-8-10.1, and open to public inspection. As a prerequisite to such filing, the clerk of each such registry may collect a fee in the amount of the fee then allowed for the filing of statements of partnership. A limited liability partnership election shall state:

(1) The name of the partnership, which must comply with Code Section 14-8-63;

(2) The business, profession, or other activity in which the partnership engages;

(3) That the partnership thereby elects to be a limited liability partnership;

(4) That such election has been duly authorized; and

(5) Any other matters the partnership determines to include therein.

(b) Subject to any contrary agreement among the partners, the election shall be executed by a majority of the partners or by one or more partners authorized to execute an election.

(c) A partnership becomes a limited liability partnership at the time of the recording of the election or at such later date or time, if any, as is stated



in the election and continues to be a limited liability partnership until a cancellation of limited liability partnership election, which states that it has been duly authorized, is:

(1) Subject to any contrary agreement among the partners, executed by a majority of the partners or by one or more partners authorized to execute such a cancellation; and

(2) Recorded in the office of the clerk of the superior court of each county in which the partnership recorded a limited liability partnership election.

(d) The status of a partnership as a limited liability partnership shall not be affected by changes, after the recording of a limited liability partnership election, in the information stated in the election.

(e) The fact that a limited liability partnership election has been recorded as required by this Code section is notice that the partnership is a limited liability partnership.

(f) If a limited liability partnership is dissolved and its business continued without liquidation of the partnership's affairs, the new partnership shall succeed to the old partnership's election to become a limited liability partnership and shall continue to be a limited liability partnership until cancellation of such election.

(g) A limited partnership organizing under or subject to Chapter 9 of this title may become and continue as a limited liability partnership if its certificate of limited partnership specifies a name which complies with subsection (b) of Code Section 14-8-63 and otherwise complies with the name requirements of Code Section 14-9-102 and includes in its certificate of limited partnership a statement that the limited partnership is a limited liability partnership. Subject to any contrary agreement among the partners, an amendment to become a limited liability partnership by an existing limited partnership shall be approved by all of the partners. A limited partnership becomes a limited liability partnership at the time its certificate which complies with the foregoing provisions of this subsection becomes effective and continues to be a limited liability partnership until its certificate of limited partnership is amended to remove the statement that such limited partnership is a limited liability partnership and so that its name no longer contains the words "limited liability limited partnership," or the abbreviation "L.L.L.P.," or the designation "LLLP." The fact that the certificate of limited partnership of a limited partnership has been amended as set forth in this subsection is notice that the limited partnership is a limited liability partnership. If a limited partnership that is a limited liability partnership is dissolved and its business continued without liquidation of the limited partnership's affairs, the new limited partnership shall continue to be a limited liability partnership until its certificate of limited partnership is amended as provided in this subsection. A limited partner-

ship that becomes a limited liability partnership pursuant to this subsection shall otherwise remain subject to Chapter 9 of this title, including, without limitation, the annual registration provisions of Code Section 14-9-206.5. (Code 1981, § 14-8-62, enacted by Ga. L. 1995, p. 470, § 11; Ga. L. 1996, p. 787, § 3; Ga. L. 1997, p. 1380, § 1.)

**Law reviews.** — For article commenting on the 1997 amendment of this section, see 14 Georgia St. U. L. Rev. 57 (1997). For article, "Creating Limited Liability for a

General Partnership, LLP or LLLP?," see 4 Ga. St. B.J. 8 (1998). For article, "Choice of Entity with Emphasis on Estate Planning," see 6 Ga. St. B.J. 26 (2000).

#### **14-8-63. Name of limited liability partnership.**

(a) Except as provided in subsection (b) of this Code section, the name of a limited liability partnership shall contain the words "limited liability partnership," it being permitted to abbreviate the word "limited" as "ltd.," or the abbreviation "L.L.P." or the designation "LLP" as the last words or letters of its name.

(b) The name of a limited partnership that is a limited liability partnership shall contain the words "limited liability limited partnership," it being permitted to abbreviate the word "limited" as "ltd.," or the abbreviation "L.L.L.P." or the designation "LLLP" as the last words or letters of its name. (Code 1981, § 14-8-63, enacted by Ga. L. 1995, p. 470, § 11; Ga. L. 1996, p. 787, § 4.)

#### **14-8-64. Recognition of limited liability partnership outside state; internal affairs of partnerships governed by state law.**

(a) A partnership, including a limited liability partnership, formed and existing under this chapter, may conduct its business, carry on its operations, and have and exercise the powers granted by this chapter in any state, territory, district, or possession of the United States or in any foreign country. It is the intent of this state that the legal existence of limited liability partnerships be recognized outside the boundaries of this state.

(b) It is the policy of this state that the internal affairs of partnerships, including limited liability partnerships, formed and existing under this chapter, including the liability of partners for debts, obligations, and liabilities of partnerships, shall be subject to and governed by the laws of this state. (Code 1981, § 14-8-64, enacted by Ga. L. 1995, p. 470, § 11.)



# REVISED UNIFORM LIMITED PARTNERSHIP ACT

## CHAPTER 9

### REVISED UNIFORM LIMITED PARTNERSHIP ACT

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**Cross references.** — Limited partnerships existing before July 1, 1988, not electing to adopt the provisions of this chapter, 14-9A-1 et seq.

**Editor's notes.** — Ga. L. 1988, p. 1016, effective April 15, 1988, redesignated former Chapter 9 of Title 14 as Chapter 9A of that title and former Code sections 14-9-1 through 14-9-130 as Code sections 14-9A-1 through 14-9A-130, respectively.

**Administrative rules and regulations.** — Rules of General Applicability, Official Rules and Regulations of the State of Georgia, Office of Secretary of State, Limited Partnerships, Chapter 590-7-10.

**Limited Partnership** — Corporation Information Center, Official Rules and Regulations of the State of Georgia, Office of

Secretary of State, Limited Partnerships, Chapter 590-7-14.

**Law reviews.** — For article, "The New Georgia Limited Partnership Act," see 24 Ga. St. B.J. 168 (1988). For article, "An Applied Theory of Limited Partnership," see 37 Emory L.J. 835 (1988). For annual survey of law of business associations, see 43 Mercer L. Rev. 85 (1991). For annual survey article on business associations, see 45 Mercer L. Rev. 53 (1993). For survey article discussing developments in law of business associations for the period from June 1, 1999 through May 31, 2000, see 52 Mercer L. Rev. 95 (2000). For article, "Choice of Entity With Emphasis on Estate Planning," see 6 Ga. St. B.J. 26 (2000).

For note on 1995 amendments of sections in this chapter, see 12 Ga. St. U.L. Rev. 65



(1995). For note on 1999 amendments and enactments of sections in this chapter, see 16 Ga. St. U.L. Rev. 27 (1999).

## CODE REVISION COMMISSION NOTE ON COMMENTS

The comments appearing in this chapter have been prepared under the supervision of the Joint Committee on Partnership Law of the Real Property and Corporate and Banking Law Sections of the State Bar of Georgia and are included in the Official Code of Georgia Annotated at the request of these committees. Neither the General Assembly of Georgia nor the Code Revision Commission of the State of Georgia has participated in the drafting of these comments or has reviewed the comments for their content. The comments should not be considered to constitute a statement of legislative intention by the General Assembly of Georgia nor do they have the force of statutory law.

### NOTES AS TO COMMENTS

The comments in Chapter 9 of Title 14 were prepared for the Joint Committee on Partnership Law of the Real Property and Corporate and Banking Law Sections of the State Bar of Georgia by Larry E. Ribstein, Professor of Law, George Mason University School of Law. Professor Ribstein was Reporter to the Joint Committee.

References in the comments to "Section 14-9- " are to the Georgia Revised Uniform Limited Partnership Act. References in the comments to "Section 14-8- " are to the Uniform Partnership Act. References in the comments to "Section 14-9A- " are to provisions of the Uniform Limited Partnership Act formerly codified in Chapter 9 of Title 14, which now applies only to domestic limited partnerships formed prior to July 1, 1988 (see Section 14-9-1201). References in the comments to "Section 14-2- " are to the Georgia Business Corporation Code in effect until July 1, 1989.

References in the comments to the "Official RULPA" or "official version" are to the official version of the correspondingly numbered section of the Revised Uniform Limited Partnership Act, approved by the National Conference of Commissioners on Uniform State Laws in 1976 and amended in 1985, as set forth, together with the Commissioners' comments, in Volume 6, Uniform Laws Annotated, page 366 (West Supp. 1988).

References in the comments to Rules of the Secretary of State are to the Rules of Office of Secretary of State, Limited Partnerships, effective July 1, 1988.

## ARTICLE 1

### GENERAL PROVISIONS

#### 14-9-100. Short title.

This chapter may be cited as the "Georgia Revised Uniform Limited Partnership Act." (Code 1981, § 14-9-100, enacted by Ga. L. 1988, p. 1016, § 1.)

#### 14-9-101. Definitions.

As used in this chapter, unless the context of a provision of this chapter

otherwise requires or unless otherwise defined in the partnership agreement:

(1) "Certificate of limited partnership" means the certificate referred to in Code Section 14-9-201, and such certificate as amended or restated.

(2) "Contribution" means a contribution to the capital of a limited partnership authorized by Code Section 14-9-501.

(2.1) "Electronic transmission" or "electronically transmitted" means any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient.

(3) "Event of withdrawal of a general partner" means an event that causes a person to cease to be a general partner as provided in Code Section 14-9-602.

(4) "Foreign limited partnership" means a partnership formed under the laws of another state and having as partners one or more general partners and one or more limited partners.

(5) "General partner" means a person who:

(A) Becomes a general partner upon the formation of a limited partnership in accordance with Code Section 14-9-201 or becomes a general partner in accordance with Code Section 14-9-401, is named in the certificate of limited partnership as a general partner and has not ceased to be a general partner pursuant to Code Section 14-9-602; or

(B) Is a general partner of a foreign limited partnership in accordance with the law of the state of organization.

(6) "Interest" means interest at the legal rate that applies when the percentage rate is not named in the contract as provided by Code Section 7-4-2 or any successor statute.

(7) "Limited partner" means a person who:

(A) Has been admitted to a limited partnership as a limited partner in accordance with Code Section 14-9-301 and has not withdrawn as a limited partner pursuant to Code Section 14-9-603; or

(B) Is a limited partner in a foreign limited partnership in accordance with the law of the state of organization.

(8) "Limited partnership" and "domestic limited partnership" mean a partnership formed in accordance with Code Section 14-9-201 by two or more persons under the laws of this state and having one or more general partners and one or more limited partners.

(9) "Partner" means a limited partner or general partner of a limited partnership.



(10) "Partnership agreement" means an agreement, written or oral, of the partners of a limited partnership as to the affairs of the limited partnership and the conduct of its business.

(11) "Partnership interest" means a partner's share of the capital and profits and losses of a limited partnership, the right to receive distributions of partnership assets, and the right to receive any allocation of income, gain, loss, deduction, credit, or similar items.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity, or any person acting in a representative capacity.

(13) "State" means the District of Columbia or the Commonwealth of Puerto Rico or any state, territory, possession, or other jurisdiction of the United States. (Code 1981, § 14-9-101, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1999, p. 405, § 22.)

#### COMMENT

##### Note to Georgia Revised Uniform Partnership Act

This section sets forth definitions of terms used in the Georgia Revised Uniform Partnership Act.

##### Prior Georgia Law

Section 14-9A-2 merely defines "limited partnership."

##### Comparison With Official RULPA

The following definitions are either not in or substantially different from official RULPA:

Paragraphs (5) and (7) have been revised to better correlate with the sections on formation, admission and withdrawal. Also, paragraph (5) includes in the definition of "general partner" the general partner of a foreign limited partnership.

Paragraph (6) is the same as Section 14-8-2(5).

Paragraph (11) covers all of the partner's financial rights, and not merely his share in profits and losses and the right to receive distributions of partnership assets.

Paragraph (12) includes "any person acting in a representative capacity." It follows that where a general partner is such in his representative capacity, only the person represented — that is, the principal, trust or estate — is liable for partnership debts.

##### Cross-References

When a person is a general partner in a general partnership: §§ 14-8-6 and 14-8-7.  
When a person is a general partner by estoppel: § 14-8-16.

#### RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, §§ 1237 — 1239. C.J.S. — 68 C.J.S., Partnership, § 402.

**14-9-102. Partnership name.**

(a) The name of each limited partnership shall be as set forth in its certificate of limited partnership and:

(1) Must contain the words "limited partnership" or the abbreviation "L.P.";

(2) Must be distinguishable on the records of the Secretary of State from the name of any active limited partnership which is organized under this chapter or which has elected to adopt this chapter pursuant to subsection (b) of Code Section 14-9-1201; and any active foreign limited partnership having a certificate of authority in this state; and any corporation, professional corporation, or professional association on file with the Secretary of State pursuant to this title; and

(3) May not contain any words indicating that the business is organized other than as a limited partnership.

(b) If by reason of paragraph (1) or (3) of subsection (a) of this Code section a name would otherwise be unavailable to a limited partnership which files with the Secretary of State under the provisions of subsection (b) of Code Section 14-9-1201, such name shall nonetheless be available to such limited partnership, but such limited partnership shall be distinguished on the records of the Secretary of State by the Secretary of State's adding as necessary:

(1) "(L.P.)" to the name of the partnership on its records; and

(2) Adding to the name of such partnership on its records in parentheses the name of the county in which it was organized and, if necessary to distinguish multiple partnerships making such filings that were organized in the same county, by adding a numerical distinction to the county name. Such addition of a county name and numerical distinction to a limited partnership name by the Secretary of State shall be solely for the purpose of distinguishing limited partnerships on the files of the Secretary of State, shall not constitute a change in the name of the limited partnership, and shall have no effect whatsoever on the authority of the limited partnership to use its name.

(c) This chapter does not control the use of fictitious or trade names. Issuance of a name under this chapter means that the name is distinguishable for filing purposes on the records of the Secretary of State pursuant to paragraph (2) of subsection (a) of this Code section. Issuance of a limited partnership name does not affect the commercial availability of the name. (Code 1981, § 14-9-102, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 1; Ga. L. 1990, p. 257, § 34.)



**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

### COMMENT

#### Note to Georgia Revised Uniform Partnership Act

This section requires that the partnership name contain “limited partnership” or “l.p.”; not contain a limited partner’s name except in designated circumstances; be “distinguishable on the records of the Secretary of State” from the names of other firms listed on those records; and not contain words indicating that the business is organized other than as a limited partnership.

#### Prior Georgia Law

Section 14-9A-22 prohibits the inclusion of the surname of a limited partner.

#### Comparison With Official RULPA

Official RULPA prohibits the use of a name that is “deceptively similar to” the name of another corporation or limited partnership organized or qualified in the state. This test was rejected as too vague. The test adopted serves the principal concern from the standpoint of the limited partnership statute — facilitating the maintenance and distribution of records concerning limited liability firms. Note that the Section does not preclude liability under the law of unfair trade practices for use of a deceptively similar name.

Subsection (b) permits a limited partnership that was formed prior to July 1, 1988 and that elects to adopt this Act to adopt a name that would otherwise be unavailable to the partnership by adding as necessary “(L.P.)” or certain marks that would distinguish the name on the records of the Secretary of State.

#### Note to 1990 Amendment

The 1990 amendment deleted an extraneous clause at the end of subsection (a)(3).

#### Cross-Reference

Election by pre-existing partnership to adopt this Act: § 14-9-1201(b).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1254.

**C.J.S.** — 68 C.J.S., Partnership, § 415.

#### 14-9-103. Reservation of name.

(a) A person may apply to reserve a name for the purpose of forming a limited partnership by paying the fee specified in Code Section 14-9-1101. If the Secretary of State finds that the limited partnership name applied for is available, he or she shall reserve the name for the applicant’s use for 30 days or until the certificate of limited partnership is filed, whichever is sooner. If the Secretary of State finds that the name applied for is not distinguishable for filing purposes upon the records of the Secretary of State, he or she shall notify the applicant who may then submit another

reservation request within ten days of the date of the rejection notice without payment of an additional reservation fee.

(b) Upon expiration of a name reservation after 30 days without the filing of a certificate of limited partnership, the name may again be reserved for another 30 day period by the same or another applicant under the same guidelines of subsection (a) of this Code section.

(c) A person who has in effect a name reservation under subsection (a) of this Code section may transfer the reservation to another person by delivering to the Secretary of State a signed notice of the transfer that states the name and address of the transferee. (Code 1981, § 14-9-103, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 2; Ga. L. 1990, p. 257, § 35; Ga. L. 2003, p. 883, § 5.)

**The 2003 amendment**, effective July 1, 2003, substituted the present provisions of subsection (a) for the former provisions which read: "A person may apply to reserve the use of a limited partnership name under Code Section 14-9-102. If the Secretary of State finds that the limited partnership name applied for is available, he shall reserve the name for the applicant's use for a nonrenewable 90 day period."; added sub-

section (b); and redesignated former subsection (b) as present subsection (c).

**Administrative rules and regulations.** — Limited Partnership Name Reservation, Official Rules and Regulations of the State of Georgia, Office of Secretary of State, Limited Partnerships, Chapter 590-7-11.

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

## COMMENT

### Note to Georgia Revised Uniform Limited Partnership Act

This section permits any person to reserve the exclusive right to use of a name for 60 days.

### Prior Georgia Law

There was no comparable provision.

### Comparison With Official RULPA

The official version only permits reservation in designated situations, including by "a person intending to organize a limited partnership...." This test serves little purpose and introduces an element of uncertainty. The reservation under RULPA is for 120 day-periods, which can be renewed 60 days after expiration.

### Note to 1990 Amendment

The 1990 amendment extends the non-renewable name reservation period for limited partnerships from 60 to 90 days.

### Cross-References

Rules regarding limited partnership name: § 14-9-102. Special one-year name reservation for limited partnerships formed under prior law: § 14-9-1203. Secretary of State Rules on name reservations: 590-7-10.05; 590-7-11.



## RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, § 1255.

**14-9-104. Registered office and agents.**

(a) Each limited partnership shall continuously maintain in this state:

(1) A registered office which may, but need not, be a place of its business in this state; and

(2) A registered agent for service of process on the limited partnership. The address of the business office of the registered agent shall be the same as the address of the registered office referred to in paragraph (1) of this subsection.

(b) An agent for service of process must be an individual resident of this state, a domestic corporation, professional corporation, or limited liability company, or a foreign corporation or limited liability company authorized to transact business in this state.

(c) A limited partnership may change its registered office or its registered agent by filing an amendment to its annual registration setting forth:

(1) The name of the limited partnership;

(2) The address of its then registered office;

(3) If the address of its registered office is to be changed, the new address of the registered office;

(4) The name or names of its then registered agent or agents;

(5) If its registered agent or agents are to be changed, the name or names of its successor registered agent or agents and the written consent of each successor agent to his or her or its appointment; and

(6) That the address of its registered office and the address of the business office of its registered agent or agents, as changed, will be identical.

(d) If the Secretary of State finds that such statement conforms to subsection (a) of this Code section, he or she shall file such statement in his or her office; and upon such filing the change of address of the registered office or the change of the registered agent or agents, or both, as the case may be, shall become effective.

(e) Any registered agent of a limited partnership may resign as such agent upon filing a written notice thereof with the Secretary of State. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Secretary of State. There shall be attached

to such notice an affidavit of such agent, if an individual, or of an officer thereof, if a corporation, that at least ten days prior to the date of filing such notice a written notice of the agent's intention to resign was mailed or delivered to the limited partnership for which such agent is acting. Upon such resignation becoming effective, the address of the business office of the resigned registered agent shall no longer be the address of the registered office of the limited partnership.

(f) A registered agent may change his or her or its business address and the address of the registered office of any limited partnership of which he or she or it is a registered agent to another place within this state by filing a statement as required in subsection (c) of this Code section, except that it need be signed only by the registered agent and need not be responsive to paragraph (5) of subsection (c) of this Code section and must recite that a copy of the statement has been mailed or delivered to a representative or agent of each such limited partnership other than the notifying registered agent.

(g) Whenever a limited partnership shall fail to appoint or maintain a registered agent in this state, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such limited partnership upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him or her or with any other person or persons designated by the Secretary of State to receive such service a copy of such process, notice, or demand. The plaintiff or his or her attorney shall certify in writing to the Secretary of State that he or she has forwarded by registered mail or statutory overnight delivery such process, service, or demand to the last registered office or agent listed on the records of the Secretary of State, that service cannot be effected at such office, and that it therefore appears that the limited partnership has failed either to maintain a registered office or appoint a registered agent in this state. Any such service by certification to the Secretary of State shall be answerable in not more than 30 days. The provisions of this subsection may be used notwithstanding any inconsistent provisions of Chapter 11 of Title 9.

(h) The Secretary of State shall keep a record of all processes, notices, and demands served upon him or her under this Code section and shall record therein the time of such service and his or her action with reference thereto. (Code 1981, § 14-9-104, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 3; Ga. L. 1999, p. 405, § 23; Ga. L. 2000, p. 1589, § 4; Ga. L. 2002, p. 989, § 12.)

**The 2002 amendment**, effective July 1, 2002, substituted the present provisions of subsection (b) for the former provisions which read: "An agent for service of process

must be an individual resident of this state, a domestic corporation, or a foreign corporation authorized to do business in this state."

**Editor's notes.** — Ga. L. 2000, p. 1589,



§ 16, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

### JUDICIAL DECISIONS

**Substitute service authorized.** — Because there was proof that the registered agent could not with reasonable diligence be found at the registered office, the trial court abused its discretion in finding that substitute service under O.C.G.A. § 14-9-104(h) (now subsection (g)) was unauthorized. *McClendon v. 1152 Spring St. Associates-Georgia*, 225 Ga. App. 333, 484 S.E.2d 40 (1997).

**Alternative statutory service of process.** — O.C.G.A. § 14-9-104 does not purport to provide or identify the exclusive means of perfecting service of process on limited partnerships, which may also be accomplished via O.C.G.A. § 9-11-4(d)(2). *Northgate Village Apts. v. Smith*, 207 Ga. App. 479, 428 S.E.2d 381 (1993).

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section requires maintenance of a registered office and a registered agent for service, provides for change of registered office or agent, resignation or change of address of a registered agent and for substituted service on the Secretary of State for limited partnerships that fail to maintain a registered agent or when the registered agent cannot be found at the registered office.

#### Prior Georgia Law

There was no comparable provision.

#### Comparison With Official RULPA

The requirement of keeping records in the partnership office was deleted because partnership records need merely to be available and subject to inspection rather than kept at a particular place.

Procedures for change and resignation of the registered agent and for substituted service were added. These were adapted from corporate provisions, Sections 14-2-61 and 14-2-62. The provision for substitution of agents is adapted from Section 17-104(c) of the Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit. 6 Section 17-104(c) (Supp. 1986).

#### Cross-Reference

Partners' right to inspect certain records at the registered office: § 14-9-305.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1252.

#### 14-9-105. Records to be kept.

(a) The general partners shall cause the limited partnership to keep the following:

(1) A current list of the full name and last known business address of

each partner, separately identifying in alphabetical order the general partners and the limited partners;

(2) A copy of the certificate of limited partnership, all certificates of amendment thereto, and all certificates of merger filed in mergers of which the limited partnership was the surviving partnership, together with executed copies of any powers of attorney pursuant to which any certificate has been executed;

(3) Copies of the limited partnership's federal, state, and local income tax returns and reports, if any, for the four most recent years;

(4) Copies of any then effective written partnership agreements, merger agreements in connection with mergers of which the limited partnership was the surviving partnership, and of any annual financial statements of the limited partnership for the four most recent years; and

(5) Unless contained in a written partnership agreement, a writing or writings setting out:

(A) The cash and property contributed by each partner to the capital of the partnership; and

(B) The cash and property to be contributed by each partner to the capital of the partnership and terms upon which such contributions are to be made.

(b) The general partners shall make available records kept under this Code section in accordance with Code Section 14-9-305. (Code 1981, § 14-9-105, enacted by Ga. L. 1988, p. 1016, § 1.)

#### COMMENT

##### **Note to Georgia Revised Uniform Limited Partnership Act**

Requires the general partners to cause the limited partnership to keep certain records. This duty is consistent with the general partners' substantial management authority over the affairs of the partnership under Sections 14-9-302 and 14-9-403 and can be viewed as replacing the duty to put similar information in the certificate as required under prior law (Section 14-9A-20).

##### **Prior Georgia Law**

Section 14-9A-92 gives limited partners the right to have partnership books kept at the principal place of business.

##### **Comparison With Official RULPA**

The period for which the records must be kept is expanded to four years from three in order to ensure availability of the records for tax audits. Subsection (b) was changed to clarify that the duty to make records available is controlled by Section 14-9-305.

##### **Cross-Reference**

Duty to make records available to limited partners: § 14-9-305.



**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1252, 1253.

**14-9-106. Authorized activity; acquisition or conveyance of interest in real property.**

(a) A limited partnership may engage in any activity except to the extent provided by law or in the partnership agreement.

(b) Any estate in real property may be acquired in the name of a domestic limited partnership or of a foreign limited partnership (whether or not such foreign limited partnership has procured, or is required under the provisions of Code Section 14-9-902 to procure, a certificate of authority to transact business in this state), and title to any estate so acquired shall vest in the domestic or foreign limited partnership itself rather than in the partners individually. The specification of this power shall not be construed to limit any other power which such domestic or foreign limited partnership may possess.

(c) Instruments executed by a domestic or foreign limited partnership conveying an interest in real property located in this state, when signed on behalf of such limited partnership by a person purporting to be a general partner of such limited partnership, shall be presumed to have been duly authorized by and binding upon such limited partnership unless contrary limitations on the authority of the general partner are set forth in the certificate of limited partnership and a copy of the certificate of limited partnership certified by the Secretary of State is filed in the office of the clerk of the superior court of the county where the real property is located and recorded in the book kept by such clerk for statements of partnership pursuant to Code Section 14-8-10.1. (Code 1981, § 14-9-106, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

Subsection (a) provides that a limited partnership may engage in any activity permitted by non-partnership law or agreement. Subsection (b) clarifies that a domestic or foreign limited partnership can acquire any estate in real property in its name.

Subsection (c) provides for a presumption of authority of a person purporting to be a general partner in connection with a real property conveyance unless a contrary limitation on authority is set forth in the certificate of limited partnership and a copy of the certificate is filed in the county where the property is located. This provision will minimize any inconvenience in title searching that would otherwise be created in the shift from county to central filing of certificates.

**Prior Georgia Law**

Section 14-9A-21 specifies the businesses a limited partnership cannot engage in: Banking, insurance, railroad, trust, canal, navigation, express, and telegraph. Section

14-8-8(f), which applied to limited partnerships in the absence of a provision in the prior limited partnership statute, permits a partnership to acquire real property in its name. As to the statement of partnership under Section 14-8-10.1, see **Cross-References**.

#### **Comparison With Official RULPA**

Subsections (b) and (c) have been added.

#### **Cross-References**

Determination of ownership of partnership property: § 14-8-8. Conveyance of title to real property by a partnership: § 14-8-10. Filing of statement of partnership which includes such matters as authority of partners and which is binding against the partnership and, in real property transactions in county where statement is filed, in favor of the partnership: § 14-8-10.1. For some limitations on the right of partnerships and corporations to engage in certain businesses see O.C.G.A. § 12-6-55 (professional forestry); § 43-14-8 (electrical contracting, plumbing and conditioned air contracting); § 43-15-23 (professional engineer); § 43-18-3 (funeral director); § 43-23-14 (landscape architect); § 43-40-10 (real estate broker).

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1241, 1245.

**C.J.S.** — 68 C.J.S., Partnership, §§ 416, 428.

### **14-9-107. Business transactions of partner with partnership.**

Except as provided in the partnership agreement, a partner may lend money to and transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner. (Code 1981, § 14-9-107, enacted by Ga. L. 1988, p. 1016, § 1.)

#### **COMMENT**

##### **Note to Georgia Revised Uniform Limited Partnership Act**

This section permits a partner to lend money and transact other business with the limited partnership on the same basis as a non-partner, subject to the partnership agreement and other applicable law.

##### **Prior Georgia Law**

Section 14-9A-44 prohibits limited partner secured loans.

##### **Comparison With Official RULPA**

This section is the same as the official version.

##### **Cross-Reference**

Distributions to partners who are creditors: § 14-9-804(1).

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1308.



**14-9-108. Indemnification of partners or other persons; expansion, restriction, or elimination of partner's duties and liabilities in partnership agreement.**

(a) Subject to any limitations expressly set forth in the partnership agreement, a limited partnership may, and shall have the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever, provided that the partnership shall not indemnify any person:

(1) For intentional misconduct or a knowing violation of law; or

(2) For any transaction for which the person received a personal benefit in violation or breach of any provision of the partnership agreement.

This Code section shall govern limited partnerships to the exclusion of paragraph (2) of Code Section 14-8-18.

(b) To the extent that, at law or in equity, a partner has duties including but not limited to fiduciary duties and liabilities relating thereto to a limited partnership or another partner:

(1) The partner's duties and liabilities may be expanded, restricted, or eliminated by provisions in the partnership agreement; provided, however, that no such provision shall eliminate or limit the liability of a partner for intentional misconduct or a knowing violation of law or for any transaction for which the partner received a personal benefit in violation or breach of any provision of the partnership agreement; and

(2) The partner shall have no liability to the limited partnership or to any other partner for his or her good faith reliance on the provisions of the partnership agreement, including, without limitation, provisions thereof that relate to the scope of duties including but not limited to fiduciary duties of partners. (Code 1981, § 14-9-108, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1991, p. 1011, § 1; Ga. L. 1995, p. 470, § 12.)

**COMMENT**

**Note to Georgia Revised Uniform Limited Partnership Act**

The section empowers the partnership to indemnify partners and other persons to the extent set forth in the partnership agreement except for intentional misconduct, knowing violation of law, or for transactions in which the person received a personal benefit contrary to the partnership agreement. It applies to the exclusion of Section 14-8-18(2) pursuant to Section 14-9-1204.

Note that, in addition to indemnification from adjudicated liability, there is authority in other states for the proposition that the partnership agreement can limit a partner's duty to the partnership, even where the partner receives a personal benefit. See *Singer v. Singer*, 634 P. 2d 766 (Okla. App. 1981) (partnership opportunities); *Covalt v. High*, 100 N.M. 700, 675 P. 2d 999 (N.M.App. 1983), cert. denied 100 N.M. 631, 674 P. 2d 521 (1984) (self-dealing). This is consistent with Section 14-8-21, a general partnership

provision that applies to limited partnerships under Section 14-9-1204, which provides for liability of partners for profits derived by a partner "without the consent of the other partners." It follows a fortiori that the agreement could limit liability for unintentional conduct.

Even in the absence of an exculpatory provision or indemnification, there is authority against holding a general partner liable for ordinary negligence. See *Thomas v. Milfelt*, 222 S.W. 2d 359 (Mo.App. 1949) (partner only liable for losses caused by fraud, culpable negligence or bad faith). The general partners' personal liability to creditors serves as a significant constraint on general partner negligence and justifies according even greater deference to partner than to corporate director decisions.

#### **Prior Georgia Law**

There was no comparable provision in the limited partnership act, so Section 14-8-18(2) applied. That provision required, in the absence of contrary agreement, indemnification of a partner by the partnership "in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business or for the preservation of its business or property."

#### **Comparison With Official RULPA**

There is no comparable provision in the official version.

#### **Cross-References**

See above, under "Note to Georgia Revised Uniform Limited Partnership Act."

### **14-9-109. Evidence of filing.**

A certificate attached to a copy of a document or electronic transmission filed by the Secretary of State, bearing his or her signature, which may be in facsimile, and the printed or embossed seal of this state, or its electronic equivalent, is prima-facie evidence that the original document has been filed with the Secretary of State. (Code 1981, § 14-9-109, enacted by Ga. L. 1999, p. 405, § 24.)

## **ARTICLE 2**

### **FORMATION, AMENDMENT, CANCELLATION, MERGER**

**Administrative rules and regulations.** — Certificate of Limited Partnership, Official Rules and Regulations of the State of Georgia, Office of Secretary of State, Limited Partnerships, Chapter 590-7-12.

Certification of Documents, Official Rules and Regulations of the State of Georgia, Office of Secretary of State, Limited Partnerships, Chapter 590-7-15.

### **14-9-201. Certificate of limited partnership.**

(a) In order to form a limited partnership, a certificate of limited partnership must be executed and filed in the office of the Secretary of State. The certificate must set forth:

- (1) The name of the limited partnership;



(2) The address of the registered office and the name and address of the initial agent for service of process required to be maintained by Code Section 14-9-104;

(3) The name and the business address of each general partner; and

(4) Any other matters the general partners determine to include therein.

(b) A limited partnership exists from the time of the filing of the certificate of limited partnership in the office of the Secretary of State or from a later time or later time and date, not to exceed 90 days from the date of filing, specified in the certificate of limited partnership, to the time of cancellation pursuant to subsection (c) of Code Section 14-9-206. (Code 1981, § 14-9-201, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1994, p. 161, § 2; Ga. L. 1996, p. 787, § 5.)

#### COMMENT

##### Note to Georgia Revised Uniform Limited Partnership Act

This section provides for the formation of the limited partnership and specifies the contents of the certificate of limited partnership.

##### Prior Georgia Law

Section 14-9A-20 is different in several important respects. First, it required detailed disclosure concerning limited partners and their contributions, among other things. Second, it required filing of the certificate in all counties in which the partnership had places of business, rather than only with the Secretary of State. Third, the time of formation was left unclear by the provision in Section 14-9A-20(b) that the partnership was formed if "there has been substantial compliance in good faith with the requirements" of the section.

##### Comparison With Official RULPA

Subsection 14-9-201(a)(2) provides that the certificate shall include the name and address only of the initial agent for service because all changes are made pursuant to Section 14-9-104 by the filing of statements and not by amending the certificate.

Subsection (b) makes it clear that the limited partnership exists until, and only until, cancellation of the certificate. The business may then become a general partnership or some other form of business entity, depending on the application of statutory (e.g., Sections 14-8-6 and 14-8-7) and common law to the particular fact situation.

This subsection does not include RULPA's "substantial compliance" qualification because it added unnecessary uncertainty. Whether or not the certificate has been filed should be conclusive as to formation. There may be questions as to whether the certificate is so defective as not to constitute a "certificate of limited partnership," but these can be better resolved by the courts without an open ended "substantial compliance" qualification.

Note that RULPA Section 208, providing that the certificate is notice of certain matters but not others, was deleted as confusing because it does not specify to whom or under what circumstances the certificate is or is not notice.

##### Cross-References

Duty to keep record of partner contributions: § 14-9-105(a)(5). Presumption of authority rebutted by county filing of certificate: § 14-9-106(c). Cancellation of the

certificate: § 14-9-203. Execution of the certificate: §§ 14-9-204 and 14-9-205. Filing of the certificate: § 14-9-206. Secretary of State rules regarding certificate: 590-7-12.

**Law reviews.** — For article, "Creating Limited Liability for a General Partnership, LLP or LLLP?," see 4 Ga. St. B.J. 8 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1250, 1256, 1258-1265, 1268.

**C.J.S.** — 68 C.J.S., Partnership, §§ 408, 412.

### 14-9-202. Amendment of certificate.

(a) A certificate of limited partnership is amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate must set forth:

- (1) The name of the limited partnership;
- (2) The date of filing of the certificate of limited partnership;
- (3) The amendment to the certificate; and

(4) If the amendment is to become effective later than the time of filing, the effective date, or effective time and date, which may not be later than 90 days after the filing date of the amendment.

(b) A certificate of limited partnership may be amended at any time for any proper purpose the general partners determine. (Code 1981, § 14-9-202, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1996, p. 787, § 6; Ga. L. 1999, p. 405, § 25.)

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section specifies when and how the certificate of limited partnership may be amended.

#### Prior Georgia Law

Section 14-9A-25 requires amendment upon any change which would include, for example, admission of a limited partner. Section 14-9A-27 provides for liability for false statements in the certificate, including statements that become false after filing.

#### Comparison With Official RULPA

The act does not include the RULPA provisions in Sections 202 and 207 that required amendment to reflect changes and provided for liability for false statements. Deleting the duty to amend and liability for false statements is consistent with the reduced contents of the certificate. The most important information that still must be disclosed is the identity of the general partners. A person who is not listed in the certificate as a general partner is not within the definition of a "general partner" in Section 14-9-101(5), although he might be a partner by estoppel under Section 14-8-16.



**Cross-References**

Execution of certificate of amendment: §§ 14-9-204 and 14-9-205. Filing of certificate of amendment: § 14-9-206.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1270-1272. **C.J.S.** — 68 C.J.S., Partnership, § 413.

**14-9-203. Certificate of cancellation.**

A certificate of cancellation may be filed in the office of the Secretary of State when all debts, liabilities, and obligations of the limited partnership have been paid and discharged or reasonably adequate provision therefor has been made, and all of the remaining property and assets of the limited partnership have been distributed to the partners, or when there are no limited partners. Such certificate shall set forth:

- (1) The name of the limited partnership;
- (2) The date of filing of its certificate of limited partnership;
- (3) The basis permitted by this Code section for filing the certificate of cancellation;
- (4) If the cancellation is to become effective later than the date of filing, the effective date of cancellation or effective time and date, which may not be later than 90 days after the filing date of the cancellation; and
- (5) Any other information determined to be necessary by the general partners filing the certificate. (Code 1981, § 14-9-203, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1996, p. 787, § 7.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides for the time and method of cancelling the certificate of limited partnership.

**Prior Georgia Law**

Section 14-9A-25 requires cancellation when the partnership is dissolved or all limited partners cease to be such. Section 14-9A-26(b)-(e) provide for the method of cancellation.

**Comparison With Official RULPA**

The requirement of cancellation was deleted from RULPA. There will normally be little reason for a partnership to delay cancellation after the partnership has been wound up and little harm can result either to partners or third parties from such delay. It was also unclear what the remedy was for a breach of a duty to cancel.

The time of filing a certificate of cancellation is the conclusion of winding up rather than on dissolution as in RULPA. This reflects the continuation of the partnership after dissolution under Section 14-8-30, which applies to limited partnerships. Unlike

corporations, there is no need to announce dissolution and the beginning of winding up of a limited partnership because, as in a general partnership, creditors can pursue claims against the general partners even after the conclusion of winding up.

#### **Cross-References**

Filing of the certificate and when cancellation is effective: § 14-9-206. The effect of cancellation in terminating the existence of the partnership: § 14-9-201(b). Secretary of State rules regarding cancellation: 590-7-16-.02(1).

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1273, 1274.

#### **14-9-204. Execution of certificates.**

(a) Each certificate required by this article to be filed in the office of the Secretary of State must be executed, in such form as may be prescribed by the Secretary of State, in the following manner:

(1) An original certificate of limited partnership must be signed by all general partners;

(2) A certificate of amendment must be signed by at least one general partner and by each other general partner designated in the certificate as a new general partner;

(3) A certificate of cancellation must be signed by all general partners; and

(4) A certificate of merger must be executed by at least one general partner of any surviving limited partnership.

(b) Any person may sign a certificate by an attorney in fact, but a power of attorney to sign a certificate relating to the admission of a general partner must specifically describe the admission. (Code 1981, § 14-9-204, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 4; Ga. L. 1996, p. 787, § 8.)

#### **COMMENT**

##### **Note to Georgia Revised Uniform Limited Partnership Act**

This section prescribes the manner of execution of certificates of limited partnership, amendment, cancellation and merger.

##### **Prior Georgia Law**

Section 14-9A-26 requires that amendments be signed and sworn to by all members.

##### **Comparison With Official RULPA**

The criminal penalty for false execution was deleted from RULPA because of questions whether the penalty could be imposed without formal acknowledgement (see O.C.G.A. Section 16-10-71). Deletion of this penalty is consistent with elimination of penalties for erroneous certificates (see Comment to Section 14-9-202).



**Cross-References**

Informality of the partnership agreement does not affect validity of an instrument executed on behalf of the partnership by a partner: § 14-8-4(g). Execution by order of court: § 14-9-205. Filing of executed certificates: § 14-9-206.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1265-1267.

**C.J.S.** — 68 C.J.S., Partnership, § 408 et seq.

**14-9-205. Execution by judicial act.**

(a) If a person required by Code Section 14-9-204 to execute a certificate fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the superior court of the county where the registered office of the limited partnership is located to direct the execution of the certificate. If the court finds that it is proper for the certificate to be executed and that any person so designated has failed or refused to execute the certificate, it shall order the Secretary of State to record an appropriate certificate.

(b) The court shall assess the costs and expenses of such proceeding against the limited partnership, except that all or any part of such costs and expenses may be apportioned and assessed, as the court may determine, against any or all of the persons required by Code Section 14-9-204 to execute a certificate who failed or refused to do so if the court finds that such failure or refusal was arbitrary, vexatious, or otherwise not in good faith. (Code 1981, § 14-9-205, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides for execution of a certificate by order of court.

**Prior Georgia Law**

Section 14-9A-26(c)-(d) is similar to subsection (a).

**Comparison With Official RULPA**

Subsection (b) permitting assessment of costs and expenses has been added. It is derived from the Michigan Revised Uniform Limited Partnership Act, Mich. Stat. Ann. Section 20.1205 (Supp. 1988) and Section 14-2-251(g)(7) dealing with corporate appraisal rights.

**Cross-References**

Execution of certificates: § 14-9-204.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1275.

**14-9-206. Filing with Secretary of State.**

(a) A signed copy, and facsimile thereof, of the certificate of limited partnership and of any certificates of amendment, cancellation, or merger, or of any judicial decree of amendment, cancellation, or merger must be delivered to the Secretary of State; provided, however, that if the document is electronically transmitted, the electronic version of such person's name may be used in lieu of a signature. A person who executes a certificate as an agent or fiduciary need not exhibit evidence of his or her authority as a prerequisite to filing. Unless the Secretary of State finds that a certificate does not conform to law, upon receipt of all filing fees required by law he or she shall:

(1) Stamp or otherwise endorse his or her official title and the date and time of receipt on both the original and the facsimile copy;

(2) File the signed copy in his or her office; and

(3) Return the facsimile of the signed copy to the person who filed it or to his or her representative.

(b) Upon the later of the filing of a certificate of amendment pursuant to this Code section or the effective time, or effective date and time, of the amendment pursuant to paragraph (4) of subsection (a) of Code Section 14-9-202, or upon the recording pursuant to Code Section 14-9-205 of a certificate of amendment, the certificate of limited partnership is amended as set forth in the certificate of amendment.

(c) Upon the later of the filing of a certificate of cancellation pursuant to this Code section or the effective time or the effective date and time of the cancellation pursuant to paragraph (4) of Code Section 14-9-203, or upon the recording pursuant to Code Section 14-9-205 of a certificate of cancellation, the certificate of limited partnership is canceled.

(d) Upon the later of the filing of a certificate of merger pursuant to this Code section or the effective time or the effective date and time pursuant to paragraph (4) of subsection (b) of Code Section 14-9-206.1 of a certificate of merger, or upon the recording pursuant to Code Section 14-9-205 of a certificate of merger, the constituent entities named in the certificate are merged.

(e) Notwithstanding the provisions of this chapter, the Secretary of State may authorize the filing of documents by electronic transmission, following the provisions of Chapter 12 of Title 10, the "Georgia Electronic Records and Signatures Act," and the Secretary of State shall be authorized to promulgate such rules and regulations as are necessary to implement electronic filing procedures. (Code 1981, § 14-9-206, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1996, p. 787, § 9; Ga. L. 1999, p. 405, § 26.)



**COMMENT****Note to Georgia Revised Uniform Partnership Act**

This section provides for the method and effect of filing of certificates of limited partnership, amendment, cancellation and merger.

**Prior Georgia Law**

See Comment to Section 14-9-201.

**Comparison With Official RULPA**

This section is similar to the official version, except that it refers to "a signed copy, and facsimile thereof" as compared with "two signed copies" and "duplicate original" in RULPA.

**Cross-References**

Contents of certificates: §§ 14-9-201 (certificate of limited partnership), 14-9-202 (certificate of amendment), 14-9-203 (certificate of cancellation), 14-9-206.1 (certificate of merger). Execution of certificates: §§ 14-9-204, 14-9-205.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1268, 1269.

**C.J.S.** — 68 C.J.S., Partnership, § 412.

**14-9-206.1. Merger.**

(a) Pursuant to a written agreement, a domestic limited partnership may merge with one or more domestic or foreign limited partnerships, limited liability companies, or corporations. The agreement shall designate the surviving domestic or foreign limited partnership, domestic or foreign limited liability company, or domestic or foreign corporation. The agreement of merger may also set forth:

(1) The terms and conditions of the merger;

(2) The manner and basis of converting the interests in the constituent domestic or foreign limited partnerships, domestic or foreign limited liability companies, or domestic or foreign corporations into interests in the surviving domestic or foreign limited partnership, domestic or foreign limited liability company, or domestic or foreign corporation or, in whole or in part, into cash or other property; and

(3) The rights and, subject to Code Section 14-9-502, obligations of the partners of the surviving domestic limited partnership.

(b) The surviving entity shall file a certificate of merger with the Secretary of State on behalf of each domestic limited partnership that is a party to the merger. The certificate shall state:

(1) The name and state of domicile of each of the constituent entities;

(2) That an agreement of merger has been approved by the requisite action by each of the constituent entities;

(3) The name and state of domicile of the surviving partnership, limited liability company, or corporation;

(4) If the merger is to become effective later than the time of filing of the certificate of merger, the effective date or the effective time and date of the merger, which may not be later than 90 days after the filing; and

(5) If the surviving entity is a foreign limited partnership, foreign corporation, or foreign limited liability company without a certificate of authority to do business in this state, that the Secretary of State is appointed agent of the surviving limited partnership, foreign corporation, or foreign limited liability company on whom process in this state in any action, suit, or proceeding for the enforcement of an obligation of a domestic limited partnership constituent to the merger may be served and the address to which a copy of the process is to be mailed.

If the surviving entity is a domestic or foreign limited liability company, it shall also comply with the filing requirements of the laws of the state of its formation governing limited liability companies. If the surviving entity is a domestic or foreign corporation, it shall also comply with the filing requirements of the laws of the state of its incorporation governing corporations.

(c) On the effective date of the merger, each partnership that is not the surviving limited partnership in the merger is terminated.

(d) The certificate of merger filed pursuant to subsection (b) of this Code section shall have the effect of the certificate of cancellation for a domestic or registered foreign limited partnership that is not the surviving domestic or foreign limited partnership in the merger.

(e) On service on the Secretary of State pursuant to appointment under paragraph (5) of subsection (b) of this Code section, subsection (i) of Code Section 14-9-902.1 is applicable, except that the plaintiff in the action, suit, or proceeding shall certify to the Secretary of State that he or she has forwarded by registered mail or statutory overnight delivery such process, service, or demand to the address specified in the certificate of merger as required by paragraph (5) of subsection (b) of this Code section.

(f) When the certificate of merger required by subsection (b) of this Code section is effective, then for all purposes of the law of this state:

(1) The surviving entity shall thereupon and thereafter possess all of the rights, privileges, immunities, franchises, and powers of each of the merging domestic limited partnerships, and all property, real, personal, and mixed, and all debts due to any of those limited partnerships, as well as all other choses in action, and each and every other interest of or belonging to or due to each of the merged domestic limited partnerships shall be taken and deemed to be transferred to and vested in the surviving entity without further act or deed; and the title to any real



estate, or any interest therein, vested in any of the merged domestic limited partnerships shall not revert or be in any way impaired by reason of such merger;

(2) The surviving entity shall thereupon and thereafter be responsible and liable for all the liabilities and obligations of each of the merged domestic limited partnerships; and any claim existing or action or proceeding pending by or against any of such partnerships may be prosecuted as if such merger had not taken place, or such surviving entity may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such partnership shall be impaired by such merger;

(3) When a limited partnership merges with a corporation pursuant to this Code section, the effect of the merger shall be the same as if the limited partnership had been a corporation under the law governing the surviving corporation; and

(4) When a limited partnership merges with a limited liability company pursuant to this Code section, the effect of the merger shall be the same as if the limited partnership had been a limited liability company under the law governing the surviving limited liability company.

(g) A foreign corporation or foreign limited liability company authorized to transact business in this state that merges with and into a domestic limited partnership pursuant to this Code section and is not the surviving entity in such merger need not obtain a certificate of withdrawal from the Secretary of State. (Code 1981, § 14-9-206.1, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 5; Ga. L. 1993, p. 123, § 3; Ga. L. 1995, p. 470, § 13; Ga. L. 1996, p. 787, § 10; Ga. L. 2000, p. 1589, § 4; Ga. L. 2003, p. 140, § 14.)

**The 2003 amendment**, effective May 14, 2003, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraphs (b)(4) and (f)(1) through (f)(3).

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly,

provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

## COMMENT

### Notes to Georgia Revised Uniform Limited Partnership Act

Permits merger of limited partnerships with other limited partnerships and provides for method and effect of such mergers.

### Prior Georgia Law

There is no comparable provision.

### Comparison With Official RULPA

There is no provision in RULPA relating to mergers. This Section is similar to Section 17-211 of the Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit.6 Section 17-211 (Supp. 1986). Some of the language concerning the contents of the merger agreement is drawn from Section 14-2-210, and the provisions as to the effect of the merger are based on O.C.G.A. Section 14-2-216.

The Delaware statute provides for filing of a certificate of cancellation by the disappearing partnership instead of, as under Section 14-9-206.1(b), a certificate of merger by the surviving partnership. It is more likely that filing of the certificate will be neglected if it must be performed by the disappearing partnership than if the act must be performed by the surviving partnership.

### Cross-References

Execution of the merger certificate: § 14-9-204. Filing of the merger certificate: § 14-9-206. Voting on the merger and dissenters' rights provided for by the partnership agreement: §§ 14-9-302 and 14-9-404. Partners cannot be required to make additional contributions as a result of the merger without their consent: § 14-9-502.

### RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, § 1284.

### 14-9-206.2. Election to become limited partnership.

(a) A corporation, limited liability company, or general partnership may elect to become a limited partnership. Such election shall require:

(1) Compliance with Code Section 14-2-1109.1 in the case of a corporation;

(2) Approval of all of its members, or such other approval as may be sufficient under applicable law, in the case of a limited liability company; or

(3) The approval of all of its partners, or such other approval as may be sufficient under applicable law to authorize such election, in the case of a general partnership.

(b) Such election is made by delivery of a certificate of election to the Secretary of State for filing. The certificate shall set forth:

(1) The name of the corporation, limited liability company, or general partnership making the election;

(2) That the corporation, limited liability company, or general partnership elects to become a limited partnership;

(3) The effective date and time of such election if later than the date and time the certificate of election is filed;

(4) That the election has been approved as required by subsection (a) of this Code section;



(5) That filed with the certificate of election is a certificate of limited partnership that is in the form required by Code Section 14-9-201, that sets forth a name for the limited partnership that satisfies the requirements of Code Section 14-9-102, and that shall be the certificate of limited partnership of the limited partnership formed pursuant to such election unless and until modified in accordance with this chapter; and

(6) A statement that states:

(A) The manner and basis for converting the shares of the corporation, the membership interests of the members of the limited liability company, or the interests of the partners in the general partnership into interests as members of the limited partnership formed pursuant to such election; or

(B)(i) That a written partnership agreement has been entered into among the persons who will be the members of the limited partnership formed pursuant to such election;

(ii) That such partnership agreement will be effective immediately upon the effectiveness of such election; and

(iii) That such partnership agreement provides for the manner and basis of such conversion.

(c) Upon the election becoming effective the:

(1) Corporation, limited liability company, or general partnership shall become a limited partnership formed under this chapter by such election;

(2) Shares of the corporation, interests in the limited liability company, or the interests of the partners of the general partnership making the election shall be converted on the basis stated or referred to in the certificate of election in accordance with paragraph (6) of subsection (b) of this Code section;

(3) Certificate of limited partnership filed with the certificate of election shall be the certificate of limited partnership of the limited partnership formed pursuant to such election unless and until amended in accordance with this chapter;

(4) Articles of incorporation and bylaws of the corporation, articles of organization and operating agreement of the limited liability company, or partnership agreement and statement of partnership, if any, of the general partnership making the election shall be of no further force or effect;

(5) Limited partnership formed by such election shall thereupon and thereafter possess all of the rights, privileges, immunities, franchises, and powers of the corporation, limited liability company, or general partner-

ship making the election; and all property, real, personal, and mixed, and all debts due to such corporation, limited liability company, or general partnership, as well as all other choses in action, and each and every other interest of, belonging to, or due to the corporation, limited liability company, or general partnership shall be taken and deemed to be vested in the limited partnership formed by such election without further act or deed; and the title to any real estate, or any interest in real estate, vested in the corporation, limited liability company, or general partnership shall not revert or be in any way impaired by reason of such election; and

(6) Limited partnership formed by such election shall thereupon and thereafter be responsible and liable for all the liabilities and obligations of the corporation, limited liability company, or general partnership making the election, and any claim existing or action or proceeding pending by or against such corporation, limited liability company, or general partnership may be prosecuted as if such election had not become effective. Neither the rights of creditors nor any liens upon the property of the corporation, limited liability company, or general partnership shall be impaired by such election.

(d) A limited partnership formed by the foregoing election may file a copy of the foregoing election to become a limited partnership, certified by the Secretary of State, in the office of the clerk of the superior court of the county where any real property owned by such limited partnership is located and record such certified copy of the election in the books kept by such clerk for recordation of deeds in such county with the entity electing to become a limited partnership indexed as the grantor and the limited partnership indexed as the grantee. No real estate transfer tax under Code Section 48-6-1 shall be due with respect to the recordation of such election.

(e) The Secretary of State shall be authorized to promulgate such rules and charge such filing fees as are necessary to carry out the purpose of this Code section. (Code 1981, § 14-9-206.2, enacted by Ga. L. 1997, p. 1380, § 2; Ga. L. 1999, p. 827, § 1.)

**Editor's notes.** — There were no Code sections designated §§ 14-9-206.2 through 14-9-206.4 in the "Georgia Revised Uniform Limited Partnership Act" as enacted by Ga. L. 1988, p. 1016. However, in 1997, Code Section 14-9-206.2 was enacted by Ga. L.

1997, p. 1380, § 2 and, in 1999, Code Section 14-9-206.3 was enacted by Ga. L. 1999, p. 405, § 27.

**Law reviews.** — For article commenting on the enactment of this section, see 14 Georgia St. U. L. Rev. 57 (1997).

### 14-9-206.3. Articles of correction; effective date.

(a) A limited partnership may correct a document filed by the Secretary of State if the document:

- (1) Contains an incorrect statement; or



(2) Was defectively executed, attested, sealed, verified, or acknowledged.

(b) A document is corrected:

(1) By preparing articles of correction that:

(A) Describe the document, including its filing date;

(B) Specify the incorrect statement and the reason it is incorrect or the manner in which the execution was defective; and

(C) Correct the incorrect statement or defective execution; and

(2) By delivering the articles of correction to the Secretary of State for filing.

(c) Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed. (Code 1981, § 14-9-206.3, enacted by Ga. L. 1999, p. 405, § 27; Ga. L. 2002, p. 989, § 13.)

**The 2002 amendment**, effective July 1, 2002, deleted “, or attach a copy of it to the articles” following “filing date” at the end of subparagraph (b)(1)(A).

**Editor’s notes.** — There were no Code sections designated §§ 14-9-206.2 through 14-9-206.4 in the “Georgia Revised Uniform

Limited Partnership Act” as enacted by Ga. L. 1988, p. 1016. However, in 1997, Code Section 14-9-206.2 was enacted by Ga. L. 1997, p. 1380, § 2 and, in 1999, Code Section 14-9-206.3 was enacted by Ga. L. 1999, p. 405, § 27.

#### 14-9-206.4. Reserved.

**Editor’s notes.** — There were no Code sections designated §§ 14-9-206.2 through 14-9-206.4 in the “Georgia Revised Uniform Limited Partnership Act” as enacted by Ga. L. 1988, p. 1016. However, in 1997, Code

Section 14-9-206.2 was enacted by Ga. L. 1997, p. 1380, § 2 and, in 1999, Code Section 14-9-206.3 was enacted by Ga. L. 1999, p. 405, § 27.

#### 14-9-206.5. Annual registration.

(a) Each domestic limited partnership and each foreign limited partnership authorized to transact business in this state shall deliver to the Secretary of State for filing an annual registration that sets forth:

(1) The name of the limited partnership and the state under whose law it is organized;

(2) The street address and county of its registered office and the name of its registered agent at that office in this state;

(3) The mailing address of its principal office; and

(4) Any additional information that is necessary to enable the Secretary of State to carry out the provisions of this chapter.

(b) Information in the annual registration must be current as of the date the annual registration is executed on behalf of the limited partnership.

(c) The first annual registration must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the year following the calendar year in which a domestic limited partnership was organized or a foreign limited partnership was authorized to transact business. Subsequent annual registrations must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the following calendar years.

(d) If an annual registration does not contain the information required by this Code section, the Secretary of State shall promptly notify the reporting domestic or foreign limited partnership in writing and return the report to it for correction. If the report is corrected to contain the information required by this Code section and delivered to the Secretary of State within 30 days after the effective date of notice, it is deemed to be timely filed. (Code 1981, § 14-9-206.5, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 6.)

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

#### COMMENT

##### Note to Georgia Revised Uniform Limited Partnership Act

This section requires each domestic and foreign limited partnership authorized to transact business in the state to file an annual registration with the Secretary of State, and prescribes the contents of the registration.

##### Prior Georgia Law

There is no comparable provision.

##### Comparison With Official RULPA

There is no comparable provision in the official version.

##### Cross-References

Effect of failure to file for three consecutive years: § 14-9-206.7. Secretary of State rules regarding annual report: 590-7-13.

#### 14-9-206.6. Failure to file annual registration.

Reserved. Repealed by Ga. L. 1989, p. 931, § 7, effective July 1, 1989.

**Editor's notes.** — This Code section was enacted by Ga. L. 1988, p. 1016, § 1.



**14-9-206.7. Failure to file under chapter for three consecutive years.**

A limited partnership, domestic or foreign, which fails for three consecutive years to meet any filing requirement of this chapter may be placed on an inactive filing status in the automated data base of the Secretary of State and its name shall become available for reservation pursuant to Code Section 14-9-103. Such inactive status shall not affect any limitation on personal liability of a limited partner as provided by this chapter. (Code 1981, § 14-9-206.7, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides for the consequences of failing to file the annual registration for three consecutive years: The partnership may be placed on inactive filing status and its name shall become available for reservation.

**Prior Georgia Law**

There is no comparable provision.

**Comparison With Official RULPA**

There is no comparable provision in the official version.

**Cross-References**

Duty to file annual registration and contents of registration: § 14-9-206.5. Reservation of limited partnership name: § 14-9-103. Secretary of State rule regarding penalty for failure to file: 590-7-13-10.

**ARTICLE 3****LIMITED PARTNERS****14-9-301. Admission of limited partners.**

(a) Subject to subsection (b) of this Code section, a person may become a limited partner in a limited partnership:

(1) In the case of a person acquiring a partnership interest directly from the limited partnership, upon compliance with the partnership agreement or, if the partnership agreement does not so provide in writing, upon the written consent of all partners; and

(2) In the case of an assignee of a partnership interest, as provided in Code Section 14-9-704.

(b) The effective time of admission of a limited partner to a limited partnership shall be the later of:

(1) The date the limited partnership is formed; or

(2) The time provided in the partnership agreement, or if no such time is provided therein, then when the person's admission is reflected in

the records of the limited partnership. (Code 1981, § 14-9-301, enacted by Ga. L. 1988, p. 1016, § 1.)

#### COMMENT

##### Note to Georgia Revised Uniform Limited Partnership Act

Subsection (a) deals with the manner of admission of a limited partner into a limited partnership. In general, the agreement, or if not covered in the agreement, the consent of all partners, controls.

Subsection (b) deals with the time of admission of a limited partner. This subsection and the lead-in to subsection (a) clarify that a limited partner is not admitted prior to formation or the time stated in the partnership agreement or, if none, the records of the partnership.

Reading the two subsections together:

(1) One is admitted to a limited partnership on formation only if the partnership agreement so provides or all the partners consent.

(2) Even if the partnership agreement provides for admission or all the partners consent, one is not admitted into a limited partnership unless the partnership has been formed. This correlates Section 14-9-301 with Section 14-9-201.

(3) If the partnership has been formed without an agreement and the person has made a contribution purportedly in exchange for a partnership interest, that person is still not a limited partner in the limited partnership unless the records of the partnership reflect his admission. This serves to clarify the time of admission and prevent litigation over conflicting verbal or written statements.

##### Prior Georgia Law

Section 14-9A-23 permits admission of a limited partner only on amendment of the certificate.

##### Comparison With Official RULPA

The official version has been substantially rewritten for clarity and to emphasize the effect of the partnership agreement.

##### Cross-References

Formation of a limited partnership: § 14-9-201. Admission of general partner into limited partnership: § 14-9-401. Assignment of limited partnership interest: § 14-9-702. Admission of assignee as a limited partner: § 14-9-704.

#### RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, §§ 1289, 1292, 1293. C.J.S. — 68 C.J.S., Partnership, § 427.

### 14-9-302. Voting rights; additional rights, powers, and duties.

(a) The partnership agreement may grant:

(1) The right to vote to all or certain identified limited partners or specified classes or groups of the limited partners on a per capita or any other basis, separately or with all or any class or group of the limited



partners or the general partners, on all matters or on one or more specified matters; and

(2) Dissenters' rights to all or certain identified limited partners.

(b) A partnership agreement that grants a right to vote may set forth provisions relating to notice of the time, place, or purpose of any meeting at which any matter is to be voted on by any limited partners, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote. Subject to such provisions in the partnership agreement, the matters referred to in this subsection may be decided by the general partners.

(c) In addition to the relative rights, powers, and duties authorized by subsections (a) and (b) of this Code section, a partnership agreement may provide for classes or groups of limited partners to have such relative rights, powers, and duties as the partnership agreement may provide. (Code 1981, § 14-9-302, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 8.)

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

## COMMENT

### Note to Georgia Revised Uniform Limited Partnership Act

This section clarifies that the partners may provide in the partnership agreement for limited partner voting rights, rules for exercise of these voting rights, and classification of limited partners for voting and other purposes.

### Prior Georgia Law

Section 14-9A-70 provides for a limited partner veto power over certain general partner acts.

### Comparison With Official RULPA

Subsection (a) has been expanded from the official version to clarify that the agreement may provide for class voting and dissenters' rights. Subsections (b) and (c) have been added to the official version. Subsections (a) and (b) are based on Section 17-302 of the Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit. 6 Section 17-302 (Supp. 1986), except that subsection (b) clarifies that the general partners may set meeting rules if such rules are not otherwise set by the partnership agreement.

### Cross-References

Allocation of financial items among partners: § 14-9-503.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1279, 1290.

**C.J.S.** — 68 C.J.S., Partnership, §§ 422, 424.

**14-9-303. Liability.**

A limited partner is not liable for the obligations of a limited partnership by reason of being a limited partner and does not become so by participating in the management or control of the business. (Code 1981, § 14-9-303, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This Section eliminates the rule that a limited partner is liable as a general partner if he takes part in control of the partnership.

The following is a summary of the reasons for eliminating the "control" rule:

(1) The control rule has, over the years, been greatly watered down, so that in its current version in RULPA there is no liability without creditor reliance and a broad safe harbor as to what constitutes control.

(2) Even in a watered down form, the control rule leaves some uncertainty as to liability of limited partners, and therefore operates as an important disincentive to limited partnership investments. In particular, many of the "safe harbor" categories of non-control acts are open to interpretation.

(3) Even without a control rule, third parties are protected if (despite their ability to check the certificate) they are misled by a limited partner's participation in control into believing that he is a general partner. Thus, a limited partner may be liable on estoppel (see Section 14-8-16) or fraud grounds, or on general equitable grounds under a "veil-piercing" theory. Fraud liability may be imposed, for example, if the limited partner's name is used in the name of the partnership in violation of Section 14-9-102. This Section only eliminates liability imposed solely because a limited partner participates, as such, in control of the business.

(4) The control rule is not effective in fulfilling the objective of ensuring that only those with personal liability, and thus a strong incentive to be careful, will manage the business. General partners can always incorporate or delegate control to individuals other than limited partners. The control rule may actually serve to weaken the quality of management since the risk of liability for participation in control deters limited partners from monitoring the generals. If third party creditors want a limitation on partner participation in control, Section 14-9-303 does not prevent third parties from entering into agreements, similar to loan covenants, that provide for certain rights if the limited partners participate in control. Finally, it should be noted that RULPA Section 303 does not protect third parties who are misled other than by relying on a limited partner's participation in control.

**Prior Georgia Law**

Section 14-9A-41 provides that a limited partner is liable as a general if he "takes part in the control of the business."

**Comparison With Official RULPA**

The official version provides for liability of limited partners who participate in control to creditors who transact business reasonably believing on the basis of the limited's conduct that he is a general partner. A number of activities are specified as not constituting participation in control. For further discussion of the RULPA provisions, see Note to Georgia Revised Uniform Limited Partnership Act.



**Cross-References**

Partnership-by-estoppel liability: § 14-8-16. Liability of limited partner to perform contribution obligation: § 14-9-502.

**JUDICIAL DECISIONS**

Cited in *Antonic Rigging & Erecting of Missouri, Inc. v. Foundry E. Ltd. Partnership*, 773 F. Supp. 420 (S.D. Ga. 1991).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1353, 1365-1373.

**C.J.S.** — 68 C.J.S., Partnership, § 431.

**ALR.** — Liability of limited partner arising

from taking part in control of business under Uniform Limited Partnership Act, 79 ALR4th 427.

**14-9-304. Person erroneously believing himself limited partner.**

(a) Except as provided in subsection (b) of this Code section, and, as between the parties to the business enterprise, except as provided in their agreement, a person who makes a contribution to a business enterprise and erroneously believes that he has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any right of a limited partner, if, on ascertaining the mistake, he:

(1) Causes an appropriate certificate of limited partnership or a certificate of amendment to be executed and filed in accordance with Code Sections 14-9-204 through 14-9-206; or

(2) Files or causes to be filed with the Secretary of State in accordance with the procedures contained in subsection (a) of Code Section 14-9-206 a writing entitled "Filing Pursuant to Paragraph (2) of Subsection (a) of Code Section 14-9-304 of the Official Code of Georgia Annotated" that sets forth:

(A) The name of the limited partnership;

(B) The name and mailing address of the person signing the writing;

(C) That the person signing the writing acquired a limited partnership interest in the partnership;

(D) That the person signing the writing has done one or both of the following:

(i) Requested a general partner of the limited partnership to file an accurate certificate of limited partnership required by this chapter;

(ii) Instituted a proceeding pursuant to Code Section 14-9-205, which proceeding has not been concluded; and

(E) That the writing is being filed pursuant to paragraph (2) of subsection (a) of this Code section, and that the person signing the writing is claiming that he is not a general partner of the limited partnership named in the writing; or

(3) Files or causes to be filed with the Secretary of State in accordance with the procedures contained in subsection (a) of Code Section 14-9-206 a writing entitled "Filing Pursuant to Paragraph (3) of Subsection (a) of Code Section 14-9-304 of the Official Code of Georgia Annotated" that sets forth the information described in subparagraphs (A) through (C) of paragraph (2) of this subsection and the following additional information:

(A) That the person signing the writing has renounced future equity participation in the enterprise; and

(B) That the writing is being filed pursuant to this paragraph, and that the person signing the writing is claiming status as a limited partner of the enterprise for the period including and prior to the filing of the certificate pursuant to this subsection.

(b) A person who makes a contribution of the kind described in subsection (a) is liable as a general partner, irrespective of whether the enterprise is a general partnership, to any third party who transacts business with the enterprise prior to the occurrence of the earliest of the events referred to in subsection (a) of this Code section:

(1) If the contributor knew either that no certificate of limited partnership had been filed or that the certificate inaccurately referred to the contributor as a general partner; and

(2) If the third party reasonably believed that the contributor was a general partner at the time of the transaction and extended credit to the partnership in reasonable reliance on the credit of the contributor.

(c) More than one party claiming limited partnership status under this Code section may sign the writing to be filed pursuant to subsection (a) of this Code section. (Code 1981, § 14-9-304, enacted by Ga. L. 1988, p. 1016, § 1.)

**Code Commission notes.** — Pursuant to 14-9-204" in division (a)(2)(D)(ii) and "subsection (a)" was substituted for "subsection 14-9-205" was substituted for "Code Section (b)" in subsection (c).

#### COMMENT

##### Note to Georgia Revised Uniform Limited Partnership Act

This section specifies how a person who erroneously believes that he is a limited partner can avoid being held liable as a general partner.



### Prior Georgia Law

Section 14-9A-43 provides that a limited partner who is mistaken as to his status may avoid general partner liability by renouncing his interest in profits or other income on ascertaining his mistake. This section does not specify how to renunciate or whether the renouncing partner is liable to pre-renunciation creditors.

### Comparison With Official RULPA

This section is extensively revised from the official version.

Subsections (a)(2) and (3) are derived with some changes from Section 3.04 of the Texas Uniform Limited Partnership Act, Tex. Rev. Civ. Stat. Ann. Art. 6132a-1, Section 3.04 (Supp. 1988). These subsections permit the erroneous limited partner to eliminate the risk of personal liability immediately instead of having to withdraw from the partnership or wait for a general partner to execute a correct certificate or for the conclusion of a judicial execution proceeding. If, prior to the acts in subsection (a)(2) or (3), the erroneous partner knew (in contrast to "knew or should have known" as in RULPA) of the error, there may be liability as set forth in subsection (b).

Subsection (b) is derived with some changes from Section 17-304 of the Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit. 6, Section 17-304 (Supp. 1986), as well as the Texas provision cited above. It clarifies that the erroneous partner is liable to creditors who extended credit prior to the cure or withdrawal pursuant to subsection (a) only if the erroneous partner knowingly failed to act earlier and only if the third party not only believed that the erroneous partner was a general partner, but acted in reliance on that belief.

Language has been added to subsection (a) clarifying that rights inter se are governed by the parties' agreement rather than by this section.

Language has also been added to subsection (b) clarifying that the liability imposed under this section is independent of a determination of the existence of a general partnership under Sections 14-8-6 and 14-8-7. This approach serves to penalize those who knowingly permit third parties to be misled into believing that a business enterprise is an unlimited liability association.

### Cross-References

Determination of existence of general partnership: §§ 14-8-6 and 14-8-7. Execution of a certificate by judicial proceeding: § 14-9-205. The rights of a partner who renounces future equity participation by withdrawing: § 14-9-603.

### RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, §§ 1348-1352. C.J.S. — 68 C.J.S., Partnership, § 432.

### 14-9-305. Inspection of partnership records; information.

(a) Subject to such reasonable procedural standards as may be set forth in the partnership agreement or otherwise established by the general partners, a limited partner may, for any purpose reasonably related to the limited partner's interest as a limited partner:

(1) Upon his reasonable request during ordinary business hours inspect at the registered office of the limited partnership and copy at his

expense any partnership record required to be maintained by Code Section 14-9-105;

(2) Upon his reasonable request during ordinary business hours inspect and copy at his expense other partnership books and records of account; and

(3) Obtain from the general partners from time to time upon reasonable request:

(A) True information to such extent and in such form as is reasonably related to such limited partner's interest as a limited partner, regarding the state of the business and financial condition of the limited partnership;

(B) Promptly after becoming available, a copy of the limited partnership's federal, state, and local income tax returns for each year; and

(C) Other information regarding the affairs of the limited partnership as is just and reasonable; provided, however, that a general partner shall have the right to keep confidential from limited partners for such period of time as the general partner deems reasonable, any information which the general partner reasonably believes to be in the nature of trade secrets or other information, the disclosure of which the general partner in good faith believes is not in the best interests of the limited partnership or could damage the limited partnership or its business or which the limited partnership is required by law or by agreement with a third party to keep confidential.

(b) If the limited partnership or a partner or agent of the limited partnership refuses to permit the inspection authorized by subsection (a) of this Code section, the limited partner demanding inspection may apply to the superior court for the county in which the registered office of the limited partnership is located, upon such notice as the court may require, for an order directing the limited partnership, its partners, or agent to show cause why an order permitting such inspection by the applicant should not be granted. The court shall hear the parties summarily, by affidavit or otherwise, and if the limited partnership fails to establish that the applicant is not entitled to such inspection, the court shall grant an order permitting such inspection, subject to any limitations which the court may prescribe, and grant such other relief, including costs and reasonable attorneys' fees, as the court may deem just and proper. (Code 1981, § 14-9-305, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 9.)

#### COMMENT

##### **Note to Georgia Revised Uniform Limited Partnership Act**

This section sets forth a limited partner's right to obtain information from and inspect documents of the partnership, and the means of enforcing this right.



**Prior Georgia Law**

Section 14-9A-42 provides for a right to "full information" on demand and to inspect and copy partnership books.

**Comparison With Official RULPA**

Subsection (a) goes beyond RULPA in clarifying that the inspection right is subject to a proper purpose limitation and to reasonable agreed restrictions as to inspection procedures. This language is based on Section 17-305 of the Delaware Uniform Limited Partnership Act, Del. Code Ann. tit. 6 Section 17-305 (Supp. 1986). Subsection (a) also departs from RULPA in distinguishing between the records required to be maintained by Section 14-9-105, which must be made available at the partnership's registered office, and other accounting records, which need not be made available at any particular place. Note that there is no duty to keep records at any particular place. Also, subsection (a)(2) is limited to accounting records, so that a limited partner has no right under this provision to roam at will through the partnership's documents (although he may have such a right in connection with derivative or accounting litigation). Finally, subsection (a) clarifies that the inspecting partner must bear the expenses of copying.

Subsection (b) is based on Section 14-2-122(d). An important difference from that provision is that the burden of proof is on the resisting partnership.

**Cross-References**

Duty to maintain registered office: § 14-9-104. Duty to keep certain information: § 14-9-105. Duty to disclose address of initial registered office in certificate: § 14-9-201.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1347. **C.J.S.** — 68 C.J.S., Partnership, § 424.

**ARTICLE 4****GENERAL PARTNERS****14-9-401. Admission of additional general partners.**

After the formation of a limited partnership, additional general partners may be admitted as provided in writing in the partnership agreement or, if the partnership agreement does not provide in writing for the admission of additional general partners, with the written consent of all partners. (Code 1981, § 14-9-401, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Partnership Act**

This section specifies how additional general partners may be admitted to a limited partnership after the formation of the partnership.

**Prior Georgia Law**

Because there was no relevant provision in the limited partnership statute, general partnership law applied. Section 14-8-18(g) gives the partners the right to veto admission of general partners into a general partnership, subject to contrary provision

in the partnership agreement. Section 14-8-31 provides for admission of partners into a general partnership without dissolution.

#### **Comparison With Official RULPA**

The section refers to formation of the partnership rather than, as in RULPA, to the filing of the certificate, to reflect the fact that a limited partnership may be formed under Section 14-9-201(b) at a time specified in the certificate rather than on filing of the certificate.

#### **Cross-References**

Definition of "general partner" to include one who becomes a general partner in accordance with § 14-9-201 or § 14-9-401: § 14-9-101(5). Formation of limited partnership: § 14-9-201. Admission of limited partners into limited partnership: § 14-9-301. When general partner ceases to be such: § 14-9-602. Admission of general partner not a listed cause of dissolution: § 14-9-801.

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1292, 1293.

#### **14-9-402. Reserved.**

**Editor's notes.** — There was no Code section designated § 14-9-402 in the Georgia Revised Uniform Limited Partnership Act" as enacted by Ga. L. 1988, p. 1016.

#### **14-9-403. Rights, powers, and liabilities generally.**

(a) Except as otherwise provided in this chapter or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of and liabilities to the partnership and to the other partners of a partner in a partnership without limited partners.

(b) Except as otherwise provided in this chapter, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners.

(c) If a limited partnership is a limited liability partnership under Chapter 8 of this title, then, except as otherwise provided in this chapter or in the partnership agreement, the liabilities of each general partner of such limited partnership shall be determined by reference to the provisions of Chapter 8 of this title regarding limited liability partnerships. (Code 1981, § 14-9-403, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1996, p. 787, § 11.)

### **COMMENT**

#### **Note to Georgia Revised Uniform Limited Partnership Act**

This section provides that a general partner in a limited partnership has the same rights and powers and is subject to the same restrictions and liabilities as a general



partner in a general partnership unless otherwise provided in this chapter or (except as to liabilities to persons other than partners) in the partnership agreement.

#### **Prior Georgia Law**

Section 14-9A-70 provides that general partners in a limited partnership have the same rights as those in a general partnership except that they cannot take certain steps enumerated in the statute (such as an act that would make it impossible to carry on ordinary business) without the consent of all limited partners.

#### **Comparison With Official RULPA**

This Section is the same in effect as RULPA except that, for purposes of clarity, it places in separate subsections the provision relating to liabilities to third parties, which are not subject to contrary provision in the partnership agreement, and the provision relating to all other rights, liabilities and restrictions of general partners, which are.

#### **Cross-References**

The following provisions of the Uniform Partnership Act as to rights, powers and liabilities of general partners apply to general partners in a limited partnership. Power of general partner to act as agent of partnership: § 14-8-9 et seq. General partner's liability to creditors: § 14-8-15. Fiduciary duties of partners: § 14-8-21. Partner's right to accounting: §§ 14-8-22 and 14-8-43. Property rights of general partner: § 14-8-24 et seq. Effect of dissolution on partner's liabilities: § 14-8-36. Rescission for fraud: § 14-8-39. As to general partner voting rights, see Comment to § 14-9-405.

The following provisions of this chapter as to rights, powers and liabilities of a general partner supersede analogous provisions in the Uniform Partnership Act. Agreements as to voting rights of general partners in limited partnership and classification other than as to voting: § 14-9-405. Allocation of financial items: § 14-9-503. Distribution on withdrawal: § 14-9-604. Assignment of partnership interests: §§ 14-9-702, 14-9-704. Creditor's right to charge partnership interest: § 14-9-703. Winding up of partnership: § 14-9-803. Distribution on winding up: § 14-9-804.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1320, 1323, 1326, 1329, 1332.

**C.J.S.** — 68 C.J.S., Partnership, § 422 et seq.

#### **14-9-404. Rights, powers, and liabilities of general partner who is also limited partner.**

A person may be both a general partner and a limited partner in a limited partnership if his interests are separately designated in the partnership agreement. A person who is both a general partner and a limited partner has the rights and powers and is subject to the restrictions and liabilities of a general partner and, except as provided in the partnership agreement, also has the rights and powers and is subject to the restrictions and liabilities, if any, of a limited partner to the extent of his participation in the partnership as a limited partner. (Code 1981, § 14-9-404, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section permits a person to be both a general and a limited partner in a limited partnership and provides rules governing this dual status.

**Prior Georgia Law**

Section 14-9A-24 is similar.

**Comparison With Official RULPA**

This section is the same as the official version.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1321.

**C.J.S.** — 68 C.J.S., Partnership, § 426.

**14-9-405. Voting rights; additional rights, powers, and duties.****(a) The partnership agreement may grant:**

(1) The right to vote to all or certain identified general partners or specified classes or groups of the general partners on a per capita or any other basis, separately or with all or any class or group of the limited partners or the general partners, on all matters or on one or more specified matters; and

(2) Dissenters' rights to all or certain identified general partners.

(b) A partnership agreement that grants a right to vote may set forth provisions relating to notice of the time, place, or purpose of any meeting at which any matter is to be voted on by any general partners, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote. Subject to such provisions in the partnership agreement, the matters referred to in this subsection may be decided by the general partners.

(c) In addition to the relative rights, powers, and duties authorized by subsections (a) and (b) of this Code section and by Code Section 14-9-504, a partnership agreement may provide for classes or groups of general partners having such relative rights, powers, and duties as the partnership agreement may provide. (Code 1981, § 14-9-405, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 10.)

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).



**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section permits the partners to provide in the partnership agreement for voting and dissenters' rights of general partners, the manner of exercising voting rights, and for classification of partners other than with regard to voting.

**Prior Georgia Law**

As to Section 14-9A-70, see the Comment to Section 403.

**Comparison With Official RULPA**

This section expands the official version in the same way that Section 14-9-302, dealing with the rights of limited partners, changes the official version of that section.

**Cross-References**

Section 14-8-18(5) provides that all partners in a general partnership have equal rights to participate in the management of a general partnership. Section 14-8-18(7) provides that no person can become a general partner without the consent of all the partners. Section 14-8-18(8) provides that ordinary matters are settled in a general partnership by majority vote, and other matters by unanimous vote. Voting rights and classification of limited partners: § 14-9-302. As to general partners, in the absence of contrary agreement, the default provisions of the Uniform Partnership Act control pursuant to Section 14-9-1204.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1279, 1290, 1322, 1323. **C.J.S.** — 68 C.J.S., Partnership, § 422.

**ARTICLE 5****FINANCE****14-9-501. Form of contribution.**

The contribution of a partner to the capital of a limited partnership may be in such form as is provided in the partnership agreement, including, unless otherwise provided therein but without limitation, cash, property, and services rendered, and may be made in such manner as is provided in the partnership agreement, including, unless otherwise provided therein but without limitation, by delivery of a promissory note or other obligation to contribute cash or property or to perform services. (Code 1981, § 14-9-501, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section permits contributions to the capital of a limited partnership in any form and manner provided in the partnership agreement.

**Prior Georgia Law**

Section 14-9A-40 requires contributions by "cash or other property but not services."

**Comparison With Official RULPA**

The section is basically similar to the official version, but makes it even clearer that a capital contribution can be in any form, and can be made in any manner, provided in the partnership agreement.

**Cross-References**

Definition of "contribution" to include only capital contributions: § 14-9-101(2).  
Enforceability and reduction or elimination of capital contribution obligations: § 14-9-502.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1354.      **C.J.S.** — 68 C.J.S., Partnership, § 409.

**14-9-502. Promise to contribute; liability for contribution.**

(a) Notwithstanding any other provision of law regarding unwritten contracts, including but not limited to Code Section 13-5-31, a promise by a person to make a contribution to the capital of a limited partnership is not enforceable unless set out in a writing signed by the person or his attorney in fact.

(b) Except as provided in the partnership agreement:

(1) A partner is obligated to the limited partnership to perform an otherwise enforceable promise to contribute cash or property or to perform services and to pay interest on the agreed contribution from the date the contribution is due; and

(2) This obligation exists even if the partner is unable to perform because of death, disability, or any other reason.

(c) Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution to the capital of the partnership may be reduced or eliminated only by consent of all partners. (Code 1981, § 14-9-502, enacted by Ga. L. 1988, p. 1016, § 1.)

**Law reviews.** — For survey article on business associations, see 44 Mercer L. Rev. 67 (1992).

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides for enforceability and reduction or elimination of contribution obligations. The section in effect provides for its own Statute of Frauds that is not subject to the exceptions of the general Statute, particularly the part performance provision specifically referenced. Subsection (a) clarifies that a person cannot be required to make a contribution, including by amendment of the agreement or merger, unless he has specifically promised to do so.



**Prior Georgia Law**

Section 14-9A-48 provides for liability to the partnership for the difference between the actual contribution and that stated in the certificate, and that a compromise of this liability does not affect a relying creditor.

**Comparison With Official RULPA**

The Section changes the official version by making agreed reduction or elimination of the contribution effective even as against creditors who purportedly relied on the contribution. Since it is highly unlikely that a creditor will ever be able to establish that he extended credit in reliance on a particular contribution, particularly since contributions are no longer required to be stated in the certificate, permitting creditor recovery in this situation has little practical benefit. There is no equivalent rule in the corporate statute. Such a rule has, if anything, even less of a place in a limited partnership statute since the general partners are personally liable in all events and thus will not make improvident compromises.

The section also differs from the official version in requiring payment of interest on agreed contribution obligations. Interest is defined in Section 14-9-101(6) to refer to the legal rate where the rate is not named in the contract. The interest requirement reflects the fact that the contributor begins earning benefits on the contribution from the time of contributing the obligation. It is also consistent with Section 14-9A-48 in the prior law, which provides that the defaulting partner holds non-contributed property as a trustee.

There is no requirement as in the official version that a partner who fails to contribute property or services must contribute cash equal to the value of the contribution stated in the partnership records. The measure of damages will be determined under conventional breach of contract rules. As stated above, no creditor reliance interest justifies emphasis on the stated value of partner contributions.

**Cross-References**

Legal rate of interest where not provided for by contract: § Section 7-4-2. Form and manner of contribution: § 14-9-501. Definition of "contribution": § 14-9-101(2).

**JUDICIAL DECISIONS**

**Purpose.** — O.C.G.A. § 14-9-502 was intended to bar creditor recovery from limited partners. *Antonic Rigging & Erecting of Missouri, Inc. v. Foundry E. Ltd. Partnership*, 773 F. Supp. 420 (S.D. Ga. 1991).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1355, 1357-1360. **C.J.S.** — 68 C.J.S., Partnership, § 424.

**14-9-503. Allocations among partners.**

All deductions, credits, income, gains, losses, and distributions of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, all allocations shall be made on the basis of the amount, as stated in the partnership records required to be kept pursuant to Code Section 14-9-105, of the contributions made by each partner to the extent that they have been

received by the partnership and have not been returned. (Code 1981, § 14-9-503, enacted by Ga. L. 1988, p. 1016, § 1.)

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section provides for the method of allocation of financial items in the limited partnership. Because this section explicitly deals with allocation of income, under Section 14-9-1204 it supersedes Section 14-8-18(1), (3), (4) and (6) dealing with interest and remuneration for services. These provisions are, in all events, consistent with Section 14-9-503 because they state that, in the absence of contrary agreement, a partner has no right to an allocation of income other than pro rata based on his contribution.

#### Prior Georgia Law

Section 14-9A-45 provides for equal sharing as to return of contributions or compensation by way of income, subject to contrary agreement.

#### Comparison With Official RULPA

This section covers all financial items that are allocated in a partnership, including distributions, thus eliminating the necessity of a separate section for the latter as in RULPA. The effect of eliminating the separate coverage of distributions is that, in the rare situation in which the agreement provides for allocation only of items other than distributions, distributions will be allocated according to unreturned contributions rather than according to the agreed allocation as provided in RULPA.

#### Cross-References

Definition of "contribution": § 14-9-101(2). Duty to keep records reflecting contributions: § 14-9-105. Enforceability, reduction and elimination of contribution obligations: § 14-9-502. Form and manner of capital contributions: § 14-9-501. Limited partners not liable to third parties for obligations of partnership (and so not liable because of negative account balance resulting from allocation of losses): § 14-9-303.

### RESEARCH REFERENCES

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| <p><b>Am. Jur. 2d.</b> — 59A Am. Jur. 2d, Partnership, §§ 1279, 1287, 1288, 1314-1318.</p> <p><b>C.J.S.</b> — 68 C.J.S., Partnership, § 440.</p> <p><b>ALR.</b> — Release of one joint tortfeasor as</p> | <p>discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release, 6 ALR5th 883.</p> |
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## ARTICLE 6

### DISTRIBUTIONS AND WITHDRAWAL

- Administrative rules and regulations.** — Secretary of State, Limited Partnerships, Cancellations, Revocations and Withdrawals, Commissioner of Corporations, Chapter 590-7-16.
- Official Compilation of the Rules and Regulations of the State of Georgia, Office of**

#### 14-9-601. Interim distributions; redemption of interest of partner.

- (a) A partner is entitled to receive distributions from a limited partner-



ship before his withdrawal from the limited partnership and before the dissolution and winding up thereof only to the extent and at the times or upon occurrence of the events specified in the partnership agreement.

(b) A limited partnership may redeem all or a portion of the interest of any limited or general partner in accordance with the partnership agreement or as agreed among all of the persons who are partners at the time of redemption. (Code 1981, § 14-9-601, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 11.)

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section provides that the time of distributions to a partner prior to withdrawal or dissolution and winding up depends on the partnership agreement.

#### Prior Georgia Law

There was no comparable provision.

#### Comparison With Official RULPA

The official version is similar.

Note that the Georgia Revised Uniform Limited Partnership Act does not include the limitations on distributions and liability for excessive distributions provided for in RULPA Sections 607 and 608 and Sections 14-9A-46 and 14-9A-49 of the prior law. Such limitations and liabilities impose substantial costs on the partnership because they inhibit free transferability of limited partnership interests. These costs are not offset by benefits to creditors. In the first place, hinging liability on whether the distribution involves the return of a contribution is based on the very questionable assumption that creditors rely on the contributions in extending credit. It should be noted in this connection that the contributions no longer need be made a matter of public record by being stated in the certificate. Second, creditors are amply protected by the law of fraudulent conveyances and preferences and by the general partners' personal liability for all partnership debts.

#### Cross-References

Distribution on withdrawal of partner: § 14-9-604. Distribution on dissolution and winding up of limited partnership: § 14-9-804.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1279, 1287, 1314-1317.

**C.J.S.** — 68 C.J.S., Partnership, § 440.

**14-9-602. Withdrawal of general partner.**

(a) A person ceases to be a general partner of a limited partnership upon the occurrence of one or more of the following events:

(1) The general partner withdraws by voluntary act from the limited partnership as provided in subsection (c) of this Code section;

(2) The general partner ceases to be a member of the limited partnership as provided in paragraph (4) of subsection (a) of Code Section 14-9-702;

(3) The general partner is removed as a general partner in accordance with the partnership agreement;

(4) Unless otherwise provided in writing in the partnership agreement or approved by written consent of all partners at the time, the general partner:

(A) Makes an assignment for the benefit of creditors;

(B) Files a voluntary petition in bankruptcy;

(C) Is adjudicated a bankrupt or insolvent;

(D) Files a petition or answer seeking for himself any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation;

(E) Files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against him in any proceeding of this nature; or

(F) Seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties;

(5) Unless otherwise provided in the partnership agreement or approved by written consent of all partners at the time, 120 days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within 90 days after the appointment without his consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties, the appointment is not vacated or stayed or within 90 days after the expiration of any stay, the appointment is not vacated;

(6) In the case of a general partner who is an individual:

(A) His death; or



(B) The entry of an order by a court of competent jurisdiction adjudicating him incompetent to manage his person or his estate;

(7) Unless otherwise provided in writing in the partnership agreement or approved by written consent of all partners at the time, in the case of a general partner who is a trust or is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust, but not merely the substitution of a new trustee;

(8) Unless otherwise provided in writing in the partnership agreement or approved by written consent of all partners at the time, in the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;

(9) Unless otherwise provided in writing in the partnership agreement or approved by written consent of all partners at the time, in the case of a general partner that is a corporation, the filing of a certificate of the corporation's dissolution or the equivalent for the corporation or the revocation of its charter and the lapse of 90 days after notice to the corporation of revocation without a reinstatement of its charter;

(10) In the case of an estate, the distribution by the fiduciary of the estate's entire interest in the partnership; or

(11) Except as approved by written consent of all partners at the time, any event specified in writing in the partnership agreement as resulting in a person ceasing to be a general partner.

(b) The withdrawing general partner shall give such notice of withdrawal, if any, as is provided for in subsection (c) of this Code section or in writing in the partnership agreement and is subject to damages caused by the failure to give such notice or to such penalties, if any, as are provided for in the agreement for failure to give notice.

(c) A general partner may withdraw by voluntary act from a limited partnership at any time by giving 90 days' written notice to the other partners, or such other notice as is provided for in the partnership agreement, but if the withdrawal violates the partnership agreement or it occurs as a result of otherwise wrongful conduct of the general partner, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement, including the reasonable cost of obtaining replacement of the services the withdrawing general partner was obligated to perform and may offset the damages against the amount otherwise distributable to him, in addition to pursuing any remedies provided for in the partnership agreement or otherwise available under applicable law. Unless otherwise provided in the partnership agreement, in the case of a partnership for a definite term or particular undertaking, a withdrawal by a general partner before the expiration of that term or completion of that undertaking is a breach of the partnership agreement.

(d) A general partner who ceases to be a general partner under this Code section shall be personally liable to any creditor who extended credit to the limited partnership prior to the time:

(1) The partnership causes an appropriate certificate of amendment to be executed and filed in accordance with Code Sections 14-9-204 through 14-9-206; or

(2) He or his representative files or causes to be filed with the Secretary of State in accordance with the procedures contained in subsection (a) of Code Section 14-9-206 a writing entitled "Filing Pursuant to Paragraph (2) of Subsection (d) of Code Section 14-9-602 of the Official Code of Georgia Annotated" that sets forth:

(A) The name of the limited partnership;

(B) The name and mailing address of the person signing the writing;

(C) That the person signing the writing has ceased to be a general partner in the partnership;

(D) That the person signing the writing has done one or both of the following:

(i) Requested a general partner of the limited partnership to file an amended certificate of limited partnership;

(ii) Instituted a proceeding pursuant to Code Section 14-9-204, which proceeding has not been concluded; and

(E) That the writing is being filed pursuant to this paragraph and that the person signing the writing is claiming that he has ceased to be a general partner in the partnership named in the writing.

(e) A general partner who ceases to be a general partner under this Code section shall not be personally liable as a general partner for any partnership debt incurred after one of the events specified in subsection (d) of this Code section unless the applicable creditor at the time the partnership debt is incurred had a reasonable basis for believing that the partner remained a general partner. The creditor shall be deemed to have a reasonable basis for believing that the partner remained a general partner if the creditor was a creditor of the partnership at the time of the general partner's withdrawal or had extended credit to the partnership within two years prior to the withdrawal and, in either case, had no knowledge or notice of the general partner's withdrawal.

(f) The filing of a writing or certificate provided for in subsection (d) of this Code section shall not alone constitute notice within the meaning of subsection (e) of this Code section. (Code 1981, § 14-9-602, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 12.)



**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section provides for how and when a general partner ceases to be such, and for the liability of a general partner who ceases to be such to creditors and to the partnership.

#### Prior Georgia Law

Sections 14-8-29 and 14-8-31 provide for dissolution of a general partnership upon partner dissociation, but the general partnership statute does not define when a partner ceases to be such and does not provide for withdrawal without dissolution of the partnership.

#### Comparison With Official RULPA

Section 14-9-602 incorporates, in Subsection (a), RULPA Section 402, so that withdrawal of a general partner is dealt with in one section. Subsection (a) differs from RULPA Section 402 by clarifying that (1) partner consent prevents withdrawal only as to those events, like bankruptcy or dissolution of a business-entity partner, where there may be some question whether the partner can continue as such despite occurrence of the event; (2) a corporate partner does not withdraw on revocation of its charter until it has been given an opportunity to have the charter reinstated; (3) a trust itself can be a partner; (4) withdrawal may be triggered by other events specified in the partnership agreement; and (5) the partnership agreement may provide for notice of withdrawal in situations other than voluntary withdrawal.

Subsections (b) and (c) differ from the official version of Section 14-9-602 by clarifying what constitutes withdrawal in violation of the agreement, that the partnership can recover the cost of replacing a general partner's services, that 90 days' notice is required for withdrawal and that the partnership agreement may specify damages for wrongful withdrawal. Wrongful withdrawal may include withdrawal that results from removal by the partners, judicial dissolution, or other means stemming from misconduct of the general partner other than voluntary and premature withdrawal.

Subsections (d) and (e) have been added to the official version to clarify the withdrawn general partner's liability to third parties. Under subsection (d), one who has ceased to be a partner is nevertheless liable to creditors who thereafter extend credit before an appropriate filing is made to reflect the withdrawal. [Note that after the certificate is amended to remove a partner's name, the person is no longer a "general partner" under Section 14-9-101(5) even if the partner has not otherwise ceased to be such under Section 14-9-602.]

Under subsection (e), even after the appropriate filing under subsection (d) is made, one who has ceased to be a general partner may continue to be liable to those who extend credit after the withdrawal and who have a reasonable basis for believing that the partner continued as such. Thus, creditors who have relied on the general partner's former status are protected. The situations in which the third party can recover from the former partner — that is, in which the third party is deemed to have a reasonable basis for believing that the former partner remained such — are set forth in subsection (e)(1) and (2). In general, the third party must either know or have notice of the withdrawal. Such notice must, under subsection (f), be more than the mere constructive notice that consists in amendment of the certificate to reflect the partner's withdrawal (although this amendment can serve as the basis of the creditor's knowledge of withdrawal). The

notice provision is based on Section 14-8-35, which applies to partner powers and liabilities after dissolution of a general partnership. Since Section 14-9-602 specifically applies to partner withdrawal it, and not Section 14-8-35, will govern whether or not withdrawal causes dissolution under Section 14-9-801.

Note that subsections (d) and (e) cut off liability only to certain persons who extend credit after the general partner's withdrawal. Thus, subsection (d) clearly states that a person who ceases to be a partner shall be personally liable to prior creditors, and subsection (e) applies only to post-notice creditors. There is nothing in the partnership statutes that would permit a partner to cut off an accrued liability by ceasing to be a partner. In fact, Section 14-8-36, which applies to limited partnerships by virtue of Section 14-9-1204, provides that such accrued liability is not cut off even by dissolution of the partnership.

#### **Cross-References**

"Knowledge" and "notice" defined: § 14-8-3. "General partner" defined: § Section 14-9-101(5). General partner withdrawal as cause of dissolution: § 14-9-801(3).

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1302-1306.

#### **14-9-603. Withdrawal of limited partner.**

A limited partner may withdraw from a limited partnership at the time or upon the occurrence of events specified in writing in the partnership agreement. (Code 1981, § 14-9-603, enacted by Ga. L. 1988, p. 1016, § 1.)

#### **COMMENT**

##### **Note to Georgia Revised Uniform Limited Partnership Act**

This section provides that the partnership agreement controls when a limited partner may withdraw from a limited partnership.

##### **Prior Georgia Law**

Section 14-9A-47(b) provides for return of the limited partner's contribution on six months' notice, subject to contrary provision in the certificate.

##### **Comparison With Official Version of RULPA**

The official version has been changed to provide that a limited partner has no right to withdraw other than as provided in the partnership agreement. The limited partner is treated like a corporate shareholder in this respect. This is significant insofar as it restricts the limited partner's ability to receive a distribution pursuant to Section 14-9-604. The delicate balancing of the limited partners' need for liquidity against the burden to the partnership that can result from a limited partner "put" is best left to customized drafting in the partnership agreement.

Note that a general partner may withdraw at any time. The lack of parity is due to the need to permit the general partner to extricate himself from joint and several liability for partnership debts. The withdrawing general partner cannot simply be converted into a limited because the extent of the general partner's financial interest would normally be determined by the general partner's management responsibilities and individual liability, and therefore should not continue after responsibility and liability has ended.



**Cross-References**

Withdrawal of a general partner: § 14-9-602. Distribution on withdrawal of a limited partner: § 14-9-604.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1299-1301.

**14-9-604. Distribution upon withdrawal.**

Subject to contrary provision in the partnership agreement, a withdrawing partner is entitled to receive, within a reasonable time after withdrawal, the fair value as of the date of withdrawal of the interest in the limited partnership with respect to which the withdrawal has occurred. (Code 1981, § 14-9-604, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1996, p. 787, § 12.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section states what distribution a withdrawing general or limited partner receives in the absence of contrary agreement. This provision will apply to any partner who withdraws (including any general partner who ceases to be such under Section 14-9-602) from a partnership that is continued after a partner's withdrawal without distribution of assets (including a partnership that is dissolved but continued without winding up.) This section applies pursuant to Section 14-9-1204 to the exclusion of Section 14-8-42 (see Prior Georgia Law).

**Prior Georgia Law**

A limited partner is entitled under Section 14-9A-47(b) to "the return of his contribution." Section 14-8-42 formerly applied to limited partnerships because there was no limited partnership provision relating to withdrawal of general partners. That section provides that a partner who withdraws from a general partnership that continues after dissolution shall, unless otherwise agreed, receive "the value of his interest in the dissolved partnership." It was unclear whether this provision applied to general partners withdrawing from a non-dissolving limited partnership.

**Comparison With Official RULPA**

This Section is the same in effect as the RULPA version but has been reworded for clarity. Although "fair value" is not defined, it should present no more problem than the provision for payment of the "value of his interest" to a partner who withdraws from a general partnership under Section 14-8-42.

**Cross-References**

Limited partner's right to withdraw: § 14-9-603. Distribution to limited partner on dissolution: § 14-9-804.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1318.

**C.J.S.** — 68 C.J.S., Partnership, § 440.

**14-9-605. Form of distribution.**

Except as provided in writing in the partnership agreement, a partner, regardless of the nature of his contribution, has no right to demand or to receive any distribution from a limited partnership in any form other than cash. Except as provided in writing in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him exceeds a percentage of that asset which is equal to the percentage in which he shares in distributions from the limited partnership. (Code 1981, § 14-9-605, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides that, subject to contrary provision in the partnership agreement, a partner has no right to demand or receive a distribution other than in cash, and cannot be compelled to accept a distribution in kind except to the extent specified in the section.

**Prior Georgia Law**

Section 14-9A-47(c) provides that a limited partner, without consent of other partners, may "demand and receive" only cash.

**Comparison With Official RULPA**

The Section has been changed from the official version to clarify that a partner can neither demand nor receive a distribution in kind, and thus may not receive such a distribution even if he did not demand it, unless the partners otherwise agree. This was probably the intent of RULPA.

**Cross-References**

Limited partner's right to withdraw: § 14-9-603. Limited partner's right to distribution on withdrawal: § 14-9-604.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1279, 1287, 1317.

**C.J.S.** — 68 C.J.S., Partnership, § 440.

**14-9-606. Right to distribution.**

Except as otherwise provided in the partnership agreement at the time a partner becomes entitled to receive a distribution, he has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution. (Code 1981, § 14-9-606, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides a partner with a creditor's status and remedies in enforcing a right to receive a distribution.



**Prior Georgia Law**

There is no comparable provision.

**Comparison With Official RULPA**

This section is the same as the official version.

**Cross-References**

Partner's right to receive a distribution on withdrawal: § 14-9-604. Partner's right to receive a distribution on dissolution: § 14-9-804.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1314, 1316.

**C.J.S.** — 68 C.J.S., Partnership, §§ 440, 441.

**ARTICLE 7****PARTNERSHIP INTERESTS****14-9-701. Nature of partnership interest.**

A partnership interest is personal property. A partner has no interest in specific partnership property. (Code 1981, § 14-9-701, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides that a partner's interest in the partnership is personal property and that a partner has no interest in specific property of the partnership.

**Prior Georgia Law**

Sections 14-8-26 and 14-9A-49 provide that a partnership interest is personal property.

**Comparison With Official RULPA**

Pursuant to Section 14-8-25, although a general partner owns specific partnership property nominally as a tenant in partnership, the incidents of this tenancy are such that, in effect, the property is owned by the partnership entity rather than by the partners. Section 14-9-701, like Section 17-701 of the Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit. 6, Section 17-701 (Supp. 1986) takes this a step further by making it absolutely clear that a partner has no interest in specific property of a limited partnership.

**Cross-References**

Assignment of partnership interest: § 14-9-702. Rights of creditor in partnership interest: § 14-9-703.

**JUDICIAL DECISIONS**

**Financial payments** to which a limited partner is entitled pursuant to statute or the partnership/certificate of formation is a chose in action. *Prodigy Centers/Atlanta v. T-C Assocs.*, 269 Ga. 522, 501 S.E.2d 209 (1998).

Cited in *Prodigy Centers/Atlanta v. T-C Assocs.*, 127 F.3d 1021 (11th Cir. 1997).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1320, 1345.

**C.J.S.** — 68 C.J.S., Partnership, §§ 423 et seq.

#### 14-9-702. Assignment of partnership interest.

(a) Unless otherwise provided in the partnership agreement:

(1) A partnership interest is assignable in whole or in part;

(2) An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner;

(3) An assignment entitles the assignee to receive, to the extent assigned, the assignor's partnership interest;

(4) Until the assignee of a partnership interest becomes a partner, the assignor partner continues to be a partner and to have the power to exercise any rights or powers of a partner, except to the extent those rights or powers are assigned; provided that on the assignment by a general partner of all of the general partner's rights as a general partner, the general partner's status as a general partner may be terminated by the affirmative vote of a majority in interest of the limited partners;

(5) Until an assignee of a partnership interest becomes a partner, the assignee has no liability as a partner solely as a result of the assignment; and

(6) The assignor of a partnership interest is not released from his liability as a partner solely as a result of the assignment.

(b) A written partnership agreement may provide that a partner's partnership interest may be evidenced by a certificate of partnership interest issued by the limited partnership and may also provide for the assignment or transfer of a partnership interest represented by such a certificate and make other provisions with respect to those certificates. (Code 1981, § 14-9-702, enacted by Ga. L. 1988, p. 1016, § 1.)

#### COMMENT

##### Note to Georgia Revised Uniform Limited Partnership Act

This section provides for the method and effect of assignment of a general or limited partner's partnership interest (defined in Section 14-9-101(11) to include only financial rights), and validates use of certificates of partnership interest.

##### Prior Georgia Law

Section 14-9A-50 provides that a limited partner's interest is assignable; that a substituted limited partner has all the rights of the assignor and the liabilities of which



he was aware when becoming a limited partner or which could be ascertained from the certificate; that an assignee who is not a substituted limited partner has no information rights; that an assignee can become a substituted limited partner as provided in the certificate or if all the members agree upon amendment of the certificate; and that the assignor is not relieved of liability by the substitution. Section 14-8-27(1) provides that an interest in a general partnership is assignable, and that the assignment does not dissolve the partnership and does not confer management rights on the assignee. This provision applied to the assignment of a general partner's interest in a limited partnership in the absence of an explicit provision to the contrary in the prior limited partnership statute.

#### **Comparison With Official RULPA**

The provisions concerning not only assignability but also the effects of an assignment have been explicitly made subject to contrary agreement. One practical effect of this is that the partners can agree that an assignee automatically assumes the status of a limited partner so that, like corporate shares, a partner's entire status and not merely his financial rights would be fully transferable.

Subject to contrary agreement, the assignment transfers all financial rights of the assignor (see the definition of "partnership interest" in Section 14-9-101(11)), and not merely the right to receive distributions as under RULPA.

Subsection (a)(4) changes RULPA by providing that the assignor retains rights despite the assignment. This result appears to be consistent with current law under ULPA. See *Kanarek v. Gadlex Associates*, 115 A.D. 2d 592, 496 N.Y.S. 2d 253 (1985). The contrary result would result in creation of a financial interest without management power.

Subsection (a)(5) clarifies that the assignee assumes no liabilities as a result of the assignment alone. As to assumption of liabilities upon becoming a partner, see Section 14-9-704. RULPA provides only for assumption on becoming a limited partner and is silent on the effect of the assignment alone.

Under subsection (a)(6), the assignor is not released from liability (i.e., for failure to make an agreed contribution) as a result of the assignment. RULPA provides only for nonrelease where the assignee becomes a limited partner (this situation is covered by Section 14-9-704(c)). Although nonrelease may hamper transferability of limited partnership interests, this is a problem largely in publicly held partnerships which are in all events likely to have extensive customized agreements that can provide for release of liability. The parties to a closely held limited partnership are less likely to be governed by an extensive agreement and so are more likely to rely on the provisions of the partnership statute. In such a partnership, transferability of interests is not a major issue and the parties may have relied on the unique characteristics of a particular contributor.

The subsection on certificates of limited partnership is based on Section 17-702 of the Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit. 6, Section 17-702 (Supp. 1986).

#### **Cross-References**

Definition of "partnership interest" as referring only to limited partnership and including all financial items: § 14-9-101(11). Liability of partner on contribution obligation: § 14-9-502. Assignee becoming limited partner: § 14-9-704.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1279, 1294-1298.

**C.J.S.** — 68 C.J.S., Partnership, §§ 422, 427.

**14-9-703. Rights of creditor.**

(a) On application to a competent court by a judgment creditor of a partner or of any assignee of a partner, the court may charge the partnership interest of the partner or such assignee with payment of the unsatisfied amount of the judgment, with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This chapter shall not deprive any partner of the benefit of any exemption laws applicable to his partnership interest.

(b) The remedy conferred by this Code section shall not be deemed exclusive of others which may exist, including, without limitation, the right of a judgment creditor to reach the interest of a partner in the partnership by process of garnishment served on the partnership. (Code 1981, § 14-9-703, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides for creditors' rights to charge a partnership interest.

**Prior Georgia Law**

Section 14-9A-52, which permits a limited partner's creditor to charge the interest of the limited partner, is similar, except that it permits appointment of a receiver and other necessary orders and provides for redemption of the interest with the separate property of a general partner, but not with partnership property.

**Comparison With Official RULPA**

The section has been broadened from the official version to allow a remedy against the assignee of a partner and to provide that the charging order remedy does not preclude the availability of garnishment or other creditor remedies.

**Cross-References**

Partner has no interest in specific partnership property: § 14-9-701. Rights of assignee of partnership interest: § 14-9-702. Garnishment generally: § 18-4-40 et seq.

**JUDICIAL DECISIONS**

**A judgment against a limited partner does not create a lien.** — Financial payments to which a limited partner is entitled pursuant to statute or the partnership/certificate of formation is a chose in action and a judg-

ment creditor must initiate collateral proceedings in order to attach a lien thereto. *Prodigy Centers/Atlanta v. T-C Assocs.*, 269 Ga. 522, 501 S.E.2d 209 (1998).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1376-1378.

**C.J.S.** — 68 C.J.S., Partnership, § 436.



**14-9-704. Right of assignee to become limited partner.**

(a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that:

- (1) The partnership agreement so provides; or
- (2) All other partners consent.

(b) An assignee who has become a limited partner has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a limited partner under the partnership agreement and this chapter. An assignee who becomes a limited partner also is liable for the obligations of his assignor to make contributions as provided in Code Section 14-9-502. However, unless otherwise agreed between the assignee and the assignor, such assignee is not obligated for liabilities unknown to the assignee at the time he became a limited partner and which could not be ascertained from the written partnership agreement.

(c) Subject to contrary provision in the partnership agreement, if an assignee of a partnership interest becomes a limited partner, the assignor is not released from his liability to the limited partnership under Code Section 14-9-502. (Code 1981, § 14-9-704, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section specifies how an assignee of a general or limited partner's partnership interest becomes a limited partner and the consequences of doing so, including assumption by the assignee of rights, powers and liabilities of limited partner.

**Prior Georgia Law**

See Comment to Section 14-9-702.

**Comparison With Official RULPA**

Subsection (a) changes the official version by clarifying that the partnership agreement can permit an assignee to become a limited partner whether or not the assignor confers that right on the assignee.

Subsection (b) changes the official version by limiting the reference to partner liabilities to Section 14-9-502, consistently with the elimination of broader liabilities (see the Comment to Section 14-9-601).

**Cross-References**

Definition of "limited partner": § 14-9-101(7). Admission of limited partner into partnership generally: § 14-9-301. Partner's liability on contribution obligation: § 14-9-502. Assignment of partnership interest in a limited partnership: § 14-9-702.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1279, 1289, 1296-1298.

**C.J.S.** — 68 C.J.S., Partnership, §§ 422, 427.

**14-9-705. Power of legal representative of deceased or incompetent partner.**

(a) If a partner who is an individual dies or a court of competent jurisdiction adjudges him to be incompetent to manage his person or his property, the partner's executor, administrator, conservator, or other legal representative may exercise all the partner's rights for the purpose of settling his estate or administering his property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor.

(b) The estate of a deceased partner or the successor of a partner that is a dissolved or terminated corporation, trust, or other entity shall be liable for all of the partner's liabilities as a partner. (Code 1981, § 14-9-705, enacted by Ga. L. 1988, p. 1016, § 1.)

## COMMENT

**Note to Georgia Revised Uniform Limited Partnership Act**

This section provides for succession to the rights, powers and liabilities of a deceased partner.

**Prior Georgia Law**

Section 14-9A-51, which applies only to deceased partners, is similar except that it refers to partners instead of only limited partners, as well as to partners that are not individuals.

**Comparison With Official RULPA**

Subsection (b), which is not in the official version, is based on prior Section 14-9A-51, with the differences noted in **Prior Georgia Law**, above.

**Cross-References**

Events causing person to cease to be a partner: § 14-9-602. Right of withdrawing partner to receive distribution: § 14-9-604. Dissolution on withdrawal of general partner: § 14-9-801(3). Distribution on dissolution of partnership: § 14-9-804.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1299, 1302.

**C.J.S.** — 68 C.J.S., Partnership, § 427.



## ARTICLE 8

### DISSOLUTION

**Administrative rules and regulations.** — Secretary of State, Limited Partnerships, Cancellations, Revocations and Withdrawals, Commissioner of Corporations, Chapter 590-7-16.  
Official Compilation of the Rules and Regulations of the State of Georgia, Office of

#### 14-9-801. Events triggering dissolution.

A limited partnership is dissolved and its affairs must be wound up upon the first of the following to occur:

- (1) Events specified in writing in the partnership agreement;
- (2) Written consent of all partners;
- (3) An event of withdrawal of a general partner unless:

(A) There remains at least one other general partner and the written provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining general partner or general partners alone or together with new general partners, and that partner or those general partners do so; or

(B) Within 90 days after the withdrawal, all partners other than the general partner with respect to which the event of withdrawal has occurred (or such partners as are provided for in the written provisions of the partnership agreement) agree in writing to continue the business of the limited partnership and, if there is no remaining general partner, to the appointment, effective as of the date of withdrawal, of one or more new general partners; or

(4) Entry of a decree of judicial dissolution under Code Section 14-9-802. (Code 1981, § 14-9-801, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 13; Ga. L. 1994, p. 161, § 3; Ga. L. 1996, p. 787, § 13.)

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section specifies the causes of dissolution. It applies to the exclusion of Sections 14-8-29 and 14-8-31 (see Section 14-9-1204).

#### Prior Georgia Law

Section 14-9A-90 provides for dissolution on retirement, death or insanity of a general partner unless the business is continued pursuant to the certificate or with the consent

of all members. Section 14-9A-47(d) provides that a limited partner may have the partnership dissolved when he rightfully but unsuccessfully demands return of his contribution.

#### **Comparison With Official RULPA**

This section is similar to the official version. Subsection (3)(B) makes explicit what is implicit in RULPA Section 801(4), that the appointment of a new general partner is necessary and not merely desirable for continuation of the partnership where there is no remaining general partner.

Because of the 90-day lag before a general partner's withdrawal becomes effective under Section 14-9-602(c), the limited partnership will have one or more general partners even after a sole general partner serves notice of withdrawal. It therefore remains a "limited partnership" under Section 14-9-101(8)). At the end of the 90 days the partnership will either be dissolved or will continue, with a new general partner appointed effective as of the date of withdrawal of the former general partner (see subsection 801(3)(B)). Even if the sole general partner withdraws and is not replaced, a limited partnership that was formed under Section 14-9-201 continues to exist under Section 14-9-201(b) until cancellation of the certificate. Thus, the withdrawal of the sole general partner will not result in loss of limited liability for the limited partners.

If the partnership is dissolved it continues for winding up under Sections 14-8-30 and 14-9-803 and until cancellation of the certificate as discussed in the previous paragraph. Also, the partnership business can be continued after dissolution pursuant to Section 14-8-38, which applies pursuant to Section 14-9-1204.

#### **Cross-References**

Partnership continues for winding up after dissolution until cancellation of certificate: §§ 14-8-30 and 14-9-201(b). Effect of dissolution on existing liabilities of partners: § 14-8-36. Continuation of partnership business or application of property following dissolution: § 14-8-38. Rights of creditors against successor partnership or other business: § 14-8-41. Events of withdrawal of general partner: § 14-9-602. Distribution to withdrawing partner where partnership continues: § 14-9-604. Judicial dissolution: § 14-9-802. Winding up after dissolution: § 14-9-803. Distribution of property upon winding up: § 14-9-804.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1402.

**C.J.S.** — 68 C.J.S., Partnership, § 440.

#### **14-9-802. Judicial dissolution.**

On application by or for a partner, the court may decree dissolution of a limited partnership whenever:

(1) It is not reasonably practicable to carry on the business in conformity with the partnership agreement; or

(2) A general partner has been guilty of such misconduct as tends to affect prejudicially the carrying on of the business. (Code 1981, § 14-9-802, enacted by Ga. L. 1988, p. 1016, § 1.)



**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section states the grounds for dissolution of a limited partnership by judicial decree. It applies to the exclusion of Section 14-8-32 pursuant to Section 14-9-1204.

**Prior Georgia Law**

Section 14-9A-42(a)(3) provides that a limited partner has the same right to seek judicial dissolution as a general partner, thus implicitly referring to Section 14-8-32.

**Comparison With Official RULPA**

The official version has been expanded by the addition of subsection (b), which is based on Section 14-8-32(3). This mitigates the effect of Section 14-9-603 which, by deleting the limited partners' right of withdrawal except as otherwise provided for in the agreement, can have the effect of rendering the limiteds vulnerable to general partner misconduct.

**Cross-References**

General partner ceases to be such by court-adjudicated incompetence: § 14-9-602(a)(6)(B). Causes of dissolution of limited partnership: § 14-9-801.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1403, 1404. **C.J.S.** — 68 C.J.S., Partnership, § 441.

**14-9-803. Winding up.**

(a) After dissolution, except as provided in the partnership agreement, the general partners who have not withdrawn or, if none, the limited partners may wind up the limited partnership's affairs but, if one or more of such general partners have engaged in wrongful conduct, or upon other cause shown, the court may wind up the limited partnership's affairs upon application of a partner, his legal representative, or assignee.

(b) Unless otherwise provided in writing in the partnership agreement, the persons winding up the limited partnership's affairs may, in the name of, and for and on behalf of, the limited partnership:

- (1) Prosecute and defend suits, whether civil, criminal, or administrative;
- (2) Settle and close the limited partnership's business;
- (3) Dispose of and convey the limited partnership's property for cash;
- (4) Discharge the limited partnership's liabilities; and
- (5) Distribute to the partners any remaining assets of the limited partnership. (Code 1981, § 14-9-803, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 14.)

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section states who may wind up the limited partnership's affairs after dissolution, and the powers of such persons. It applies to the exclusion of Section 14-8-37 (see Section 14-9-1204).

#### Prior Georgia Law

In the absence of a limited partnership act provision, the Uniform Partnership Act applied. Section 14-8-37 provides for winding up of a partnership by non-wrongful partners, the legal representative of the last surviving partner, or by the court "upon cause shown."

#### Comparison With Official RULPA

Subsection (a) was changed from the official version to clarify that withdrawn partners may not participate in winding up unless otherwise agreed. This was made particularly unclear in RULPA by the reference to partners "who have not wrongfully dissolved." Since the usual method of wrongful dissolution is voluntary withdrawal in violation of the partnership agreement, RULPA implies that rightfully withdrawing partners can participate in winding up. Unlike under RULPA, a general partner who has engaged in wrongful conduct without withdrawing may participate in winding up unless the limited partnership's affairs are wound up by the court or unless the agreement provides otherwise. Subsection (b) is based on Section 17-803 of the Delaware Revised Uniform Limited Partnership Act, Del. Code Ann. tit. 6, Section 17-803 (Supp. 1986).

#### Cross-References

Limited partnership continues to exist after dissolution until cancellation of certificate: §§ 14-8-30, 14-9-201(b). Post-dissolution partner acts binding the partnership: § 14-8-33 et seq. When general partner ceases to be such: § 14-9-602. Wrongful withdrawal of general partner: § 14-9-602(c). Causes of dissolution of limited partnership: § 14-9-801.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1405. **C.J.S.** — 68 C.J.S., Partnership, § 440.

#### 14-9-804. Distribution of assets.

Upon the winding up of a limited partnership, the assets must be distributed as follows:

- (1) To creditors, including partners who are creditors, to the extent permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under Code Section 14-9-601 or 14-9-604;



(2) Except as provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under Code Section 14-9-601 or 14-9-604; and

(3) Except as provided in the partnership agreement, to partners first for the return of their contributions and second, respecting their partnership interests, in the proportions in which the partners share in distributions. (Code 1981, § 14-9-804, enacted by Ga. L. 1988, p. 1016, § 1.)

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section states the order of priority of distribution of assets upon winding up the limited partnership. It applies to the exclusion of Section 14-8-40 pursuant to Section 14-9-1204.

#### Prior Georgia Law

Section 14-9A-91 provides for distribution of partnership assets in the following order of priority: Creditors other than general partners or limited partners to the extent of their contributions; limited partners for profits; limited partners for capital; general partners other than for capital and profits; general partners for profits; and general partners for capital. Subject to certificate provision or agreement, limiteds share as to capital in proportion to their claims for capital and as to profits or other compensation in proportion to those claims.

#### Comparison With Official RULPA

This section is the same as the official version.

#### Cross-References

Partners' rights on rescission of partnership agreement following fraud or misrepresentation: § 14-8-39. Partner's right to accounting of interest upon dissolution: § 14-8-43. Partner's right to distribution on withdrawal from a continuing partnership: § 14-9-604. Causes of dissolution of a limited partnership: § 14-9-801. Winding up of limited partnership: § 14-9-803.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1279, 1287, 1406, 1407. **C.J.S.** — 68 C.J.S., Partnership, § 440.

#### 14-9-805. Execution of deeds or other transfer instruments.

Deeds or other transfer instruments requiring execution after the filing of a certificate of cancellation by a dissolved limited partnership may be signed by any person who had authority to wind up the dissolved partnership under the provisions of subsection (a) of Code Section 14-9-803. (Code 1981, § 14-9-805, enacted by Ga. L. 1994, p. 161, § 4.)

ARTICLE 9  
FOREIGN LIMITED PARTNERSHIPS

RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1248, 1386.

**14-9-901. Laws governing.**

Subject to the Constitution of this state:

(1) The laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners regardless of whether the foreign limited partnership procured or should have procured a certificate of authority under this chapter; and

(2) A foreign limited partnership may not be denied a certificate of authority by reason of any difference between those laws and the laws of this state. (Code 1981, § 14-9-901, enacted by Ga. L. 1988, p. 1016, § 1.)

COMMENT

**Note to Georgia Revised Uniform Limited Partnership Act**

This section states the law governing a foreign limited partnership.

**Prior Georgia Law**

There is no provision under prior Georgia law for foreign limited partnerships.

**Comparison With Official RULPA**

Language has been added to the official version to make it clear that the limited partners of a foreign limited partnership do not lose their limited liability under the law of the state of organization even if the partnership has not complied with Georgia law regulating foreign partnerships. See the Comment to Section 14-9-907.

**Cross-References**

Definition of "foreign limited partnership": § 14-9-101(4). Duty of foreign limited partnership to procure certificate of authority: § 14-9-902. Foreign limited partnership transacting business without registration: § 14-9-907.

**14-9-902. Certificate of authority; activities not constituting transacting business.**

(a) A foreign limited partnership transacting business in this state shall procure a certificate of authority to do so from the Secretary of State. In order to procure a certificate of authority to transact business in this state, a foreign limited partnership shall submit to the Secretary of State an



application for a certificate of authority as a foreign limited partnership, signed and sworn to by a general partner setting forth:

- (1) The name of the foreign limited partnership and, if different, the name under which it proposes to qualify and transact business in this state;
  - (2) The state and date of its formation;
  - (3) The name and address of any qualified agent for service of process on the foreign limited partnership as required to be maintained by Code Section 14-9-902.1;
  - (4) A statement that the Secretary of State is, pursuant to subsection (i) of Code Section 14-9-902.1, appointed the agent of the foreign limited partnership for service of process if no agent has been appointed under subsection (a) of Code Section 14-9-902.1 or, if appointed, the agent's authority has been revoked or the agent cannot be found by the exercise of reasonable diligence or served;
  - (5) The address of the office required to be maintained in the state of its organization by the laws of that state or, if not so required, of the principal office of the foreign limited partnership;
  - (6) The name and business address of each general partner; and
  - (7) The address of the office, if any, at which is kept a list of the names and addresses of the limited partners and their capital contributions, together with an undertaking by the foreign limited partnership to keep those records until the foreign limited partnership's registration in this state is canceled or withdrawn.
- (b) Without excluding other activities which may not constitute transacting business in this state, a foreign limited partnership shall not be considered to be transacting business in this state, for the purpose of qualification under this chapter, solely by reason of carrying on in this state any one or more of the following activities:
- (1) Maintaining or defending any action or administrative or arbitration proceeding or effecting the settlement thereof or the settlement of claims or disputes;
  - (2) Holding meetings of its partners or carrying on other activities concerning its internal affairs;
  - (3) Maintaining bank accounts, share accounts in savings and loan associations, custodial or agency arrangements with a bank or trust company, or stock or bond brokerage accounts;
  - (4) Maintaining offices or agencies for the transfer, exchange, and registration of its partnership interests, or appointing and maintaining trustees or depositaries with relation to its partnership interests;

(5) Effecting sales through independent contractors;

(6) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance outside this state before becoming binding contracts and where such contracts do not involve any local performance other than delivery and installation;

(7) Making loans or creating or acquiring evidences of debt, mortgages, or liens on real or personal property, or recording same;

(8) Securing or collecting debts or enforcing any rights in property securing the same;

(9) Owning, without more, real or personal property;

(10) Conducting an isolated transaction not in the course of a number of repeated transactions of a like nature;

(11) Effecting transactions in interstate or foreign commerce;

(12) Serving as trustee, executor, administrator, or guardian, or in like fiduciary capacity, where permitted so to serve by the laws of this state; or

(13) Owning directly or indirectly an interest in or controlling directly or indirectly another person organized under the laws of or transacting business within this state.

(c) This Code section shall not be deemed to establish a standard for activities that may subject a foreign limited partnership to taxation or to service of process under any of the laws of this state. (Code 1981, § 14-9-902, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1995, p. 470, § 14.)

#### COMMENT

##### Note to Georgia Revised Uniform Limited Partnership Act

This section states when and how a foreign limited partnership shall procure a certificate of authority to transact business in this state.

##### Prior Georgia Law

See Comment to Section 14-9-901.

##### Comparison With Official RULPA

The opening clause of the official version has been deleted to clarify that a foreign partnership may obtain a certificate of authority to transact business in the state even if it has already commenced to transact business in the state and therefore may be in violation of the statute.

Subsection (a)(4) has been changed from RULPA to clarify that substituted service is governed by Section 14-9-902.1, and therefore is not conditioned on registration.

Subsections (b) and (c) are based on O.C.G.A. Section 14-2-310 dealing with foreign corporations.

##### Cross-References

Manner of issuance of certificate: § 14-9-903. Amendment of certificate: § 14-9-905. Cancellation of certificate: § 14-9-906. Consequences of failure to procure certificate: § 14-9-907. Secretary of State rules regarding certificate: 590-7-12-.08.



**14-9-902.1. Registered agent; office.**

(a) Each foreign limited partnership that is required to obtain a certificate of authority to do business in this state shall continuously maintain in this state an agent for service of process on the foreign limited partnership.

(b) An agent for service of process must be an individual resident of this state, a domestic corporation, or a foreign corporation authorized to do business in this state.

(c) A foreign limited partnership may change its registered office or its registered agent or agents, or both, by executing and filing in the office of the Secretary of State a statement setting forth:

- (1) The name of the foreign limited partnership;
- (2) The address of its then registered office;
- (3) If the address of its registered office is to be changed, the new address of the registered office;
- (4) The name or names of its then registered agent or agents;
- (5) If its registered agent or agents are to be changed, the name or names of its successor registered agent or agents; and
- (6) That the address of its registered office and the address of the business office of its resident agent or agents, as changed, will be identical.

(d) If the Secretary of State finds that such statement conforms to subsection (a) of this Code section, he shall file such statement in his office; and upon such filing the change of address of the registered office or the change of the registered agent or agents, or both, as the case may be, shall become effective.

(e) Any registered agent of a foreign limited partnership may resign as such agent upon filing a written notice thereof with the Secretary of State. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Secretary of State. There shall be attached to such notice an affidavit of such agent, if an individual, or of an officer thereof, if a corporation, that at least ten days prior to the date of filing such notice a written notice of the agent's intention to resign was mailed or delivered to the president, secretary, or treasurer of the corporation for which such agent is acting. Upon such resignation becoming effective, the address of the business office of the resigned registered agent shall no longer be the address of the registered office of the limited partnership.

(f) A registered agent may change his or its business address and the address of the registered office of any foreign limited partnership of which

he or it is registered agent to another place within this state by filing a statement as required in subsection (c) of this Code section, except that it need be signed only by the registered agent and need not be responsive to paragraph (5) of subsection (c) of this Code section and must recite that a copy of the statement has been mailed or delivered to a representative or agent of each such limited partnership other than the notifying registered agent.

(g) The registered agent of one or more foreign limited partnerships may resign and appoint a successor registered agent by filing a statement with the Secretary of State stating that he or it resigns and the name and address of the successor registered agent. There shall be attached to such certificate a statement executed by each affected foreign limited partnership ratifying and approving such change of registered agent. Upon such filing, the successor registered agent shall become the registered agent of such foreign limited partnerships as have ratified and approved such substitution, and the successor registered agent's address, as stated in such statement, shall become the address of each such limited partnership's registered office in this state. The Secretary of State shall furnish to the successor registered agent a certified copy of the statement of resignation.

(h) All general partners of, and the registered agent of a foreign limited partnership authorized in this state, are agents of the foreign limited partnership on whom may be served any process, notice, or demand required or permitted by law to be served on the foreign limited partnership.

(i) Whenever a foreign limited partnership required to procure a certificate of authority to do business in this state shall fail to appoint or maintain a registered agent in this state, or whenever its registered agent cannot with reasonable diligence be found at the registered office, the Secretary of State shall be an agent of such foreign limited partnership upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him or with any persons designated by the Secretary of State to receive such service a copy of such process, notice, or demand. The plaintiff or his attorney shall certify in writing to the Secretary of State that the foreign limited partnership has failed either to maintain a registered office or appoint a registered agent in this state and that he has forwarded by registered mail or statutory overnight delivery such process, service, or demand to the last registered office or agent listed on the records of the Secretary of State and that service cannot be effected at such office.

(j) The Secretary of State shall keep a record of all processes, notices, and demands served upon him under this Code section and shall record therein the time of such service and his action with reference thereto. (Code 1981, § 14-9-902.1, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 15; Ga. L. 2000, p. 1589, § 4.)



**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provided that the amendment to paragraph (c)(3) is applicable with respect to notices

delivered on or after July 1, 2000.

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section states the duty of a foreign limited partnership to maintain a registered agent for service of process, provides for change, resignation, change of business address and substitution of registered agents and provides for substituted service on the Secretary of State.

#### Prior Georgia Law

There is no provision under prior Georgia law for foreign limited partnerships.

#### Comparison With Official RULPA

There is no comparable provision in the official version. This section parallels Section 14-9-104 dealing with registered agents of domestic limited partnerships, and is similar to Del. Code Ann. tit. 6 Section 17-904(b)-(c) (Supp. 1986).

### 14-9-903. Issuance of certificate.

(a) If the Secretary of State finds that an application for certificate of authority conforms to law and all requisite fees and any penalty due pursuant to Code Section 14-9-907 have been paid, he shall:

- (1) Stamp or otherwise endorse his official title and the date and time of receipt on the application;
- (2) File in his office a copy of the application; and
- (3) Issue a certificate of authority to transact business in this state.

(b) The certificate of authority must be returned to the person who filed the application or his representative.

(c) If the certificate of authority is issued by the Secretary of State, a foreign limited partnership shall be deemed authorized to transact business in this state from the time of filing its application for the certificate of authority. (Code 1981, § 14-9-903, enacted by Ga. L. 1988, p. 1016, § 1.)

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section provides for the manner of issuance of the certificate of authority.

#### Prior Georgia Law

There is no provision under prior Georgia law for foreign limited partnerships.

#### Comparison With Official RULPA

Subsection (a) has been changed from the official version to clarify that a foreign limited partnership that has unlawfully transacted business without obtaining a certificate of authority must pay any penalties due before obtaining the certificate.

Other changes from the official version in subsections (a) and (b) permit issuance of the certificate without furnishing two original signed copies. Subsection (c) has been added to clarify that the partnership is authorized to transact business even if the secretary of state failed to note a flaw in the application or to require back payment of fees or penalties.

#### **Cross-References**

Duty to obtain certificate of authority: § 14-9-902. Secretary of State rules regarding certificate: 590-7-12-.08.

#### **14-9-904. Name.**

(a) A foreign limited partnership may apply for a certificate of authority with the Secretary of State under any name, whether or not it is the name under which it is registered in its state of organization, that could be registered by a domestic limited partnership.

(b) Except as provided in subsection (c) of this Code section, whenever a foreign limited partnership is unable to obtain a certificate of authority to transact business in this state because its name does not comply with any part of Code Section 14-9-102, it may nonetheless apply for authority to transact business in this state by adding in parentheses to its name in such application a word, abbreviation, or other distinctive and distinguishing element such as the name of the state where it is organized. If in the judgment of the Secretary of State the name of the limited partnership with such addition would comply with Code Section 14-9-102, said Code section shall not be a bar to the issuance to such limited partnership of a certificate of authority to transact business in this state. In such case, any such certificate issued to such foreign limited partnership shall be issued in its name with such additions, and the limited partnership shall use such name with such additions in all its dealings with the Secretary of State and in the conduct of its affairs in this state.

(c) Whenever the name of a foreign limited partnership that was organized prior to July 1 of the year in which this chapter becomes effective and that on such date is transacting business in this state does not comply with any part of Code Section 14-9-102, such foreign limited partnership may nonetheless apply for authority to transact business in this state and Code Section 14-9-102 shall not be a bar to the issuance to such limited partnership of a certificate of authority to transact business in this state; provided, however, in any such case such foreign limited partnership shall be distinguished on the records of the Secretary of State by the Secretary of State's adding to the name of such foreign limited partnership on its records in parentheses the name of the state in which it was organized and, if necessary to distinguish multiple partnerships having such characteristics and making such application that were organized in the same state, by adding a numerical distinction to the state name. Such addition of a state name and numerical distinction to the name of a foreign limited partner-



ship by the Secretary of State shall be solely for the purpose of distinguishing limited partnerships on the files of the Secretary of State, shall not constitute a change in the name of the foreign limited partnership, and shall have no effect whatsoever on the authority of the foreign limited partnership to use its name. (Code 1981, § 14-9-904, enacted by Ga. L. 1988, p. 1016, § 1.)

#### COMMENT

##### **Note to Georgia Revised Uniform Limited Partnership Act**

This section governs the name under which a foreign limited partnership may apply for a certificate of authority.

##### **Prior Georgia Law**

There is no provision under prior Georgia law for foreign limited partnerships.

##### **Comparison With Official RULPA**

Subsection (a) is similar to the official version of this section, but has been revised from the official version to clarify that a foreign limited partnership is subject to the same rules regarding name as a domestic limited partnership (see Section 14-9-102). Subsections (b) and (c) have been added to the official version to parallel the rules as to name availability that apply to domestic limited partnerships.

##### **Cross-References**

Duty to obtain certificate of authority: § 14-9-902.

#### **14-9-905. Change of name or state of organization.**

A foreign limited partnership authorized to transact business in this state must obtain an amended certificate of authority from the Secretary of State if it changes its name or its state of organization. The requirements of Code Sections 14-9-902 and 14-9-903 for obtaining an original certificate of authority shall apply to obtaining an amended certificate under this Code section. (Code 1981, § 14-9-905, enacted by Ga. L. 1988, p. 1016, § 1.)

#### COMMENT

##### **Note to Georgia Revised Uniform Limited Partnership Act**

This section requires a foreign limited partnership to obtain an amended certificate of authority under certain circumstances, and provides for the method of obtaining such a certificate.

##### **Prior Georgia Law**

There is no provision under prior Georgia law for foreign limited partnerships.

##### **Comparison With Official RULPA**

This section differs from the official version by requiring an amended certificate only when there has been a change in a name or state of organization and in specifying that the same procedure for obtaining the original certificate applies to amendments.

##### **Cross-References**

Contents of application for certificate of authority: § 14-9-902. Issuance of certificate of authority by Secretary of State: § 14-9-903.

**14-9-906. Certificate of withdrawal.**

A foreign limited partnership authorized to transact business in this state may apply for a certificate of withdrawal by delivering to the Secretary of State for filing an application that sets forth:

- (1) The name of the limited partnership and the name of the jurisdiction under whose law it is organized;
- (2) That it is not transacting business in this state and that it surrenders its authority to transact business in this state;
- (3) That it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state;
- (4) A mailing address to which a copy of any process served on the Secretary of State pursuant to paragraph (3) of this Code section may be mailed; and
- (5) A commitment to notify the Secretary of State in the future of any change in the mailing address provided pursuant to paragraph (4) of this Code section. (Code 1981, § 14-9-906, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1999, p. 405, § 28.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides for the method of cancellation of the certificate of authority.

**Prior Georgia Law**

There is no provision under prior Georgia law for foreign limited partnerships.

**Comparison With Official RULPA**

RULPA language as to substituted service was deleted as unnecessary. Substituted service is permitted pursuant to Section 14-9-902.1(i).

**Cross-References**

Method of filing certificate of authority: § 14-9-903. Substituted service on Secretary of State when foreign limited partnership fails to maintain registered office: § 14-9-902.1(i). Secretary of State rules regarding cancellation of certificate: 590-7-16-03(1).

**14-9-907. Transaction of business without registering.**

(a) A foreign limited partnership transacting business in this state may not maintain an action, suit, or proceeding in a court of this state until it has obtained a certificate of authority.

(b) The failure of a foreign limited partnership to obtain a certificate of authority does not impair the validity of any contract or act of the foreign



limited partnership or prevent the foreign limited partnership from defending any action, suit, or proceeding in any court of this state.

(c) A foreign limited partnership that transacts business in this state without registering as required by this article shall be liable to the state:

(1) For all fees which would have been imposed by this article upon such foreign limited partnership had it registered as required by this article; and

(2) If it has not registered within 30 days after the first day on which it transacts business in this state, for a penalty of \$500.00. (Code 1981, § 14-9-907, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 2002, p. 989, § 14.)

The 2002 amendment, effective July 1, 2002, deleted "for each year or part thereof during which it so transacts business" following "\$500.00" at the end of paragraph (c)(2).

### COMMENT

#### Note to Georgia Revised Uniform Limited Partnership Act

This section provides for penalties and other consequences of transacting business in this state without a certificate of authority.

#### Prior Georgia Law

There is no provision under prior Georgia law for foreign limited partnerships.

#### Comparison With Official RULPA

RULPA subsection 907(c), protecting limited partners of unregistered foreign limited partnerships from general partner liability, was deleted as unnecessary in light of Section 14-9-901, which provides that the limited partners are subject to the law of the state of organization, including the provisions relating to limited liability, even if the partnership has not registered. RULPA Section 907(d), concerning substituted service, was deleted as unnecessary because substituted service is provided for in Section 14-9-902.1(i) (see Comment to Section 14-9-906).

#### Cross-References

Law governing foreign limited partnership: § 14-9-901. Requirement that all fines and fees be paid before registration: § 14-9-902. Substituted service on Secretary of State when foreign limited partnership fails to maintain registered office: § 14-9-902.1(i).

### 14-9-908. Action by Attorney General.

The Attorney General may maintain an action to restrain a foreign limited partnership from transacting business in this state in violation of this chapter. (Code 1981, § 14-9-908, enacted by Ga. L. 1988, p. 1016, § 1.)

**Code Commission notes.** — Pursuant to General" was capitalized in the catchline Code Section 28-9-5, in 1988, "Attorney and text of the Code section.

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section permits action by the Attorney General against foreign partnerships that fail to qualify.

**Prior Georgia Law**

There is no provision under prior Georgia law for foreign limited partnerships.

**Comparison With Official RULPA**

This section is the same as the official version.

**Cross-References**

Duty to obtain a certificate of authority by foreign limited partnership transacting business in this state: § 14-9-902. Duty to amend certificate of authority: § 14-9-905. Other penalties and consequences for transacting business without certificate of authority: § 14-9-907. Secretary of State rules regarding consequences of failing to obtain certificate: 590-7-16.03(1).

**ARTICLE 10****DERIVATIVE ACTIONS****14-9-1001. Right of limited partner to bring action.**

A limited partner may maintain an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or an effort to cause those general partners to bring the action is not likely to succeed. The foregoing authority to bring an action in the right of a limited partnership shall not limit any right a limited partner might have under the partnership agreement or otherwise. (Code 1981, § 14-9-1001, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section permits limited partner derivative suits in specified circumstances.

**Prior Georgia Law**

There is no provision under prior Georgia law for partnership derivative actions.

**Comparison With Official RULPA**

Language has been added to the official version to clarify that, by granting a right to sue derivatively, the Section should not be read to limit any other rights, including the right to bring an action for accounting, to sue directly outside an accounting, or to pursue remedies provided for in the partnership agreement.

**Cross-References**

Action for accounting: §§ 14-8-22 and 14-8-43. Who may bring a derivative action: § 14-9-1002. Pleading effort to secure action by general partner: § 14-9-1003.



**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1395, 1397, 1398. **C.J.S.** — 68 C.J.S., Partnership, § 438.

**14-9-1002. Requirements for plaintiff.**

Except to the extent provided by the partnership agreement, in a derivative action, the plaintiff must be a partner at the time of bringing the action and:

- (1) Must have been a partner at the time of the transaction of which he complains; or
- (2) His status as a partner must have devolved upon him by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction. (Code 1981, § 14-9-1002, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section sets forth rules regarding who may bring a derivative action.

**Prior Georgia Law**

There is no provision under prior Georgia law for limited partner derivative actions.

**Comparison With Official RULPA**

Introductory language has been added to the official version that empowers the partners to provide in the partnership agreement for suit by assignees, non-contemporaneous partners or others.

**Cross-Reference**

Limited partner derivative suits permitted: § 14-9-1001.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1396, 1398.

**14-9-1003. Complaint.**

In a derivative action, the complaint must set forth with particularity the effort of the plaintiff to secure commencement of the action by a general partner or the reasons for not making the effort. (Code 1981, § 14-9-1003, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section sets forth the pleading rule regarding plaintiff's effort to secure action by the general partner.

**Prior Georgia Law**

There is no provision under prior Georgia law for partner derivative actions.

**Comparison With Official RULPA**

This section is the same as the official version.

**Cross-Reference**

Derivative action permitted only if general partners with authority to do so have refused to bring the action or an effort to cause them to do it is not likely to succeed: § 14-9-1001.

**RESEARCH REFERENCES**

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, § 1400.

**14-9-1004. Expenses.**

If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorneys' fees, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him. (Code 1981, § 14-9-1004, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section permits payment of expenses to a successful plaintiff, and requires the plaintiff to remit to the limited partnership proceeds of the action received by him in excess of expenses.

**Prior Georgia Law**

There is no provision under prior Georgia law for partnership derivative suits.

**Comparison With Official RULPA**

This section is the same as the official version.

**Cross-References**

Limited partner derivative action permitted: § 14-9-901. Indemnification of partners: § 14-9-108.

**RESEARCH REFERENCES**

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, § 1401.



ARTICLE 11  
ADMINISTRATION

14-9-1101. Fees.

The Secretary of State shall charge and collect for:

- (1) Filing a certificate of limited partnership ..... \$ 100.00
- (2) Filing a registration of a foreign limited partnership .... 225.00
- (3) Filing an annual registration ..... 30.00
- (4) Agent’s statement of resignation ..... No fee
- (5) Statement of change of address of registered agent or  
registered office...\$5.00 per limited partnership but not less  
than ..... 20.00
- (6) Filing of an amendment to a certificate of limited part-  
nership for the purpose of becoming a limited liability  
partnership ..... 100.00
- (7) Certificate of election to become a limited partnership 80.00
- (8) Filing any other document required or permitted pursu-  
ant to this chapter ..... 20.00
- (9) Application for reservation of a name ..... 25.00

(Code 1981, § 14-9-1101, enacted by Ga. L. 1988, p. 1016, § 1; Ga. L. 1989, p. 931, § 16; Ga. L. 1996, p. 787, § 14; Ga. L. 1999, p. 405, § 29; Ga. L. 2003, p. 883, § 6.)

The 2003 amendment, effective July 1, 2003, substituted “\$100.00” for “\$60.00” in paragraph (1), substituted “225.00” for “170.00” in paragraph (2), substituted “30.00” for “15.00” in paragraph (3), and added paragraph (9).

Law reviews. — For note on 1989 amend-  
ment to this Code section, see 6 Ga. St. U.L.  
Rev. 184 (1989).

COMMENT

Note to Georgia Revised Uniform Limited Partnership Act

This section provides for filing fees to be charged by the Secretary of State.

Prior Georgia Law

There is no comparable provision. Under prior law, partnership documents were not filed with the Secretary of State.

Comparison With Official RULPA

There is no comparable provision in the official version.

**Cross-References**

Procedure for filing of certificates of limited partnership, amendment, cancellation and merger with Secretary of State: § 14-9-206. Procedure for issuance of certificate of authority of foreign limited partnership: § 14-9-903.

**14-9-1102. Administrative powers of Secretary of State.**

The Secretary of State shall have the power and authority reasonably necessary to enable him to administer this chapter efficiently and to perform the duties therein imposed upon him, including, without limitation, the power and authority to employ from time to time such additional personnel as in his judgment are required for those purposes. (Code 1981, § 14-9-1102, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section gives the Secretary of State power and authority to enable him to administer this chapter.

**Prior Georgia Law**

There was no comparable provision.

**Comparison With Official RULPA**

There is no comparable provision in the official version.

**14-9-1103. Rules and regulations.**

The Secretary of State may promulgate such rules and regulations, not inconsistent with the provisions of this chapter, which are incidental to and necessary for the implementation and enforcement of such provisions of this chapter as are administered by the Secretary of State. Such rules and regulations shall be promulgated in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 14-9-1103, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section permits the Secretary of State to promulgate rules and regulations.

**Prior Georgia Law**

There is no comparable provision.

**Comparison With Official RULPA**

There is no comparable provision in the official version.

**Cross-Reference**

Secretary of State rules regarding limited partnerships: 590-7-10 et seq.



**14-9-1104. Duty of Secretary of State to file documents.**

The Secretary of State's duty to file documents under this chapter is ministerial. His filing or refusing to file a document does not:

- (1) Affect the validity or invalidity of the document in whole or part;
- (2) Relate to the correctness or incorrectness of information contained in the document; or
- (3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect. (Code 1981, § 14-9-1104, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides that the Secretary of State's duty is ministerial, so that his filing or refusing to file a document does not validate or invalidate the substance of the document.

**Prior Georgia Law**

There is no comparable provision.

**Comparison With Official RULPA**

There is no comparable provision in the official version.

**Cross-References**

Effect of filing certificate of limited partnership and of cancellation of certificate: § 14-9-201(b). Effect of filing certificates of amendment, cancellation and merger: § 14-9-206(b)-(d). Effect of issuing certificate of authority for foreign limited partnership: § 14-9-903(c).

**ARTICLE 12****APPLICABILITY****RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1234, 1235. **C.J.S.** — 68 C.J.S., Partnership, § 403.

**14-9-1201. Partnerships covered by chapter.**

(a) This chapter governs all domestic limited partnerships formed on or after July 1 of the year in which this chapter becomes effective and all foreign limited partnerships transacting business in this state on or after July 1 of the year in which this chapter becomes effective.

(b) A domestic limited partnership formed before July 1 of the year in which this chapter becomes effective may voluntarily elect, in accordance with any provision in its partnership agreement permitting it to do so or by

complying with the procedures provided in its partnership agreement for amending the partnership agreement, to adopt the provisions of this chapter and thereafter may become subject to its provisions as of July 1 of the year in which this chapter becomes effective by filing with the Secretary of State at any time after April 15 of the year in which this chapter becomes effective a certificate of limited partnership that complies with this chapter or a certificate of amendment that would cause its certificate of limited partnership to comply with this chapter and that, in each case, specifically states that the limited partnership is electing to adopt the provisions of this chapter. Upon the later of July 1 of the year in which this chapter becomes effective or the filing of a document complying with the immediately preceding sentence, all provisions of this chapter shall thereafter apply to the limited partnership.

(c) A domestic limited partnership formed before July 1 of the year in which this chapter becomes effective that does not adopt the provisions of this chapter pursuant to subsection (b) of this Code section shall continue to be governed by Article 1 or Article 2 of Chapter 9A of this title, as applicable. (Code 1981, § 14-9-1201, enacted by Ga. L. 1988, p. 1016, § 1.)

#### COMMENT

##### **Note to Georgia Revised Uniform Limited Partnership Act**

Subsection (a) provides that the chapter governs all domestic limited partnerships formed, and all foreign limited partnerships transacting business in this state, on or after July 1, 1988. Partnerships formed prior to July 1, 1988 may, under subsection (b), elect coverage under the new act by a filing that becomes effective upon the later of the date of filing or July 1, 1988. Under subsection (c), a partnership formed prior to the effective date that does not adopt this act will be governed by the prior law.

##### **Prior Georgia Law**

Section 14-9A-5 similarly provides that pre-existing partnerships were governed by the prior law until they become limited partnerships under the new law.

##### **Comparison With Official RULPA**

RULPA Section 1104 applies the new act even to existing partnerships, although it includes phase-in provisions to avoid impairing pre-effective partnerships, contracts and actions. Application of prior law to existing partnerships that do not elect coverage under the new law reduces the burden on both partnerships (which would have to revise existing agreements and refile) and on the Secretary of State, and eliminates the necessity for elaborate and confusing phase-in provisions.

##### **Cross-References**

Organization, contracts, rights and actions not impaired or affected: § 14-9-1202(b).  
Ensuring availability of name to partnerships existing prior to effective date: § 14-9-1203.

#### **14-9-1202. Effect on partnerships existing prior to July 1, 1988.**

(a) This chapter shall not apply to limited partnerships existing before July 1 of the year in which this chapter becomes effective except as provided in Code Section 14-9-1201.



(b) This chapter shall not be construed so as to impair, or otherwise affect, the organization or the continued existence of a limited partnership existing before July 1 of the year in which this chapter becomes effective. This chapter shall not be construed so as to impair any contract or to affect any action or proceedings begun or right accrued before July 1 of the year in which this chapter becomes effective. (Code 1981, § 14-9-1202, enacted by Ga. L. 1988, p. 1016, § 1.)

#### COMMENT

##### **Note to Georgia Revised Uniform Limited Partnership Act**

Subsection (a) provides that the new act does not apply to limited partnerships existing prior to July 1, 1988 unless they elect to be so covered pursuant to Section 14-9-1201. Subsection (b) provides that the chapter does not impair or affect pre-existing organization, existence, contracts, actions or proceedings.

##### **Prior Georgia Law**

As to subsection (a), see Comment to Section 14-9-1201. Section 14-9A-3(c) is similar to subsection (b).

##### **Comparison With Official RULPA**

See Comment to Section 14-9-1201. RULPA Section 1105 is similar to Section 14-9-1202(b).

##### **Cross-Reference**

New act applies only to partnerships formed after effective date or that elect to adopt the new act: § 14-9-1201.

#### **14-9-1203. Nonrenewable one-year name reservation for partnerships existing prior to July 1, 1988.**

(a) The intent of this Code section is to ensure an orderly transition to a centralized filing system for limited partnerships and to give existing limited partnerships an opportunity to establish name availability and other files with the Secretary of State to permit an orderly implementation of this chapter.

(b) In order to preserve the availability of its name, a domestic limited partnership or a foreign limited partnership existing prior to July 1 of the year in which this chapter becomes effective may file with the Secretary of State a nonrenewable one-year name reservation after April 15 and before July 1 of the year in which this chapter becomes effective. Any of such limited partnerships which do not so file shall be subject to the name restrictions of Code Section 14-9-102. (Code 1981, § 14-9-1203, enacted by Ga. L. 1988, p. 1016, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, the cross reference at the end of the Code section was corrected.

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

A domestic or foreign limited partnership existing prior to July 1, 1988 may preserve the availability of its name by filing a one-year name reservation prior to July 1, 1988. A limited partnership that does not do so is subject to Section 14-9-102, particularly including the rule that its name be distinguishable from a limited partnership that has already filed, as by having to add distinguishing notations under Section 14-9-102(b)(2).

**Prior Georgia Law**

There is no comparable provision.

**Comparison With Official RULPA**

There is no comparable provision in the official version.

**Cross-Reference**

Rules regarding partnership name: § 14-9-102.

**14-9-1204. Applicability of Uniform Partnership Act.**

The provisions of Chapter 8 of this title, known as the "Uniform Partnership Act," shall govern in any case not provided for in this chapter. (Code 1981, § 14-9-1204, enacted by Ga. L. 1988, p. 1016, § 1.)

**COMMENT****Note to Georgia Revised Uniform Limited Partnership Act**

This section provides that the Uniform Partnership Act governs any case not provided for by the Georgia Revised Uniform Limited Partnership Act.

**Prior Georgia Law**

Section 14-8-6(2) provides that the Uniform Partnership Act applies to "limited partnerships except insofar as the statutes relating to such partnerships are inconsistent with this chapter."

**Comparison With Official RULPA**

RULPA Section 1106 is similar.

**Cross-References**

The application of provisions of the Uniform Partnership Act is noted in the Comments to particular sections. Application of provisions regarding rights, powers and liabilities of general partners is summarized in the Comments to §§ 14-9-404 and 14-9-405. The application of provisions regarding dissolution is summarized in the Comment to § 14-9-801.



## LIMITED PARTNERSHIPS

### CHAPTER 9A

#### LIMITED PARTNERSHIPS

Article 1		Sec.	
<b>Limited Partnerships Formed Since February 15, 1952</b>			himself limited partner not liable as general partner.
<b>PART 1</b>		14-9A-44.	Loans and other business transactions between limited partner and partnership; limitation on resulting claims against partnership.
<b>GENERAL PROVISIONS</b>		14-9A-45.	Priority among limited partners.
Sec.		14-9A-46.	Compensation.
14-9A-1.	Short title.	14-9A-47.	Withdrawal or reduction of contribution.
14-9A-2.	Limited partnership defined.	14-9A-48.	Liability of limited partner to partnership.
14-9A-2.1.	Applicability of article.	14-9A-49.	Nature of limited partner's interest.
14-9A-3.	Construction of article.	14-9A-50.	Assignment of limited partner's interest.
14-9A-4.	Rules for cases not provided for by article.	14-9A-51.	Effect of death of limited partner.
14-9A-5.	Effect of article on existing partnerships.	14-9A-52.	Rights of judgment creditor of limited partner.
<b>PART 2</b>			<b>PART 4</b>
<b>FORMATION, CANCELLATION, AND AMENDMENT</b>			<b>GENERAL PARTNERS</b>
14-9A-20.	Formation.	14-9A-70.	Rights, powers, and liabilities of general partner.
14-9A-21.	Business which may be carried on; power to acquire property.		<b>PART 5</b>
14-9A-22.	Use of surname of limited partner in partnership name; liability of limited partner if surname improperly used.		<b>CONTRIBUTORS</b>
14-9A-23.	Admission of additional limited partners.	14-9A-80.	Party to proceedings.
14-9A-24.	One person both general and limited partner.		<b>PART 6</b>
14-9A-25.	When certificate of limited partnership required to be canceled.		<b>DISSOLUTION</b>
14-9A-26.	Procedure for amendment or cancellation of certificate of limited partnership.	14-9A-90.	Effect of retirement, death, or insanity of general partner.
14-9A-27.	Liability for false statement in certificate.	14-9A-91.	Settling of accounts.
<b>PART 3</b>			<b>Article 2</b>
<b>LIMITED PARTNERS</b>			<b>Limited Partnerships Formed Prior to February 15, 1952</b>
14-9A-40.	Character of limited partner's contribution.	14-9A-110.	Applicability of article; renewal of existing partnerships restricted.
14-9A-41.	Limited partner not liable to creditors.	14-9A-111.	Who may form limited partnership; purposes; liability of general and special partners.
14-9A-42.	Rights.		
14-9A-43.	Person erroneously believing		

## CORPORATIONS, PARTNERSHIPS, ETC.

Sec.		Sec.	
14-9A-112.	Firm name.		in firm name, capital, or death of partner.
14-9A-113.	Certificate of limited partnership — Contents.	14-9A-122.	Dissolution — By acts of partners; notice required.
14-9A-114.	Certificate of limited partnership — Acknowledgment.	14-9A-123.	Powers of general and special partners.
14-9A-115.	Certificate of limited partnership — Filing.	14-9A-124.	Repayment of contribution of special partner prohibited; payment of interest and profits to special partner.
14-9A-116.	Affidavits of capital paid in.	14-9A-125.	Priority of special partners.
14-9A-117.	Certified copies admissible in evidence.	14-9A-126.	Parties to actions.
14-9A-118.	Certificate and affidavit prerequisite to formation; effect of false statement.	14-9A-127.	Liability of general partners for management of firm.
14-9A-119.	Publication of terms of partnership; affidavits of publication as evidence.	14-9A-128.	Liability of partners for fraud.
14-9A-120.	Renewal or continuance of partnership.	14-9A-129.	Fraudulent sale, assignment, or transfer of property void.
14-9A-121.	Dissolution — Effect of changes	14-9A-130.	Penalty for fraud.

**Cross references.** — Limited partnerships formed after July 1, 1988, § 14-9-100 et seq.

**Law reviews.** — For article, "Freedom of Contract Among the Owners of a Partnership or Limited Partnership," see 36 Mercer

L. Rev. 701 (1985). For article, "The New Georgia Limited Partnership Act," see 24 Ga. St. B.J. 168 (1988). For article, "An Applied Theory of Limited Partnership," see 37 Emory L.J. 835 (1988).

### JUDICIAL DECISIONS

**Nature of claim for partnership accounting, dissolution, or injunction.** — No provision in the Georgia Uniform Partnership Act, O.C.G.A. § 14-8-1 et seq., or Georgia Uniform Limited Partnership Act, O.C.G.A.

§ 14-9A-1 et seq., changes a claim for an accounting, dissolution, or injunction into a legal action or grants a partner the right to a jury trial. *Williams v. Tritt*, 262 Ga. 173, 415 S.E.2d 285 (1992).

## ARTICLE 1

### LIMITED PARTNERSHIPS FORMED SINCE FEBRUARY 15, 1952

**Law reviews.** — For article discussing the Uniform Limited Partnership Act, adopted in Georgia in 1952, see 14 Ga. B.J. 423

(1952). For article, "Use of Limited Partnership to Invest in Depreciable Realty," see 21 Mercer L. Rev. 481 (1970).

### JUDICIAL DECISIONS

**One of this article's (O.C.G.A. Art. 1, Ch. 9, T. 14) main purposes** is to ensure that, where there has been substantial compliance with the law, limited partners do not find themselves exposed to the liability of a general partnership because of a mere techni-

cality. *Franklin v. Rigg*, 143 Ga. App. 60, 237 S.E.2d 526 (1977).

The whole tenor of O.C.G.A. Art. 1, Ch. 9, T. 14 is to protect the investors from being held to be general partners and to give third parties notice that some of the partners have



limited liability. *Hirsch v. Equilateral Assocs.*, 245 Ga. 373, 264 S.E.2d 885 (1980).

**Intended as remedial legislation.** — The Uniform Limited Partnership Act (see O.C.G.A. § 14-9A-1) as adopted in Georgia is obviously intended as remedial legislation.

*Franklin v. Rigg*, 143 Ga. App. 60, 237 S.E.2d 526 (1977).

**Cited in** *Hammond v. Chastain*, 230 Ga. 747, 199 S.E.2d 237 (1973); *Kleiner v. Silver*, 137 Ga. App. 560, 224 S.E.2d 508 (1976).

## OPINIONS OF THE ATTORNEY GENERAL

**Offering for sale of limited partnerships** constitutes offering for sale of a security as the same is defined by the Georgia Securities Act, (see O.C.G.A. § 10-5-1 et seq.) unless exempted or involved in an exempt transaction, such securities must be registered. 1969 Op. Att'y Gen. No. 69-328.

**Offering for sale of investment club interest.** — If the formation of an investment club were essentially the same as that for a limited partnership, such an interest would be a security. 1969 Op. Att'y Gen. No. 69-328.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1232.

**ALR.** — Personal liability to other party to contract of member of firm who, without

authority, attempts to bind the firm, 4 ALR 258.

Right of individual partner to exemption in partnership property, 4 ALR 300.

## PART 1

### GENERAL PROVISIONS

#### 14-9A-1. Short title.

This article may be cited as the "Uniform Limited Partnership Act." (Ga. L. 1952, p. 375, § 27; Code 1981, § 14-9-1; Code 1981, § 14-9A-1, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**Law reviews.** — For review of 1996 corporation, partnership, and association legislation, see 13 Ga. St. U. L. Rev. 70.

## RESEARCH REFERENCES

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 27.

#### 14-9A-2. Limited partnership defined.

A limited partnership is a partnership formed by two or more persons under Code Section 14-9A-20, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership. (Ga. L. 1952, p. 375, § 1; Code 1981, § 14-9-2; Code 1981, § 14-9A-2, as redesignated by Ga. L. 1988, p. 1016, § 1.)

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the issues covered in the provisions, decisions under former Code 1933, § 75-205 are included in the annotations to this Code section.

**Incoming limited partners not liable for old firm debts.** — Although provision in former Code 1933, § 75-205 that an incoming partner was not bound for the old debts of the firm in the absence of an express agreement to assume the old indebtedness

was applicable to general partners, it was equally applicable to limited partners. *Leventhal v. Green*, 246 Ga. 287, 271 S.E.2d 194 (1980) (decided under former Code 1933, § 75-205).

**Cited in** *Farmers Hdwe. of Athens, Inc. v. L.A. Properties, Ltd.*, 136 Ga. App. 180, 220 S.E.2d 465 (1975); *Westwood Place, Ltd. v. Green*, 153 Ga. App. 595, 266 S.E.2d 242 (1980).

## OPINIONS OF THE ATTORNEY GENERAL

**A limited partnership may establish and operate a health maintenance organization** since a limited partnership is a partnership and a partnership is a person within the

meaning of the health maintenance organization chapter. 1984 Op. Att'y Gen. No. 84-87.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1231, 1237, 1240-1244.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 1.

## 14-9A-2.1. Applicability of article.

This article is applicable only to limited partnerships to which Chapter 9 of this title or Article 2 of this chapter does not apply as provided by Code Section 14-9-1201 or 14-9A-110. (Code 1981, § 14-9A-2.1, enacted by Ga. L. 1988, p. 1016, § 2.)

## 14-9A-3. Construction of article.

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

(b) This article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(c) This article shall not be so construed as to impair the obligations of any contract existing when the article goes into effect, nor to affect any action on proceedings begun or right accrued before this article takes effect. (Ga. L. 1952, p. 375, § 28; Code 1981, § 14-9-3; Code 1981, § 14-9A-3, as redesignated by Ga. L. 1988, p. 1016, § 1.)



## JUDICIAL DECISIONS

**Cited in** *Trans-Am Bldrs., Inc. v. Woods Mill, Ltd.*, 133 Ga. App. 411, 210 S.E.2d 866 (1974).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1234-1236.

**C.J.S.** — 68 C.J.S., Partnership, § 402 et seq.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 28.

**14-9A-4. Rules for cases not provided for by article.**

In any case not provided for in this article, the rules of law and equity, including the law merchant, shall govern. (Ga. L. 1952, p. 375, § 29; Code 1981, § 14-9-4; Code 1981, § 14-9A-4, as redesignated by Ga. L. 1988, p. 1016, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1234-1236.

**C.J.S.** — 68 C.J.S., Partnership, § 402 et seq.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 29.

**14-9A-5. Effect of article on existing partnerships.**

(a) A limited partnership formed under any statute of this state prior to the adoption of this article may become a limited partnership under this article by complying with Code Section 14-9A-20, provided the certificate sets forth:

(1) The amount of the original contribution of each limited partner and the time when the contribution was made; and

(2) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(b) A limited partnership formed under any statute of this state prior to the adoption of this article, until or unless it becomes a limited partnership under this article, shall continue to be governed by Article 2 of this chapter, except that such partnership shall not be renewed unless so provided in the original agreement. (Ga. L. 1952, p. 375, § 30; Code 1981, § 14-9-5; Code 1981, § 14-9A-5, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**JUDICIAL DECISIONS**

**Applicability to limited partnership created before effective date.** — The Uniform Limited Partnership Act (see O.C.G.A. Art. 1, Ch. 9A, T. 14) does not apply to a limited partnership created prior to its effective date

in absence of showing of compliance with provisions of the 1952 Act proscribing the method by which it may come within its provisions. *Hasty v. Wilson*, 223 Ga. 739, 158 S.E.2d 915 (1967).

**RESEARCH REFERENCES**

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 30.

**PART 2****FORMATION, CANCELLATION, AND AMENDMENT****14-9A-20. Formation.**

(a) Two or more persons desiring to form a limited partnership shall:

(1) Sign and swear to a certificate, which shall state:

(A) The name of the partnership;

(B) The character of the business;

(C) The location of the principal place of business;

(D) The name and place of residence of each member, designating which of the members are general partners and which are limited partners;

(E) The term for which the partnership is to exist, or that it is to exist until terminated by law or according to the termination provisions of the partnership agreement, which provisions shall be set forth in the certificate;

(F) The amount of cash and a description and the agreed value of the other property contributed by each limited partner;

(G) The additional contributions, if any, agreed to be made by each limited partner and the times at which or events upon the happening of which they shall be made;

(H) The time, if agreed upon, when the contribution of each limited partner is to be returned;

(I) The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution;

(J) The right, if given, of a limited partner to substitute an assignee as contributor in his place and the terms and conditions of the substitution;



(K) The right, if given, of the partners to admit additional limited partners;

(L) The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority;

(M) The right, if given, of the remaining general partner or partners to continue the business on the death, retirement, or insanity of a general partner; and

(N) The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(2) File the certificate in the office of the clerk of the superior court of the county in which the principal place of business of the partnership shall be situated, to be recorded by the clerk in a book to be kept for that purpose and open to public inspection. If the partnership shall have places of business situated in different counties, a transcript of the certificate, duly certified by the clerk in whose office it shall be filed and under his official seal, shall be filed and recorded in like manner in the office of the clerk of the superior court in every such county.

(b) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of subsection (a) of this Code section. (Ga. L. 1952, p. 375, § 2; Code 1981, § 14-9-20; Ga. L. 1982, p. 3, § 14; Ga. L. 1985, p. 149, § 14; Code 1981, § 14-9A-20, as redesignated by Ga. L. 1988, p. 1016, § 1; Ga. L. 1992, p. 6, § 14.)

**Cross references.** — Registration of partnership name which does not disclose individual ownership of trade, business, or profession carried on under such name, § 10-1-490 et seq.

**Law reviews.** — For article surveying Georgia cases in the area of business associations from June 1977 through May 1978, see 30 Mercer L. Rev. 1 (1978).

## JUDICIAL DECISIONS

**Reasonable time applicable where no specific time fixed.** — The rule that, where a specific time is not fixed, an act is sufficient which is done within a reasonable time applies to Ga. L. 1952, p. 375, § 2 (see

O.C.G.A. § 14-9A-20). *Franklin v. Rigg*, 143 Ga. App. 60, 237 S.E.2d 526 (1977).

**Cited in** *Hirsch v. Equilateral Assocs.*, 245 Ga. 373, 264 S.E.2d 885 (1980).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1250, 1251, 1256-1269.

**C.J.S.** — 68 C.J.S., Partnership, § 406 et seq.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 2.

**ALR.** — Validity of partnership agreement between husband and wife, 157 ALR 652.

**14-9A-21. Business which may be carried on; power to acquire property.**

(a) A limited partnership may carry on any business which a partnership without limited partners may carry on, except for banking, insurance, railroad, trust, canal, navigation, express, and telegraph businesses.

(b) A limited partnership may acquire property of any nature and take title thereto in the name of the partnership. The specification of this power shall not be construed to limit any other power which such limited partnership may have. (Ga. L. 1952, p. 375, § 3; Ga. L. 1970, p. 195, § 1; Code 1981, § 14-9-21; Code 1981, § 14-9A-21, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**Cross references.** — Status of banking, insurance, or railroad corporations as Secretary of State Corporations, § 14-4-1 et seq.

**JUDICIAL DECISIONS**

**Legal title to real property in partners as tenants in common.** — Legal title to real property can never vest in a partnership as such; legal title is in the partners as tenants in common. Ga. L. 1952, p. 375, § 3 (see O.C.G.A. § 14-9A-21) permitting limited partnerships to take and hold property in the partnership name does not have the effect of changing the ownership from the partners to the partnership. *Hammond v. Chastain*, 230 Ga. 747, 199 S.E.2d 237 (1973).

**Limited partner holds tangible personal property interest.** — A limited partnership is a legal entity and authorized to hold title to

real property in its own name. As such a legal entity, the limited partnership is entirely separate and apart from its partners; and the property interest held by a limited partner is tangible personal property. A limited partner owns an interest in the legal entity but holds no title to the assets of the partnership. Any benefit to the limited partners stemming from the assets of the limited partnership is indirect. *Maxco, Inc. v. Volpe*, 247 Ga. 212, 274 S.E.2d 561 (1981).

**Cited in** *York Assocs. v. Frenchmen's Creek Investors, Ltd.*, 720 F. Supp. 991 (N.D. Ga. 1989).

**OPINIONS OF THE ATTORNEY GENERAL**

**Signing bonds as bondsmen.** — Limited partnerships can engage in business of signing both criminal and civil bonds as professional bondsmen. 1957 Op. Att'y Gen. p. 197.

**Health maintenance organization as insurer.** — A health maintenance organization is not by definition automatically considered to be conducting the business of insurance. 1984 Op. Att'y Gen. No. 84-87.

**Revision of Insurance Code definition of**

**"insurer".** — A limited partnership which has been operating a health maintenance organization since 1981 may continue to do so notwithstanding § 33-1-2(4), which defines "insurer" for purposes of the Georgia Insurance Code, since even if the 1982 revision of that section could affect the right of a limited partnership to operate a health maintenance organization, the effect of the revision, if any, is prospective only. 1984 Op. Att'y Gen. No. 84-87.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1240, 1241.

**C.J.S.** — 68 C.J.S., Partnership, §§ 403, 416.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 3.

**14-9A-22. Use of surname of limited partner in partnership name; liability of limited partner if surname improperly used.**

(a) The surname of a limited partner shall not appear in the partnership name, unless:

(1) It is also the surname of a general partner; or

(2) Prior to the time when the limited partner became such, the business had been carried on under a name in which his surname appeared.

(b) A limited partner whose name appears in a partnership name contrary to subsection (a) of this Code section is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner. (Ga. L. 1952, p. 375, § 5; Code 1981, § 14-9-22; Code 1981, § 14-9A-22, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**Cross references.** — Registration of partnership name which does not disclose individual ownership of trade, business, or pro-

fession carried on under such name, § 10-1-490 et seq.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1254.

**C.J.S.** — 68 C.J.S., Partnership, § 415.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 5.

**14-9A-23. Admission of additional limited partners.**

After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of Code Section 14-9A-26. (Ga. L. 1952, p. 375, § 8; Code 1981, § 14-9-23; Code 1981, § 14-9A-23, as redesignated by Ga. L. 1988, p. 1016, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1270.

**C.J.S.** — 68 C.J.S., Partnership, §§ 417, 427.

**ALR.** — Limited partnership: sufficiency

of procedure for designating or admitting additional general partner, 6 ALR4th 1277.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 8.

**14-9A-24. One person both general and limited partner.**

(a) A person may be a general partner and a limited partner in the same partnership at the same time.

(b) A person who is at the same time both a general and a limited partner shall have all the rights and powers and be subject to all the restrictions of a general partner, except that, in respect to his contributions, he shall have the rights against the other members which he would have had as a limited partner if he were not also a general partner. (Ga. L. 1952, p. 375, § 12; Code 1981, § 14-9-24; Code 1981, § 14-9A-24, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1321.

**C.J.S.** — 68 C.J.S., Partnership, §§ 405, 407.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 12.

**14-9A-25. When certificate of limited partnership required to be canceled.**

(a) The certificate required under Code Section 14-9A-20 shall be canceled when the partnership is dissolved or all limited partners cease to be such.

(b) A certificate shall be amended when:

(1) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner;

(2) A person is substituted as a limited partner;

(3) An additional limited partner is admitted;

(4) A person is admitted as a general partner;

(5) A general partner retires, dies, or becomes insane and the business is continued under Code Section 14-9A-90;

(6) There is a change in the character of the business of the partnership;

(7) There is a false or erroneous statement in the certificate;

(8) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution;

(9) A time is fixed for the dissolution of the partnership or the return of a contribution, no time having been specified in the certificate; or

(10) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement



between them. (Ga. L. 1952, p. 375, § 24; Code 1981, § 14-9-25; Code 1981, § 14-9A-25, as redesignated by Ga. L. 1988, p. 1016, § 1.)

### JUDICIAL DECISIONS

**Cited in** *Ameritrust Co. v. White*, 73 F.3d 1553 (11th Cir. 1996).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1273, 1402-1404.

**C.J.S.** — 68 C.J.S., Partnership, §§ 417, 427, 440, 441.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 24.

**ALR.** — Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

### **14-9A-26. Procedure for amendment or cancellation of certificate of limited partnership.**

(a) The writing to amend a certificate shall:

(1) Conform to the requirements of paragraph (1) of subsection (a) of Code Section 14-9A-20 as far as necessary to set forth clearly the change in the certificate which it is desired to make; and

(2) Be signed and sworn to by all members. An amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added; and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(b) The writing to cancel a certificate shall be signed by all members.

(c) A person desiring the cancellation or amendment of a certificate, if any person designated in subsections (a) and (b) of this Code section as a person who must execute the writing refuses to do so, may petition the superior court of the county wherein the principal place of business of said partnership is situated to direct a cancellation or amendment thereof.

(d) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the clerk of the superior court in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(e) A certificate is amended or canceled when there is filed for record in the office of the clerk of the superior court where the certificate is recorded:

(1) A writing in accordance with subsection (a) or (b) of this Code section; or

(2) A certified copy of the order of court in accordance with subsection (d) of this Code section.

(f) After the certificate is duly amended in accordance with this Code section, the amended certificate shall thereafter be for all purposes the certificate provided for by this article. (Ga. L. 1952, p. 375, § 25; Code 1981, § 14-9-26; Code 1981, § 14-9A-26, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**Law reviews.** — For article surveying business associations developments in Georgia from mid-1980 through mid-1981 concern-

ing partnerships and corporations, see 33 Mercer L. Rev. 19 (1981).

### JUDICIAL DECISIONS

**Order of recordation is simply a memorial** of action previously taken and ministerial in nature; it can appropriately take place following an interlocutory hearing. *Consortium Mgt. Co. v. Mutual Am. Corp.*, 246 Ga. 346, 271 S.E.2d 488 (1980).

**No personal service required on general partner.** — Where partnership agreement expressly empowers the holders of 75 percent interest in partnership to remove a general partner; when the holders of more than 75 percent of the interest in the partnership vote to remove the general partners, the action is then effective. As no intervention by the court is necessary to accomplish the removal, and the only necessity for in-

volving the court is to record the action already taken, which is the purpose of Ga. L. 1952, p. 375, § 25, the role of the court in this connection is that of carrying out a purely ministerial function, and under these circumstances, no personal service is required on general partner. *Consortium Mgt. Co. v. Mutual Am. Corp.*, 246 Ga. 346, 271 S.E.2d 488 (1980).

**Propriety of injunction based on amended certificate.** — Where order directing recording of amended certificate is proper, injunction based on amended certificate is proper. *Consortium Mgt. Co. v. Mutual Am. Corp.*, 246 Ga. 346, 271 S.E.2d 488 (1980).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1270, 1271, 1273, 1274, 1402, 1403.

**C.J.S.** — 68 C.J.S., Partnership, §§ 417, 427, 440, 440.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.), § 25.

### 14-9A-27. Liability for false statement in certificate.

If the certificate required under Code Section 14-9A-20 contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false:

(1) At the time he signed the certificate; or

(2) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate or to file a petition for its cancellation or amendment as provided in subsection (c) of Code Section 14-9A-26. (Ga. L. 1952, p. 375, § 6; Code 1981, § 14-9-27; Code 1981, § 14-9A-27, as redesignated by Ga. L. 1988, p. 1016, § 1.)



## JUDICIAL DECISIONS

**Intent to defraud a prerequisite.** — A motion to dismiss a complaint alleging violations of the Georgia Securities Act, O.C.G.A. § 10-5-1, the Uniform Limited Partnership Act, O.C.G.A. § 14-9A-1 et seq., and common-law fraud was granted on the

ground that the complaint did not show an intent to defraud. *Currie v. Cayman Resources Corp.*, 595 F. Supp. 1364 (N.D. Ga. 1984), reversed on other grounds, 835 F.2d 780 (11th Cir. 1988).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1311, 1312.

**C.J.S.** — 68 C.J.S., Partnership, §§ 414, 418.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.), § 6.

**ALR.** — Liability for false information in certificate of limited partnership, under Uniform Limited Partnership Act § 6, 34 ALR2d 1454.

## PART 3

## LIMITED PARTNERS

## 14-9A-40. Character of limited partner's contribution.

The contributions of a limited partner may be cash or other property but not services. (Ga. L. 1952, p. 375, § 4; Code 1981, § 14-9-40; Code 1981, § 14-9A-40, as redesignated by Ga. L. 1988, p. 1016, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Partnership, § 378.

**C.J.S.** — 68 C.J.S., Partnership, § 409.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 4.

## 14-9A-41. Limited partner not liable to creditors.

A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. (Ga. L. 1952, p. 375, § 7; Code 1981, § 14-9-41; Code 1981, § 14-9A-41, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**Law reviews.** — For article surveying Georgia cases in the area of business associ-

ations from June 1977 through May 1978, see 30 Mercer L. Rev. 1 (1978).

## JUDICIAL DECISIONS

**Limited partner as advisor to general partner.** — Where project is confronted with severe financial crisis, limited partner may advise general partner and visit partnership

business, without becoming liable as general partner. *Trans-Am Bldrs., Inc. v. Woods Mill, Ltd.*, 133 Ga. App. 411, 210 S.E.2d 866 (1974).

**Incoming limited partners not liable for old firm debts.** — Although provision in former Code 1933, § 75-205 (see O.C.G.A. § 14-8-17) that an incoming partner is not bound for the old debts of the firm in the absence of an express agreement to assume the old indebtedness is applicable to general

partners, it is equally applicable to limited partners. *Leventhal v. Green*, 246 Ga. 287, 271 S.E.2d 194 (1980).

**Cited in** *Franklin v. Rigg*, 143 Ga. App. 60, 237 S.E.2d 526 (1977); *Westwood Place, Ltd. v. Green*, 153 Ga. App. 595, 266 S.E.2d 242 (1980).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1354.

**C.J.S.** — 68 C.J.S., Partnership, § 429 et seq.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 7.

**ALR.** — Right to setoff claim of individual partner against claim against partnership, 55 ALR 566.

Liability of special partner who has withdrawn his capital, to creditors of the firm, 67 ALR 1096.

### 14-9A-42. Rights.

(a) A limited partner shall have the same rights as a general partner to:

(1) Have the partnership books kept at the principal place of business of the partnership and at all times to inspect and copy any of them;

(2) Have on demand true and full information of all things affecting the partnership and a formal account of partnership affairs whenever circumstances render it just and reasonable; and

(3) Have dissolution and winding up by decree of court.

(b) A limited partner shall have the right to receive a share of the profits or other compensation by way of income and to the return of his contribution as provided in Code Sections 14-9A-46 and 14-9A-47. (Ga. L. 1952, p. 375, § 10; Code 1981, § 14-9-42; Code 1981, § 14-9A-42, as redesignated by Ga. L. 1988, p. 1016, § 1.)

### JUDICIAL DECISIONS

**Limited partner as advisor to general partner.** — Where project is confronted with severe financial crisis, limited partner may advise general partner and visit partnership business, without becoming liable as a general partner. *Trans-Am Bldrs., Inc. v. Woods Mill, Ltd.*, 133 Ga. App. 411, 210 S.E.2d 866 (1974).

**Nature of interest in partnership.** — A limited partner's interest in the partnership is a chose in action. The limited partner has

no present possession but a right of possession in the future based upon that partner's rights under the limited partnership agreement. *Harris v. C.C. Dickson, Inc. (In re Smith)*, 17 Bankr. 541 (Bankr. M.D. Ga. 1982).

**Judgment against limited partner does not create lien against that partner's partnership interest.** *Harris v. C.C. Dickson, Inc. (In re Smith)*, 17 Bankr. 541 (Bankr. M.D. Ga. 1982).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1314-1319, 1344-1347, 1402-1407.

**C.J.S.** — 68 C.J.S., Partnership, § 422 et seq.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 10.

**ALR.** — Right of limited partner to maintain derivative action on behalf of partnership, 26 ALR4th 264.

**14-9A-43. Person erroneously believing himself limited partner not liable as general partner.**

A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership if, on ascertaining the mistake, he promptly renounces his interest in the profits of the business or other compensation by way of income. (Ga. L. 1952, p. 375, § 11; Code 1981, § 14-9-43; Code 1981, § 14-9A-43, as redesignated by Ga. L. 1988, p. 1016, § 1.)

## JUDICIAL DECISIONS

**Cited in** *Franklin v. Rigg*, 143 Ga. App. 60, 237 S.E.2d 526 (1977).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1348-1352.

**C.J.S.** — 68 C.J.S., Partnership, §§ 452, 454.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 11.

**ALR.** — Construction and effect of § 11 of the Uniform Limited Partnership Act providing for modification or limitation of liability upon performance of certain acts by one who erroneously believed he had become a limited partner, 18 ALR2d 1360.

**14-9A-44. Loans and other business transactions between limited partner and partnership; limitation on resulting claims against partnership.**

(a) A limited partner may loan money to and transact other business with the partnership and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim:

(1) Receive or hold as collateral security any partnership property; or

(2) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(b) The receiving of collateral security, or a payment, conveyance, or release in violation of subsection (a) of this Code section is a fraud on the creditors of the partnership. (Ga. L. 1952, p. 375, § 13; Code 1981, § 14-9-44; Code 1981, § 14-9A-44, as redesignated by Ga. L. 1988, p. 1016, § 1.)

### JUDICIAL DECISIONS

**Scope of Code section.** — Section limited to situations where limited partner has loaned money to or otherwise transacted business with partnership. *Mills v. Kochis*, 132 Ga. App. 492, 208 S.E.2d 352 (1974), aff'd, 233 Ga. 652, 212 S.E.2d 823 (1975).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1308, 1309.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 13.

**C.J.S.** — 68 C.J.S., Partnership, § 422 et seq.

#### 14-9A-45. Priority among limited partners.

Where there are several limited partners, the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made, it shall be stated in the certificate required under Code Section 14-9A-20, and in the absence of such a statement all the limited partners shall stand upon equal footing. (Ga. L. 1952, p. 375, § 14; Code 1981, § 14-9-45; Code 1981, § 14-9A-45, as redesignated by Ga. L. 1988, p. 1016, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1261, 1262, 1315.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 14.

**C.J.S.** — 68 C.J.S., Partnership, § 422 et seq.

#### 14-9A-46. Compensation.

A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated in the certificate, provided that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. (Ga. L. 1952, p. 375, § 15; Code 1981, § 14-9-46; Code 1981, § 14-9A-46, as redesignated by Ga. L. 1988, p. 1016, § 1.)



## RESEARCH REFERENCES

Am. Jur. 2d. — 59A Am. Jur. 2d, Partnership, §§ 1314-1319.

C.J.S. — 68 C.J.S., Partnership, § 422 et seq.

U.L.A. — Uniform Limited Partnership Act (U.L.A.) § 15.

**14-9A-47. Withdrawal or reduction of contribution.**

(a) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until:

(1) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them;

(2) The consent of all members is had, unless the return of the contribution may be rightfully demanded under subsection (b) of this Code section; and

(3) The certificate required under Code Section 14-9A-20 is canceled or so amended as to set forth the withdrawal or reduction.

(b) Subject to subsection (a) of this Code section a limited partner may rightfully demand the return of his contribution:

(1) On the dissolution of a partnership; or

(2) When the date specified in the certificate for its return has arrived;  
or

(3) After he has given six months' notice in writing to all other members, if no time is specified in the certificate, either for the return of the contribution or for the dissolution of the partnership.

(c) In the absence of any statement in the certificate to the contrary or of the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(d) A limited partner may have the partnership dissolved and its affairs wound up when:

(1) He rightfully but unsuccessfully demands the return of his contribution; or

(2) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph (1) of subsection (a) of this Code section and the limited partner would otherwise be entitled to the return of his contribution. (Ga. L. 1952, p. 375, § 16; Code 1981, § 14-9-47; Code 1981, § 14-9A-47, as redesignated by Ga. L. 1988, p. 1016, § 1.)

## JUDICIAL DECISIONS

**Condition precedent to personal indemnification by general partner.** — Ga. L. 1952, p. 375, § 16 (now O.C.G.A. § 14-9A-47) makes the payments of all debts and liabilities of a partnership a condition precedent to personal indemnification by a general partner to a limited partner of the limited partner's contribution to the partnership. *Mills v. Kochis*, 132 Ga. App. 492, 208 S.E.2d 352 (1974), *aff'd*, 233 Ga. 652, 212 S.E.2d 823 (1975).

A promise by a general partner to repurchase a limited partner's interests out of partnership assets or out of the general partner's individual assets cannot be enforced in the absence of allegations that all liabilities of the partnership, other than those owed to general and limited partners on account of their contributions, have been paid, or that there shall remain sufficient property of the partnership to pay them. *Kochis v. Mills*, 233 Ga. 652, 212 S.E.2d 823 (1975).

**Put option agreement as a defense.** — A

defendant may not rely on a put option agreement as defense to contributions owed upon the dissolution of a partnership absent a showing that all obligations to the partnership's third party creditors have been satisfied. *Ameritrust Co. v. White*, 73 F.3d 1553 (11th Cir. 1996).

**Priority between creditors and limited partners to general partner's assets.** — After assets of partnership are exhausted, creditors take precedence over limited partners as to assets of general partners which may be available for payment of claims, other than transactions where limited partner may be considered as an ordinary business creditor in other than partnership contribution situations, regardless of whether or not such a restriction appears in articles of partnership. *Mills v. Kochis*, 132 Ga. App. 492, 208 S.E.2d 352 (1974), *aff'd*, 233 Ga. 652, 212 S.E.2d 823 (1975).

**Cited in** *Bumgarner v. Green*, 227 Ga. App. 156, 489 S.E.2d 43 (1997).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1355, 1361-1364, 1402-1406.

**C.J.S.** — 68 C.J.S., Partnership, § 424.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 16.

**ALR.** — Liability of special partner who has withdrawn his capital, to creditors of the firm, 67 ALR 1096.

## 14-9A-48. Liability of limited partner to partnership.

(a) A limited partner is liable to the partnership:

(1) For the difference between his contribution as actually made and that stated in the certificate required under Code Section 14-9A-20 as having been made; and

(2) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

(b) A limited partner holds as trustee for the partnership:

(1) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned; and

(2) Money or other property wrongfully paid or conveyed to him on account of his contribution.



(c) The liabilities of a limited partner as set forth in this Code section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(d) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return. (Ga. L. 1952, p. 375, § 17; Code 1981, § 14-9-48; Code 1981, § 14-9A-48, as redesignated by Ga. L. 1988, p. 1016, § 1.)

### JUDICIAL DECISIONS

**Garnishment of partner's return of capital.** — Creditor, who obtained that status by virtue of partnership's breach of contract, could not garnish limited partner's return of capital contribution where return occurred prior to breach of contract by partnership.

First Bank & Trust Co. v. Cannon, 164 Ga. App. 449, 297 S.E.2d 349 (1982).

Cited in Leventhal v. Green, 246 Ga. 287, 271 S.E.2d 194 (1980); Adler v. Hertling, 215 Ga. App. 769, 451 S.E.2d 91 (1994).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1354, 1357, 1359, 1361-1364.

**C.J.S.** — 68 C.J.S., Partnership, § 422 et seq.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 17.

**ALR.** — Derivative liability of partner for punitive damages for wrongful act of copartner, 14 ALR4th 1335.

### 14-9A-49. Nature of limited partner's interest.

A limited partner's interest in the partnership is personal property. (Ga. L. 1952, p. 375, § 18; Code 1981, § 14-9-49; Code 1981, § 14-9A-49, as redesignated by Ga. L. 1988, p. 1016, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — The use of the term "tangible personal property" in the official report of the *Maxco* case, resulted from a clerical error. By order of the Supreme Court reported at 251 Ga. 892, the term "intangible personal property" was substituted for "tangible personal property." The annotation which follows has been rewritten.

**Limited partner holds intangible personal property interest.** — A limited partnership is a legal entity and authorized to hold title to

real property in its own name. As such a legal entity, the limited partnership is entirely separate and apart from its partners; and the property interest held by a limited partner is intangible personal property. A limited partner owns an interest in the legal entity but holds no title to the assets of the partnership. Any benefit to the limited partners stemming from the assets of the limited partnership is indirect. *Maxco, Inc. v. Volpe*, 247 Ga. 212, 274 S.E.2d 561 (1981).

Limited partner's interest in partnership is a personal property interest but does not vest limited partner with title to assets of partnership. *Havik, Inc. v. Theodore H. Smyth Family Trust*, 14 Bankr. 635 (Bankr. N.D. Ga. 1981).

**Judgment against limited partner does not create lien** against that partner's partnership interest. *Harris v. C.C. Dickson, Inc.* (In re Smith), 17 Bankr. 541 (Bankr. M.D. Ga. 1982).

**Financial payments** to which a limited partner is entitled pursuant to statute or the partnership/certificate of formation is a chose in action. *Prodigy Centers/Atlanta v. T-C Assocs.*, 269 Ga. 522, 501 S.E.2d 209 (1998).

**Cited in** *Hill v. L/A Mgt. Corp.*, 234 Ga. 341, 216 S.E.2d 97 (1975); *Hirsch v. Equilateral Assocs.*, 245 Ga. 373, 264 S.E.2d 885 (1980).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1344, 1345.

**C.J.S.** — 68 C.J.S., Partnership, § 402 et seq.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 18.

#### 14-9A-50. Assignment of limited partner's interest.

- (a) A limited partner's interest is assignable.
- (b) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.
- (c) An assignee who does not become a substituted limited partner has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.
- (d) An assignee shall have the right to become a substituted limited partner if all the members, except the assignor, consent thereto or if the assignor, being thereunto empowered by the certificate required under Code Section 14-9A-20, gives the assignee that right.
- (e) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with Code Section 14-9A-26.
- (f) The substituted limited partner has all the rights and powers and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.
- (g) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under Code Sections 14-9A-27 and 14-9A-48. (Ga. L. 1952, p. 375, § 19; Code 1981, § 14-9-50; Code 1981, § 14-9A-50, as redesignated by Ga. L. 1988, p. 1016, § 1.)



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1294-1298.

**C.J.S.** — 68 C.J.S., Partnership, §§ 417, 427.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 19.

**ALR.** — Partner's breach of fiduciary duty to copartner on sale of partnership interest to another partner, 4 ALR4th 1122.

**14-9A-51. Effect of death of limited partner.**

(a) On the death of a limited partner, his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate and such power as the deceased had to constitute his assignee a substituted limited partner.

(b) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner. (Ga. L. 1952, p. 375, § 21; Code 1981, § 14-9-51; Code 1981, § 14-9A-51, as redesignated by Ga. L. 1988, p. 1016, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1243, 1299.

**C.J.S.** — 68 C.J.S., Partnership, §§ 440, 441.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 21.

**14-9A-52. Rights of judgment creditor of limited partner.**

(a) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt and may appoint a receiver and make all other orders, directions, and inquiries which the circumstances of the case may require.

(b) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(c) The remedies conferred by subsection (a) of this Code section shall not be deemed exclusive of others which may exist.

(d) Nothing in this article shall be held to deprive a limited partner of his statutory exemption. (Ga. L. 1952, p. 375, § 22; Code 1981, § 14-9-52; Code 1981, § 14-9A-52, as redesignated by Ga. L. 1988, p. 1016, § 1.)

## JUDICIAL DECISIONS

**Effect of charging order.** — The charging order remedy entitles the creditor to receive the profits and surplus of the limited part-

nership, which the limited partner would otherwise have been entitled to receive, up to the unsatisfied amount of the judgment

debt, but gives no direct remedy against specific limited partnership property. *Nigri v. Lotz*, 216 Ga. App. 204, 453 S.E.2d 780 (1995).

A charging order under O.C.G.A. § 14-9A-52 is not an assignment of the limited partner's interest to the creditor, nor does it confer upon the creditor the status of a substituted limited partner. *Nigri v. Lotz*, 216 Ga. App. 204, 453 S.E.2d 780 (1995).

**Foreclosure of charged interest.** — As an aid to enforcement of a charging order, the trial court is authorized to order that a limited partner's charged interest be foreclosed by judicial sale at which the partnership interest may be purchased by the judgment creditor or a third party. *Nigri v. Lotz*, 216 Ga. App. 204, 453 S.E.2d 780 (1995).

A charging order is considered the primary method of satisfying the creditor's judgment, but the further step of ordering a sale may be considered appropriate where it is apparent that distributions under the charging order will not pay the judgment debt within a reasonable period of time. *Nigri v. Lotz*, 216 Ga. App. 204, 453 S.E.2d 780 (1995).

Transfer of a charged interest that the debtor partner would have had pursuant to a foreclosure sale did not place the purchaser in the position of a limited partner. Accordingly, if the creditor under the charging order is the purchaser, the creditor does not by virtue of the purchase become a substituted limited partner and is only entitled to receive the distributions to which the debtor limited partner would have been entitled. *Nigri v. Lotz*, 216 Ga. App. 204, 453 S.E.2d 780 (1995).

The prohibition against sale of a charged

interest by O.C.G.A. § 14-8-28 of the Uniform Partnership Act is inconsistent with the charging remedy provisions of O.C.G.A. § 14-9A-52 this section, and does not apply to prohibit foreclosure of the charged interest of a limited partner. *Nigri v. Lotz*, 216 Ga. App. 204, 453 S.E.2d 780 (1995).

**A judgment against a limited partner does not create a lien against the partnership interest.** *Harris v. C.C. Dickson, Inc. (In re Smith)*, 17 Bankr. 541 (Bankr. M.D. Ga. 1982).

Financial payments to which a limited partner is entitled pursuant to statute or the partnership/certificate of formation is a chose in action and a judgment creditor must initiate collateral proceedings in order to attach a lien thereto. *Prodigy Centers/Atlanta v. T-C Assocs.*, 269 Ga. 522, 501 S.E.2d 209 (1998).

**Broad judicial discretion.** — Trial court has broad discretion as to whether or not to order a foreclosure and judicial sale of charged interests. *Nigri v. Lotz*, 216 Ga. App. 204, 453 S.E.2d 780 (1995).

A limited partner's interest in the partnership is a chose in action, which is not subject to seizure and sale under executions based upon ordinary judgments. *Harris v. C.C. Dickson, Inc. (In re Smith)*, 17 Bankr. 541 (Bankr. M.D. Ga. 1982).

Partner's interest in a limited partnership was properly subjected to judicial sale to satisfy a judgment for the partnership where the judgment was final as between the parties and such a remedy was within the discretion of the trial court. *Stewart v. Lanier Med. Office Bldg., Ltd.*, 259 Ga. App. 898, 578 S.E.2d 572 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1376-1378.

**C.J.S.** — 68 C.J.S., Partnership, §§ 429 et seq., 437 et seq.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 22.

**ALR.** — Right to setoff claim of individual partner against claim against partnership, 55 ALR 566.

Right of partnership creditor to proceed against estate of deceased partner, 61 ALR 1410.

Necessity and manner of pleading denial of partnership in action by third person against alleged partners, 68 ALR2d 545.



## PART 4

## GENERAL PARTNERS

**14-9A-70. Rights, powers, and liabilities of general partner.**

A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to:

(1) Do any act in contravention of the certificate required under Code Section 14-9A-20;

(2) Do any act which would make it impossible to carry on the ordinary business of the partnership;

(3) Confess a judgment against the partnership;

(4) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose;

(5) Admit a person as a general partner, unless the partnership agreement provides otherwise;

(6) Admit a person as a limited partner, unless the right so to do is given in the certificate;

(7) Continue the business with partnership property on the death, retirement, or insanity of a general partner, unless the right so to do is given in the certificate. (Ga. L. 1952, p. 375, § 9; Code 1981, § 14-9-70; Code 1981, § 14-9A-70, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**Law reviews.** — For article on the definition of a security in light of the 1973 Georgia Securities Act and the need for maximizing

investor protection, see 30 Emory L.J. 73 (1981).

## JUDICIAL DECISIONS

**General partner in limited partnership has same rights and liabilities of partner in ordinary partnership.** *Sugarman v. Shaginaw*, 151 Ga. App. 621, 260 S.E.2d 731 (1979).

**General partner can bind limited partnership by execution of note.** — A general partner in a limited partnership has power to bind the partnership by that partner's execution of a promissory note on behalf of the partnership where nothing in a limited partnership agreement would limit the power of its general partners to bind the limited partnership in such a manner. *Tara*

*Apts., Ltd. v. Citizens & S. Nat'l Bank*, 149 Ga. App. 577, 254 S.E.2d 897 (1979).

**To bind assets of partner,** partner must be served and have that partner's day in court. *Sugarman v. Shaginaw*, 151 Ga. App. 621, 260 S.E.2d 731 (1979).

**Agreement construed to make it impossible for partnership to function.** — Partnership agreement which referred to the security deed held by a general partner and specified that certain capital contributions were to be used to retire that obligation was deemed to be written consent to general

partner's foreclosure on security deed which made it impossible for the partnership to carry on its ordinary business. *Westminster Properties, Inc. v. Atlanta Assocs.*, 250 Ga. 841, 301 S.E.2d 636 (1983).

**Cited in** *Coop Mtg. Invs. Assocs. v. Pendley*, 134 Ga. App. 236, 214 S.E.2d 572

(1975); *North Peachtree I-285 Properties, Ltd. v. Hicks*, 136 Ga. App. 426, 221 S.E.2d 607 (1975); *Atlanta Whses., Inc. v. Housing Auth.*, 143 Ga. App. 588, 239 S.E.2d 387 (1977); *Third World, Ltd. No. II v. Brewmasters of Augusta, Inc.*, 155 Ga. App. 352, 270 S.E.2d 891 (1980).

## OPINIONS OF THE ATTORNEY GENERAL

**Foreign corporation as general partner.** — A foreign corporation transacting business in Georgia as a general partner in a limited partnership must qualify to do business under O.C.G.A. Ch. 2, T. 14. 1982 Op. Att'y Gen. No. 82-95.

**Licensing requirements for general partner who manages partnership property.** — To the extent the general partner in a limited partnership manages the property owned by the partnership full time and receives no separate fee, commission, or

salary for the brokerage aspects of this management, it would appear that the general partner is excepted from the licensure and regulatory requirements under former § 43-40-29(7) (now O.C.G.A. § 43-40-29(a)(7)), but, if the general partner also managed the property of others, the exception under former § 43-40-29(7) (now O.C.G.A. § 43-40-29(a)(7)) would not apply and that person would be required to be licensed by the commission. 1984 Op. Att'y Gen. No. 84-80.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1323-1332.

**C.J.S.** — 68 C.J.S., Partnership, § 422 et seq.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 9.

**ALR.** — Powers, duties, and accounting responsibilities of managing partner of min-

ing partnership, 24 ALR2d 1359.

Partner's breach of fiduciary duty to copartner on sale of partnership interest to another partner, 4 ALR4th 1122.

Derivative liability of partner for punitive damages for wrongful act of copartner, 14 ALR4th 1335.

## PART 5

### CONTRIBUTORS

#### 14-9A-80. Party to proceedings.

A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against, or liability to, the partnership. (Ga. L. 1952, p. 375, § 26; Code 1981, § 14-9-80; Code 1981, § 14-9A-80, as redesignated by Ga. L. 1988, p. 1016, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, § 1381.

**C.J.S.** — 68 C.J.S., Partnership, § 437 et seq.



**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 26. on libel or slander of a firm or its members, 52 ALR 912.

**ALR.** — Parties plaintiff to actions based

## PART 6

### DISSOLUTION

#### 14-9A-90. Effect of retirement, death, or insanity of general partner.

The retirement, death, or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners:

(1) Under a right to do so stated in the certificate required under Code Section 14-9A-20; or

(2) With the consent of all members. (Ga. L. 1952, p. 375, § 20; Code 1981, § 14-9-90; Code 1981, § 14-9A-90, as redesignated by Ga. L. 1988, p. 1016, § 1.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1402-1404.

**C.J.S.** — 68 C.J.S., Partnership, §§ 440, 441.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.) § 20.

**ALR.** — Right of solvent partner to close

firm business upon bankruptcy or insolvency of copartner, 29 ALR 45.

Relative rights of surviving partner and the estate of the deceased partner in proceeds of life insurance acquired pursuant to partnership agreement, 83 ALR2d 1347.

#### 14-9A-91. Settling of accounts.

(a) In settling accounts after dissolution, the liabilities of the partnership shall be entitled to payment in the following order:

(1) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions and to general partners;

(2) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions;

(3) Those to limited partners in respect to the capital of their contributions;

(4) Those to general partners other than for capital and profits;

(5) Those to general partners in respect to profits;

(6) Those to general partners in respect to capital.

(b) Subject to any statement in the certificate required under Code Section 14-9A-20 or to subsequent agreement, limited partners share in the

partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims. (Ga. L. 1952, p. 375, § 23; Code 1981, § 14-9-91; Code 1981, § 14-9A-91, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59A Am. Jur. 2d, Partnership, §§ 1406, 1407.

**C.J.S.** — 68 C.J.S., Partnership, §§ 440, 441.

**U.L.A.** — Uniform Limited Partnership Act (U.L.A.), § 23.

**ALR.** — Meaning and coverage of "book value" in partnership agreement in determining value of partner's interest, 47 ALR2d 1425.

### ARTICLE 2

#### LIMITED PARTNERSHIPS FORMED PRIOR TO FEBRUARY 15, 1952

**Law reviews.** — For article comparing treatment of limited partner status in Georgia and New York, see 11 Ga. B.J. 176 (1948).

#### **14-9A-110. Applicability of article; renewal of existing partnerships restricted.**

(a) This article is applicable only to limited partnerships which were in existence on February 15, 1952, and which have not become limited partnerships subject to Article 1 of this chapter or Chapter 9 of this title.

(b) No limited partnership continuing existence under this article shall be renewed pursuant to this article unless such renewal is provided for in the original agreement.

(c) Except as otherwise provided in this Code section, this article shall have no force or effect after February 15, 1952, and no limited partnership shall be formed pursuant to this article after said date. (Code 1981, § 14-9-110; Code 1981, § 14-9A-110, as redesignated by Ga. L. 1988, p. 1016, § 1; Ga. L. 1988, p. 1016, § 3.)

#### **14-9A-111. Who may form limited partnership; purposes; liability of general and special partners.**

(a) A limited partnership may be formed by two or more persons upon the terms, with the rights and powers, and subject to the conditions and liabilities prescribed in this article for the purpose of transacting any mercantile, commercial, mechanical, manufacturing, mining, or agricultural business within this state; but this article shall not be construed to authorize the formation of any such partnership for the purposes of banking or insurance.



(b) Of the two or more persons forming a limited partnership, one or more shall be general partners who shall be jointly and severally liable for the debts of the partnership; and one or more persons shall be special partners who shall contribute a specific sum in actual cash as capital to the common stock and who shall not be liable for debts of the partnership beyond the fund so contributed by him or them to the capital, except as provided in this article. (Laws 1837, Cobb's 1851 Digest, p. 585; Code 1863, §§ 1922, 1923; Code 1868, §§ 1910, 1911; Code 1873, §§ 1920, 1921; Code 1882, §§ 1920, 1921; Civil Code 1895, §§ 2662, 2663; Civil Code 1910, §§ 3191, 3192; Code 1933, §§ 75-401, 75-402; Code 1981, § 14-9-111; Code 1981, § 14-9A-111, as redesignated by Ga. L. 1988, p. 1016, § 1.)

### JUDICIAL DECISIONS

**Limited partner restricted in authority and liability.** — Limitations involved in a limited partnership do not destroy the status of partnership, but only deprive the special partner of authority to bind the partnership, and restrict the partner's liability to the

amount of capital actually paid in by the partner; the status, though thus restricted in authority and liability, is recognized by the Code as that of a partner. *Clement A. Evans & Co. v. Waggoner*, 197 Ga. 857, 30 S.E.2d 915 (1944).

### RESEARCH REFERENCES

**ALR.** — Liability of incoming partner for existing debts, 45 ALR 1240.

#### 14-9A-112. Firm name.

The business of a limited partnership may be conducted under a firm name in which the name of at least one of the partners is contained, to which may be added the word "company" or other general term to denote that there are special partners in the business, or under such firm or trade name as the partners may select; provided, however, that in all cases when the firm is a limited partnership, the firm name shall have added the word "limited" in parentheses so that all persons dealing with the partnership may know that the firm name identifies a limited partnership. The firm name shall be registered as a limited partnership with the clerk of the superior court as required by Part 3 of Article 16 of Chapter 1 of Title 10, which provides for the registration of trade names, partnership names, etc. (Laws 1837, Cobb's 1851 Digest, p. 587; Code 1863, § 1934; Code 1868, § 1922; Code 1873, § 1932; Code 1882, § 1932; Civil Code 1895, § 2674; Civil Code 1910, § 3203; Code 1933, § 75-412; Ga. L. 1943, p. 335, § 1; Code 1981, § 14-9-112; Code 1981, § 14-9A-112, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**14-9A-113. Certificate of limited partnership — Contents.**

(a) Persons desirous of forming a limited partnership shall make and severally sign, either themselves or by attorneys in fact, a certificate which shall contain:

(1) The name of the firm under which such partnership is to be conducted;

(2) The general nature of the business intended to be transacted;

(3) The names of all the general and special partners, distinguishing which are general and which are special partners, and their respective places of residence;

(4) The amount of capital which each special partner shall have contributed to the common stock; and

(5) The time at which the partnership is to commence and the time at which it shall terminate.

(b) If the certificate is signed by an attorney in fact, the power of attorney, duly authenticated, shall be recorded along with such certificate. (Orig. Code 1863, § 1925; Code 1868, § 1913; Code 1873, § 1923; Code 1882, § 1923; Civil Code 1895, § 2665; Civil Code 1910, § 3194; Code 1933, § 75-404; Code 1981, § 14-9-113; Code 1981, § 14-9A-113, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**14-9A-114. Certificate of limited partnership — Acknowledgment.**

The certificate required under Code Section 14-9A-113 shall be acknowledged by the several persons signing the same, or their attorneys in fact, before a judge of the superior court or a judge of the probate court, magistrate, or notary public, and such acknowledgment shall be certified by the officer before whom the same is made. (Laws 1837, Cobb's 1851 Digest, p. 585; Code 1863, § 1926; Code 1868, § 1914; Code 1873, § 1924; Code 1882, § 1924; Civil Code 1895, § 2666; Civil Code 1910, § 3195; Code 1933, § 75-405; Code 1981, § 14-9-114; Ga. L. 1983, p. 884, § 4-1; Code 1981, § 14-9A-114, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**14-9A-115. Certificate of limited partnership — Filing.**

The certificate and power of attorney in fact required under Code Section 14-9A-113, so acknowledged and certified, shall be filed in the office of the clerk of the superior court of the county in which the principal place of business of the partnership shall be situated and shall be recorded by the clerk at large in a book to be kept for that purpose, open to public inspection. If the partnership shall have places of business situated in different counties, a transcript of the certificate and power of attorney and



of the acknowledgments thereof, duly certified by the clerk in whose office they shall be filed, under his official seal, shall be filed and recorded in like manner in the office of the clerk of the superior court in every such county. The clerk for each registry required by this article shall be entitled to the sum of \$5.00. (Laws 1837, Cobb's 1851 Digest, p. 585; Code 1863, § 1927; Code 1868, § 1915; Code 1873, § 1925; Code 1882, § 1925; Civil Code 1895, § 2667; Civil Code 1910, § 3196; Code 1933, § 75-406; Code 1981, § 14-9-115; Code 1981, § 14-9A-115, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-116. Affidavits of capital paid in.**

At the time of filing the original certificate required under Code Section 14-9A-113, with the evidence of the acknowledgment thereof, an affidavit or affidavits of the several general partners shall also be filed in the same office, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash. (Laws 1837, Cobb's 1851 Digest, p. 586; Code 1863, § 1928; Code 1868, § 1916; Code 1873, § 1926; Code 1882, § 1926; Civil Code 1895, § 2668; Civil Code 1910, § 3197; Code 1933, § 75-407; Code 1981, § 14-9-116; Code 1981, § 14-9A-116, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-117. Certified copies admissible in evidence.**

A certified copy of the certificate, power of attorney, and affidavits required to be filed under Code Sections 14-9A-115 and 14-9A-116 shall be admissible in evidence in all courts and places whatever. (Laws 1837, Cobb's 1851 Digest, p. 586; Code 1863, § 1928; Code 1868, § 1916; Code 1873, § 1926; Code 1882, § 1926; Civil Code 1895, § 2668; Civil Code 1910, § 3197; Code 1933, § 75-407; Code 1981, § 14-9-117; Code 1981, § 14-9A-117, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-118. Certificate and affidavit prerequisite to formation; effect of false statement.**

No limited partnership shall be deemed to have been formed until the certificate required under Code Section 14-9A-113 shall have been made, acknowledged, filed, and recorded, nor until an affidavit shall have been filed as directed by Code Section 14-9A-116; and if any false statement shall be made in such certificate or affidavit, or if such partnership business shall be commenced before such certificate or affidavit is filed, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners. (Laws 1837, Cobb's 1851 Digest, p. 586; Code 1863, § 1929; Code 1868, § 1917; Code 1873, § 1927; Code 1882, § 1927; Civil Code 1895, § 2669; Civil Code 1910, § 3198; Code 1933, § 75-408;

Code 1981, § 14-9-118; Code 1981, § 14-9A-118, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**14-9A-119. Publication of terms of partnership; affidavits of publication as evidence.**

(a) The partners shall publish the terms of the partnership, when registered, for at least six weeks immediately after such registry in at least two newspapers published in the county in which the place of business is situated, provided there are two newspapers published in such county. If only one newspaper is published in such county, then the terms shall be published in that newspaper. If no newspaper is published in the county in which the business is to be transacted, the notice shall be published in the newspaper in which the sheriff advertises.

(b) If such publication shall not be made within two months from the filing of such certificate and affidavit, the partnership shall be deemed general.

(c) Affidavits of the publication of such notice by the printers, publishers, or editors of the newspapers in which the same shall be published may be filed in the office of the clerk of the superior court in which the certificate has been filed and shall be evidence of the facts therein contained. (Laws 1837, Cobb's 1851 Digest, p. 586; Code 1863, §§ 1930, 1931; Code 1868, §§ 1918, 1919; Ga. L. 1873, p. 24, § 1; Code 1873, §§ 1928, 1929; Code 1882, §§ 1928, 1929; Civil Code 1895, §§ 2670, 2671; Civil Code 1910, §§ 3199, 3200; Code 1933, §§ 75-409, 75-410; Code 1981, § 14-9-119; Code 1981, § 14-9A-119, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**14-9A-120. Renewal or continuance of partnership.**

Every renewal or continuance of a limited partnership beyond the time fixed for its duration shall be certified, acknowledged, and recorded; an affidavit of a general partner shall be made and filed; notice shall be given in the manner required in this article for its original formation; and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership. (Laws 1837, Cobb's 1851 Digest, p. 586; Code 1863, § 1932; Code 1868, § 1920; Code 1873, § 1930; Code 1882, § 1930; Civil Code 1895, § 2672; Civil Code 1910, § 3201; Code 1933, § 75-411; Code 1981, § 14-9-120; Code 1981, § 14-9A-120, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**14-9A-121. Dissolution — Effect of changes in firm name, capital, or death of partner.**

(a) Except as provided in this Code section, every change made in the firm name of the general partners, in the nature of the business, or in the



capital or shares thereof contributed, held, or owned or to be contributed, held, or owned by any of the special partners, or the death of any partner, whether general or special, shall dissolve the limited partnership, or if such partnership is continued, shall constitute such partnership a general partnership in respect to all business transacted after such alterations or death, unless the articles of partnership shall provide that in the event of the death of a partner the partnership may be continued by the survivors. If the articles so provide, the partnership shall be so continued with the consent of the personal representative of the deceased partner, and the personal representative may succeed to the partnership rights of such deceased partner and continue the business as if such partner had remained alive.

(b) Any special partner may from time to time increase the amount of capital stock contributed, held, or owned by him; or one or more special partners may be added to the partnership on actually paying in an additional amount of capital, to be agreed on by the general and special partners, and on filing in the office of the clerk with whom the original certificate was filed an additional certificate of the general partners, in the partnership name, verified by the oath of one of them, stating the increase of capital stock and by whom, the names and residences of such additional special partners and whether of legal age, and the amounts contributed by each to the common stock, together with the affidavit of one or more of the general partners stating that the amounts specified in such additional certificates have been actually and in good faith paid in cash. Such alteration shall not make the partnership general. No additional publication of the terms of the partnership nor of the alteration thereof is required in any of such cases.

(c) Any special partner or the legal representative of any such deceased special partner may sell his interest in the partnership or any portion thereof without working a dissolution thereof or rendering the partnership general, if a notice of such sale is filed within ten days thereafter in the office of the clerk with whom the original certificate of partnership was filed; and the purchaser thereof shall thereupon become a special partner with the same rights as an original special partner. (Orig. Code 1863, § 1933; Code 1868, § 1921; Code 1873, § 1931; Code 1882, § 1931; Civil Code 1895, § 2673; Civil Code 1910, § 3202; Ga. L. 1919, p. 96, § 1; Code 1933, § 75-413; Code 1981, § 14-9-121; Code 1981, § 14-9A-121, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-122. Dissolution — By acts of partners; notice required.**

(a) No dissolution of a limited partnership by the acts of the partners shall take place prior to the time specified in the original certificate or the certificate of renewal until a notice of such intended dissolution, signed by all the partners or their representatives, has been filed and recorded in the

clerk's office in which the original certificate was recorded and published at least once a week for four weeks in a newspaper printed in each of the counties where the partnership has places of business. If no newspaper is printed in such counties, the notice shall be published for four weeks in the newspapers in which the sheriffs of such counties advertise.

(b) Nothing contained in this Code section shall be construed to affect the collection of any demand against any of the special partners which may have been contracted prior to the commencement of such limited partnership. (Laws 1837, Cobb's 1851 Digest, p. 588; Code 1863, § 1945; Code 1868, § 1933; Code 1873, § 1943; Code 1882, § 1943; Civil Code 1895, § 2685; Civil Code 1910, § 3214; Code 1933, § 75-423; Code 1981, § 14-9-122; Code 1981, § 14-9A-122, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-123. Powers of general and special partners.**

(a) Only the general partners shall be authorized to transact business, sign for the partnership, and bind the partnership.

(b) A special partner may at any time examine the conditions and progress of the partnership concerns, advise as to the management of the same, and, when the general partner or partners may be rendered incompetent to act because of illness, temporary absence, or other cause, direct and control the business of the partnership with the authority of a general partner; provided, however, such special partner, before assuming such direction and control, shall place in a position easily seen by all parties dealing with said partnership a placard or sign indicating which of the partners of the firm are general partners and which are special partners; otherwise the special partner or partners shall not transact any business on account of the said partnership nor be employed for that purpose as agent or in any capacity akin thereto. If, contrary to this Code section, a special partner shall in any manner interfere with the business and affairs of the partnership, he shall be deemed a general partner; provided, however, a special partner may act as the attorney or counselor at law for the partnership without becoming liable as a general partner. (Laws 1837, Cobb's 1851 Digest, pp. 585, 587; Code 1863, §§ 1924, 1938; Code 1868, §§ 1912, 1926; Code 1873, §§ 1922, 1936; Code 1882, §§ 1922, 1936; Ga. L. 1884-85, p. 47, § 1; Civil Code 1895, §§ 2664, 2676; Civil Code 1910, §§ 3193, 3205; Code 1933, §§ 75-403, 75-414; Code 1981, § 14-9-123; Code 1981, § 14-9A-123, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-124. Repayment of contribution of special partner prohibited; payment of interest and profits to special partner.**

(a) No part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him or paid or transferred to him



in the shape of dividends, profits, or otherwise at any time during the continuance of the partnership, but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital. If, after the payment of such interest, any profits shall remain to be divided, he may also receive his portion of such profits, but shall not be liable for any debts previously contracted by the general partners.

(b) If it shall appear that, by the payment of interest or profits to any special partner, the original capital has been reduced, or the firm shall be unable to pay its debts, the partner receiving the same shall be bound to restore the interest or profits received by him necessary to make good his original share of the original stock. (Laws 1837, Cobb's 1851 Digest, p. 587; Code 1863, §§ 1936, 1937; Code 1868, §§ 1924, 1925; Code 1873, §§ 1934, 1935; Code 1882, §§ 1934, 1935; Civil Code 1895, §§ 2677, 2678; Civil Code 1910, §§ 3206, 3207; Code 1933, §§ 75-415, 75-416; Code 1981, § 14-9-124; Code 1981, § 14-9A-124, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-125. Priority of special partners.**

In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor until the claims of all the other creditors of the partnership shall be satisfied. (Laws 1837, Cobb's 1851 Digest, p. 588; Code 1863, § 1944; Code 1868, § 1932; Code 1873, § 1942; Code 1882, § 1942; Civil Code 1895, § 2684; Civil Code 1910, § 3213; Code 1933, § 75-422; Code 1981, § 14-9-125; Code 1981, § 14-9A-125, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-126. Parties to actions.**

Actions brought by limited partnerships shall be in the name or names of the general partners only. Actions brought against limited partnerships shall be brought against the general partners only, except in cases where the special partners are liable in the same manner as general partners. In such cases, actions may be brought against all the partners jointly or severally; or any one or more of the special partners may be subject to liability in the same action with the general partners. (Laws 1837, Cobb's 1851 Digest, p. 587; Code 1863, § 1935; Code 1868, § 1923; Code 1873, § 1933; Code 1882, § 1933; Civil Code 1895, § 2675; Civil Code 1910, § 3204; Code 1933, § 75-424; Code 1981, § 14-9-126; Code 1981, § 14-9A-126, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-127. Liability of general partners for management of firm.**

The general partners of a limited partnership shall be liable, both in law and equity, to each other and to the special partners for their management

of the business of the firm as other partners are liable. (Laws 1837, Cobb's 1851 Digest, p. 587; Code 1863, § 1939; Code 1868, § 1927; Code 1873, § 1937; Code 1882, § 1937; Civil Code 1895, § 2679; Civil Code 1910, § 3208; Code 1933, § 75-417; Code 1981, § 14-9-127; Code 1981, § 14-9A-127, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-128. Liability of partners for fraud.**

Every partner who shall be guilty of any fraud in the affairs or business of the partnership shall be liable civilly to the party injured to the extent of his damage. (Laws 1837, Cobb's 1851 Digest, p. 587; Code 1863, § 1940; Code 1868, § 1928; Code 1873, § 1938; Code 1882, § 1938; Civil Code 1895, § 2680; Penal Code 1895, § 678; Civil Code 1910, § 3209; Penal Code 1910, § 727; Code 1933, § 75-418; Code 1981, § 14-9-128; Code 1981, § 14-9A-128, as redesignated by Ga. L. 1988, p. 1016, § 1.)

#### **14-9A-129. Fraudulent sale, assignment, or transfer of property void.**

(a) Every sale, assignment, or transfer of any of the property or effects of a limited partnership made by such partnership when insolvent or in contemplation of insolvency or made after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership or insolvent partner; and every judgment confessed, lien created, or security given by such partnership under the like circumstances and with the like intent shall be void as against the creditors of such partnership.

(b) Every such sale, assignment, or transfer of any of the property or effects of a general or special partner who may have become liable as a general partner made by such general or special partner when insolvent or in contemplation of insolvency or made after or in contemplation of the insolvency of the partnership, with the intention of giving to any creditor of his own, or of the partnership, a preference over creditors of the partnership; and every judgment confessed, lien created, or security given by any such partner under like circumstances and with like intent shall be void as against the creditors of the partnership.

(c) Any special partner who shall violate any provision of subsections (a) and (b) of this Code section or who shall concur in, or assent to, any such violation by the partnership or by any individual partner shall be liable as a general partner. (Laws 1837, Cobb's 1851 Digest, pp. 587, 588; Code 1863, §§ 1941, 1942, 1943; Code 1868, §§ 1929, 1930, 1931; Code 1873, §§ 1939, 1940, 1941; Code 1882, §§ 1939, 1940, 1941; Civil Code 1895, §§ 2681, 2682, 2683; Civil Code 1910, §§ 3210, 3211, 3212; Code 1933, §§ 75-419, 75-420, 75-421; Code 1981, § 14-9-129; Code 1981, § 14-9A-129, as redesignated by Ga. L. 1988, p. 1016, § 1.)



**14-9A-130. Penalty for fraud.**

Every partner who shall work any fraud in the affairs or business of a limited partnership shall be guilty of a misdemeanor. (Laws 1837, Cobb's 1851 Digest, p. 587; Code 1863, § 1940; Code 1868, § 1928; Code 1873, § 1938; Code 1882, § 1938; Ga. L. 1895, p. 63, § 2; Civil Code 1895, § 2680; Penal Code 1895, § 678; Civil Code 1910, § 3209; Penal Code 1910, § 727; Code 1933, § 75-9901; Code 1981, § 14-9-130; Code 1981, § 14-9A-130, as redesignated by Ga. L. 1988, p. 1016, § 1.)

**RESEARCH REFERENCES**

**ALR.** — Embezzlement, larceny, false pretenses, or allied criminal fraud by a partner, 82 ALR3d 822.

## CHAPTER 10

## PROFESSIONAL ASSOCIATIONS

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| <p>Sec.</p> <p>14-10-1. Short title.</p> <p>14-10-2. Definitions.</p> <p>14-10-3. Persons entitled to form association; purpose; limitation to one type of professional service.</p> <p>14-10-4. Formation.</p> <p>14-10-5. Business other than rendering professional service prohibited; investments and ownership of property.</p> <p>14-10-6. Professional services to be rendered only by licensed officers, employees, and agents; "employee" defined.</p> <p>14-10-7. Relationship between person rendering and person receiving professional service; liability of members for debts of or claims against association.</p> <p>14-10-8. Management.</p> <p>14-10-9. Continuity of existence independent of status or acts of members.</p> <p>14-10-10. Ownership.</p> | <p>Sec.</p> <p>14-10-11. Severance of connection with association required upon legal disqualification of member to render professional service; effect of failure to comply.</p> <p>14-10-12. Valuation of membership or shares of deceased, retired, expelled, or disqualified member or shareholder.</p> <p>14-10-13. Annual report; fee; penalty for failure to furnish report [Repealed].</p> <p>14-10-14. Limitation on sale or transfer of membership or shares.</p> <p>14-10-15. Distribution of assets following dissolution.</p> <p>14-10-16. Powers generally; assets not liable to attachment for debts of members or shareholders.</p> <p>14-10-17. Actions by or against associations.</p> <p>14-10-18. Applicability of corporation laws; inapplicability of partnership laws.</p> |
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**Cross references.** — Professional associations practicing certified public accounting and public accountancy, §§ 43-1-24, 43-3-5, 43-3-21 et seq., 43-11-47(a)(7), and 43-15-23.

**Law reviews.** — For article discussing formation of professional association under this chapter and tax and ethical considerations involved therein, see 24 Ga. B.J. 163 (1961). For survey article discussing developments in law of business associations for the period from June 1, 1998 through May 31, 1999, see 51 Mercer L. Rev. 127 (1999). For survey article discussing developments in law of

business associations for the period from June 1, 1999 through May 31, 2000, see 52 Mercer L. Rev. 95 (2000).

For note, "Federal Income Tax Advantages for Professionals — The Georgia Professional Association Act," see 12 Mercer L. Rev. 388 (1961).

For comment discussing federal tax status of Georgia professional associations in light of *Empey v. United States*, 20 Am. Fed. Tax R.2d 5403 (D. Colorado 1967), see 19 Mercer L. Rev. 270 (1968).

## OPINIONS OF THE ATTORNEY GENERAL

**Foreign professional corporation is not entitled to certificate of authority to transact business in Georgia.** 1970 Op. Att'y Gen. No. 70-64.

**One-man out-of-state professional service**

**corporation.** — "One-man" Florida professional service corporation formed for the purpose of practicing medicine in Florida and Georgia cannot register as a foreign corporation under the present provisions of



O.C.G.A. Ch. 2, T. 14 pertaining to the admission of foreign corporations. 1969 Op. Att'y Gen. No. 69-507.

### RESEARCH REFERENCES

**ALR.** — Practice by attorneys and physicians as corporate entities or associations under professional service corporation statutes, 4 ALR3d 383.

Professional corporation stockholders' non-malpractice liability, 50 ALR4th 1276.

#### 14-10-1. Short title.

This chapter may be cited as "The Georgia Professional Association Act." (Ga. L. 1961, p. 404, § 1.)

#### 14-10-2. Definitions.

As used in this chapter, the term:

(1) "Professional association" means an unincorporated association, as distinguished from a partnership, organized under this chapter for the purpose of rendering one type of professional service.

(2) "Professional service" means the personal services rendered by attorneys at law and any type of professional service which may be legally performed only pursuant to a license from a board pursuant to Title 43, for example, the personal services rendered by certified public accountants, chiropractors, dentists, osteopaths, physicians and surgeons, and podiatrists (chiroprpodists). (Ga. L. 1961, p. 404, § 2; Ga. L. 2000, p. 1706, § 21.)

**Cross references.** — Professional associations engaged in practice of professional

engineering or land surveying, §§ 43-1-24, 43-3-5, 43-3-21 et seq., and 43-11-47(a)(7).

### JUDICIAL DECISIONS

**"Professional" defined for malpractice act.** — The legislature intended for the term "professional" as used in O.C.G.A. § 9-11-9.1 to be defined by O.C.G.A. §§ 14-7-2(2), 14-10-2(2), and 43-1-24. *Gillis v. Goodgame*, 262 Ga. 117, 414 S.E.2d 197 (1992).

O.C.G.A. § 9-11-9.1 applies only to those licensed professions regulated by state examining boards when licensure is predicated upon successful completion of the specialized schooling or training necessary to ob-

tain the expertise to practice that profession. *Harrell v. Lusk*, 263 Ga. 895, 439 S.E.2d 896 (1994).

**Pest control company.** — Based upon the statutory definition of professional service, a pest control company's control and treatment of wood destroying organisms is a profession for purposes of filing a professional malpractice action. *Colston v. Fred's Pest Control, Inc.*, 210 Ga. App. 362, 436 S.E.2d 23 (1993).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § et seq.

### 14-10-3. Persons entitled to form association; purpose; limitation to one type of professional service.

Any two or more persons duly licensed to practice a profession under the laws of this state may form a professional association, as distinguished from a partnership and a corporation, by associating themselves for the purpose of carrying on a profession and dividing the gains therefrom upon compliance with the terms of this chapter. No professional association organized pursuant to this chapter shall render professional service in more than one type of professional service. (Ga. L. 1961, p. 404, § 3.)

**Cross references.** — Refusal of license to practice medicine for engaging in practice as officer or employee of corporation other than one organized pursuant to this chapter; §§ 43-1-24, 43-3-5, 43-3-21 et seq., 43-11-47(a)(7), and 43-15-23.

## OPINIONS OF THE ATTORNEY GENERAL

**Medical doctors allowed to form association even with different specialties.** — Medical doctors are allowed to form an association even where they are specialists in different areas of the medical profession such as pediatrics, gynecology, general practice, etc., since all the doctors are practicing medicine and are governed by one board of medical examiners; on the other hand, they could not be joined in a professional association by a dentist, for example, or some

member of an entirely different profession. 1963-65 Op. Att'y Gen. p. 791.

**One-man out-of-state professional service corporation.** — "One-man" Florida professional service corporation formed for the purpose of practicing medicine in Florida and Georgia cannot register as a foreign corporation under provisions pertaining to the admission of foreign corporations. 1969 Op. Att'y Gen. No. 69-507.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 2, 5.

### 14-10-4. Formation.

#### (a) *Articles of association.*

(1) **FILING; CONTENTS.** To form a professional association, such persons shall execute and file articles of association in the office of the clerk of the superior court in the county in which the association's principal office is located. Articles of association may contain any provision not in violation of law or the public policy of this state as the members of the association may decide.

(2) **RECORDING; FEES.** The clerk shall record the articles of association and any amendments thereto or instruments of dissolution thereof in the



same manner as required for articles of incorporation and shall receive a fee as required by paragraph (17) of subsection (g) of Code Section 15-6-77. Articles shall not be required to be published or recorded elsewhere. Such record of the articles, when so recorded, shall be notice of the articles to the world as well as to all parties dealing with such association.

(3) **AMENDMENT; DISSOLUTION.** The articles may be amended or dissolved at any time by agreement of two-thirds of the members at any regular meeting or at a special meeting called for that purpose and upon filing the amendment or instrument of dissolution in the same place or places as the original article of association.

(b) *Name.* The persons forming the association shall adopt such name for the association as they in their discretion may determine; but the name selected shall be followed by the words "Professional Association" or the abbreviation "P.A." (Ga. L. 1961, p. 404, § 4; Ga. L. 1981, p. 1396, § 22; Ga. L. 1992, p. 6, § 14.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 6, 7, 16.

#### **14-10-5. Business other than rendering professional service prohibited; investments and ownership of property.**

A professional association may be organized only for the purpose of rendering one specific kind of professional service and shall not engage in any business other than rendering the professional service for which it was organized. However, it may invest its funds in real estate, mortgages, stocks, bonds, or any other type of investment and may own real or personal property necessary or appropriate for rendering its professional service. (Ga. L. 1961, p. 404, § 5.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Medical doctors allowed to form association even with different specialties.** — Ga. L. 1961, p. 404 (see O.C.G.A. §§ 14-10-3 and 14-10-5) allow medical doctors to form an association even where they are specialists in different areas of the medical profession such as pediatrics, gynecology, general prac-

tice, etc., since all the doctors are practicing medicine and are governed by one board of medical examiners; on the other hand, they could not be joined in a professional association by a dentist, for example, or some member of an entirely different profession. 1963-65 Op. Att'y Gen. p. 791.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 2, 13, 14.

**14-10-6. Professional services to be rendered only by licensed officers, employees, and agents; "employee" defined.**

A professional association may render professional service only through officers, employees, and agents who are themselves duly licensed or otherwise legally authorized to render professional service within this state. The term "employee" as used in this Code section does not include clerks, bookkeepers, technicians, nurses, or other individuals who are not usually and ordinarily considered by custom and practice to be rendering professional services for which a license or other legal authorization is required in connection with the profession practiced by a particular professional association; nor does the term "employee" include any other person who performs all his employment under the direct supervision and control of an officer, agent, or employee who is himself rendering professional service to the public on behalf of the professional association; but no person shall, under the guise of employment, practice a profession unless duly licensed to practice that profession under the laws of this state. (Ga. L. 1961, p. 404, § 6.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 6, 7. 61 Am. Jur. 2d, Physicians, Surgeons, and other Healers, § 114.

**ALR.** — Right of corporation or individual, not himself licensed, to practice medicine, surgery, or dentistry through licensed employees, 103 ALR 1240.

Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 ALR3d 637.

**14-10-7. Relationship between person rendering and person receiving professional service; liability of members for debts of or claims against association.**

(a) This chapter does not modify any law applicable to the relationship between a person furnishing and a person receiving professional service, including liability arising out of such professional service and including the confidential relationship between the person rendering and the person receiving such professional service, if any. All confidential relationships enjoyed under the laws of this state prior to April 5, 1961, or enacted thereafter shall remain inviolate.

(b) Subject to subsection (a) of this Code section, the members or shareholders of any professional association organized pursuant to this chapter shall not be individually liable for the debts of, or claims against, the professional association unless such member or shareholder has personally participated in the transaction for which the debt or claim is made or out of which it arises. (Ga. L. 1961, p. 404, § 7.)



**Cross references.** — Privileged communications generally, § 24-9-20 et seq.

**Law reviews.** — For article on incorporat-

ing the professional practice through a partnership of professional corporations, see 17 Ga. St. B.J. 102 (1981).

### JUDICIAL DECISIONS

**Failure to sign in representative capacity.** — The defendants' acts of negotiating a sublease for their professional association and signing the sublease, without denoting that each signature was in a representative capacity, did not constitute personal participation in the transaction since an association, like a corporation, can only operate

through the actions of individuals and the sublease explicitly stated that the lease was between the plaintiff and the professional association. *Swiss Bank Corp. v. Thomas, Conner & McDonald*, 236 Ga. App. 890, 514 S.E.2d 68 (1999).

**Cited in** *Holder v. United States*, 289 F. Supp. 160 (N.D. Ga. 1968).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 46, 49.

**ALR.** — Liability of attorney for negligence in connection with investigation or certification of title to real estate, 59 ALR3d 1176.

Liability of member of unincorporated association for tortious acts of association's nonmember agent or employee, 62 ALR3d 1165.

### 14-10-8. Management.

(a) *Board of governors; officers.* A professional association organized pursuant to this chapter shall be governed by a board of governors elected by the members or shareholders and represented by officers elected by the board of governors so that centralization of management will be assured and no member shall have the power to bind the association within the scope of the association's business or profession merely by virtue of his being a member or shareholder of the association. Members of the board of governors need not be members or shareholders of the professional association. Officers, with the exception of the president, need not be members of the board of governors. No officer or member of the board of governors who is not duly licensed to practice the profession for which the professional association was organized shall participate in any decisions constituting the practice of said profession. The officers of the association shall include a president, vice-president, secretary, treasurer, and such other officers as the board of governors may determine. Any one person may serve in more than one office, except that the president and the secretary of the professional association shall not be the same person.

(b) *Bylaws.* The members may adopt such bylaws as they may deem proper, or the power to promulgate bylaws of the association may be delegated by the articles of association to the board of governors of the professional association as the members or shareholders may decide.

(c) *Voting.* Each member or shareholder shall have such power to cast such vote or votes at the meeting of the members or shareholders as the articles of association shall provide.

(d) *Agents and employees.* The officers of the professional association may employ such agents or employees of the association as they may deem advisable, subject to Code Section 14-10-6. (Ga. L. 1961, p. 404, § 8.)

### JUDICIAL DECISIONS

Cited in *Holder v. United States*, 289 F. Supp. 160 (N.D. Ga. 1968).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 7.

### 14-10-9. Continuity of existence independent of status or acts of members.

Unless the articles of association expressly provide otherwise, a professional association shall continue as a separate entity independent of its members or shareholders, for all purposes for such period of time as provided in the articles, or until dissolved by a vote of two-thirds of the members. An association shall continue notwithstanding the death, insanity, incompetency, conviction for felony, resignation, withdrawal, transfer of membership or ownership of shares, retirement, or expulsion of any one or more of the members or shareholders; the admission of or transfer of membership or shares to any new member or members or shareholder or shareholders; or the happening of any other event, which under the law of this state and under like circumstances would work a dissolution of a partnership, it being the aim and intention of this Code section that such professional association shall have continuity of life independent of the life or status of its members or shareholders. No member or shareholder of a professional association shall have the power to dissolve the association by his independent act of any kind. (Ga. L. 1961, p. 404, § 9.)

### JUDICIAL DECISIONS

Cited in *Holder v. United States*, 289 F. Supp. 160 (N.D. Ga. 1968).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 1, 11.



**14-10-10. Ownership.**

(a) *Stock-type and nonstock associations.* A professional association organized pursuant to this chapter may issue stock or certificates evidencing ownership of an interest in the assets of the professional association to its members; the association may be a nonstock organization with the members owning no individual interest in the assets of the association but with the rights and duties specified in the articles of association; or the association may be a nonstock organization with the members owning undivided interests in the assets of the association according to the articles of association.

(b) *Transferability.* The stock or certificates of ownership, if a stock-type association or a membership in a nonstock association, shall be freely transferable except as may be lawfully restricted in the articles of association.

(c) *Shareholders and members.* A professional association may issue its capital stock if it is a stock-type association or accept as members of the professional association, if a nonstock association, only persons who are duly licensed or otherwise legally authorized to render the same professional service as that for which the professional association was organized.

(d) *Estate of deceased shareholder or member.* Subject to the articles of association, the estate of a member or shareholder who was a person duly licensed or otherwise legally authorized to render the same professional service as that for which the professional association was organized may continue to hold stock or membership pursuant to the articles of association for a reasonable period of administration of the estate, but shall not be authorized to participate in any decisions concerning the rendering of professional service. (Ga. L. 1961, p. 404, § 10.)

**JUDICIAL DECISIONS**

Cited in *Holder v. United States*, 289 F. Supp. 160 (N.D. Ga. 1968).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, § 2. 46 Am. Jur. 2d, Joint Stock Companies, §§ 7, 8, 10.

**14-10-11. Severance of connection with association required upon legal disqualification of member to render professional service; effect of failure to comply.**

If any member, shareholder, agent, or employee of a professional association becomes legally disqualified to render a professional service

within this state or accepts employment or is elected to a public office which, pursuant to existing law, is a restriction or limitation upon the rendering of professional service, he shall sever all employment with, or financial interest in, such professional association forthwith. A professional association's failure to comply or require compliance with this requirement shall be a ground for the forfeiture of its right to render professional service as a professional association pursuant to this chapter. When a professional association's failure to comply with this requirement is brought to the attention of the Secretary of State, the Secretary of State shall certify that fact to the Attorney General for appropriate action to dissolve the professional association. (Ga. L. 1961, p. 404, § 11.)

**14-10-12. Valuation of membership or shares of deceased, retired, expelled, or disqualified member or shareholder.**

If the articles of association or bylaws of a professional association fail to fix a price at which a professional association or its members or shareholders may purchase the membership or shares of a deceased, retired, expelled, or disqualified member or shareholder, and if the articles of association or bylaws do not otherwise provide, then the price for such membership or shares shall be the book value of such membership or shares at the end of the month immediately preceding the death or disqualification of the member or shareholder. Book value shall be determined by an independent certified public accountant employed for such purpose from the books and records of the professional association by the regular method of accounting employed by the professional association. The determination by the certified public accountant of book values shall be conclusive on the professional association and its members or shareholders. (Ga. L. 1961, p. 404, § 12.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 7, 18 et seq., 26. 46 Am. Jur. 2d, Joint Stock Companies, §§ 10, 14, 15.

**14-10-13. Annual report; fee; penalty for failure to furnish report.**

Reserved. Repealed by Ga. L. 1989, p. 1027, § 37, effective July 1, 1989.

**Editor's notes.** — This Code section was based on Ga. L. 1961, p. 404, § 13 and Ga. L. 1985, p. 619, § 1.

**14-10-14. Limitation on sale or transfer of membership or shares.**

A member or shareholder of a professional association may sell or transfer his membership or shares in such professional association only to



another individual who is duly licensed or otherwise legally authorized to render the same professional services as those for which the association was organized. (Ga. L. 1961, p. 404, § 14.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 18, 19. 46 Am. Jur. 2d, Joint Stock Companies, § 8.

#### 14-10-15. Distribution of assets following dissolution.

In the event of dissolution of a stock-type professional association, the board of governors, as trustees of the property of such professional association, shall apply the assets first to the payment of debts of the association and, secondly, to the holders of the stock as provided in the articles of association. In the event of dissolution of a nonstock association, the assets shall be distributed or sold and the net proceeds distributed first to the payment of debts of the association and, secondly, to or among the members of the association as the articles of association shall provide. (Ga. L. 1961, p. 404, § 15.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 61, 62. 46 Am. Jur. 2d, Joint Stock Companies, §§ 14, 15.

#### 14-10-16. Powers generally; assets not liable to attachment for debts of members or shareholders.

A professional association organized pursuant to this chapter may contract in its own name, take, hold, and sell real and personal property in its own name, independent of its members, and sue and be sued as an independent entity as provided by law. Any conveyance in the name of the professional association to a third person executed by the president and attested by the secretary shall be conclusively presumed to be properly executed and shall divest all right, title, and interest of the professional association, its members, and the board of governors thereof. The assets of a professional association shall not be liable to attachment for the individual debts of its members or shareholders. (Ga. L. 1961, p. 404, § 16.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 6 Am. Jur. 2d, Associations and Clubs, §§ 11 et seq., 43 et seq. 46 Am. Jur. 2d, Joint Stock Companies, §§ 9 et seq.

**14-10-17. Actions by or against associations.**

Code Sections 9-2-24 and 9-2-25 are incorporated by reference and shall govern professional associations organized pursuant to this chapter in all respects as contained therein. (Ga. L. 1961, p. 404, § 17.)

**RESEARCH REFERENCES**

**ALR.** — Mandamus against unincorporated association or its officers, 137 ALR 311.

Right of labor union, or other organization for protection or promotion of interests of members, to challenge validity of statute or ordinance on behalf of members, 2 ALR2d 917.

Recovery by member from unincorporated association for injuries inflicted by tort of fellow member, 14 ALR2d 473.

Suability of individual members of unincorporated association as affected by statute or rule permitting association to be sued as an entity, 92 ALR2d 499.

**14-10-18. Applicability of corporation laws; inapplicability of partnership laws.**

A professional association organized pursuant to this chapter shall be governed generally by all laws governing or applying to corporations, where applicable, and not in conflict with this chapter; and no such association shall be held or deemed to be a partnership nor shall such association be governed by laws relating to partnerships. (Ga. L. 1961, p. 404, § 18.)

**Law reviews.** — For article enumerating the 1969 amendments to Georgia's Corpora-

tion Code of 1968, see 5 Ga. St. B.J. 433 (1969).

**OPINIONS OF THE ATTORNEY GENERAL**

**One-man out-of-state professional service corporation.** — "One-man" Florida professional service corporation formed for the purpose of practicing medicine in Florida

and Georgia cannot register as a foreign corporation under provisions pertaining to the admission of foreign corporations. 1969 Op. Att'y Gen. No. 69-507.



## CHAPTER 11

## LIMITED LIABILITY COMPANIES

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**Editor's notes.** — Ga. L. 1993, p. 123, § 1, effective March 1, 1994, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter, concerning foreign limited liability companies, consisted of Code 1981, §§ 14-11-1 through 14-11-19 and was based on Ga. L. 1992, p. 1865, § 1.

**Law reviews.** — For article, "Effective Use of Limited Liability Companies in Georgia: An Overview of Their Characteristics and Advantages," see 45 Mercer L. Rev. 25 (1993). For article, "LLC Statutes: Use by

Attorneys," see 29 Ga. L. Rev. 693 (1995). For article discussing developments in Georgia law of business associations from June 1, 1996 through May 31, 1997, see 49 Mercer L. Rev. 71 (1997). For survey article discussing developments in law of business associations for the period from June 1, 1998 through May 31, 1999, see 51 Mercer L. Rev. 127 (1999).

For note on 1993 enactment of this chapter, see 10 Ga. St. U.L. Rev. 79 (1993). For note on 1995 amendments of sections in this chapter, see 12 Ga. St. U.L. Rev. 65 (1995).

## COMMENT

### NOTE AS TO DRAFTING COMMITTEE

The Georgia Limited Liability Company Act was drafted by the Georgia Limited Liability Company Committee, an ad hoc committee of lawyers from the Business and Finance Law Section and the Taxation Section of the Atlanta Bar Association and the Partnership Subcommittee of the Corporate and Banking Law Section of the State Bar of Georgia. The Committee operated under the auspices of the Corporate and Banking Law Section and is composed of the following individuals:

Robert P. Bryant, Co-Chair

Patrick G. Jones, Co-Chair

Michael E. Axelrod

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Hon. Thurbert E. Baker

Janet K. Jackson

Deputy Director, Business

Services and Regulation,

Office of the Secretary of State

Thomas M. Boller

George E. Hibbs

Russell N. Sewell

## ARTICLE 1

## GENERAL PROVISIONS

**14-11-100. Short title.**

This chapter may be cited as the "Georgia Limited Liability Company Act." (Code 1981, § 14-11-100, enacted by Ga. L. 1993, p. 123, § 1.)

**Law reviews.** — For article, "Choice of Entity with Emphasis on Estate Planning," see 6 Ga. St. B.J. 26 (2000).

## RESEARCH REFERENCES

**ALR.** — Construction and application of limited liability company acts, 79 ALR5th 689.

**14-11-101. Definitions.**

As used in this chapter, unless the context otherwise requires, the term:

(1) "Articles of organization" means the articles filed under Code Section 14-11-203 and such articles as amended or restated.

(2) "Business entity" means a limited liability company, a foreign limited liability company, a limited partnership, a foreign limited partnership, a general partnership, a corporation, or a foreign corporation.

(3) "Conflicting interest" with respect to a limited liability company means the interest a member or manager of the limited liability company has respecting a transaction effected or proposed to be effected by the limited liability company (or by a person in which the limited liability company has a controlling interest), with respect to which the member or manager has the power to act or vote, if:

(A) Whether or not the transaction is brought before the members or managers responsible for the decision, as the case may be, of the limited liability company for action, to the knowledge of the member or manager at the time of commitment, he or she or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the member or manager or a related person that it would reasonably be expected to exert an influence on the member or manager's judgment if he or she were called upon to vote on the transaction; or

(B) The transaction is brought (or is of such character and significance to the limited liability company that it would in the normal course be brought) before the members or managers responsible for



the decision, as the case may be, of the limited liability company for action and, to the knowledge of the member or manager at the time of commitment, any of the following persons is either a party to the transaction or has a beneficial financial interest so closely linked to the transaction and of such financial significance to that person that it would reasonably be expected to exert an influence on the member or manager's judgment if he or she were called upon to vote on the transaction: an entity (other than the limited liability company) of which the member or manager is a director, general partner, member, manager, agent, or employee; an entity that controls, is controlled by, or is under common control with one or more of the entities specified in the preceding clause; or an individual who is a general partner, principal, or employer of the member or manager.

(4) "Contribution" means a contribution to the capital of a limited liability company authorized by Code Section 14-11-401.

(5) "Corporation" means a corporation incorporated under Chapter 2 of this title.

(6) "Distribution" means a direct or indirect transfer of money or other property (except its own limited liability company interests) by a limited liability company to or for the benefit of its members or their assignees in respect of any of its limited liability company interests. A distribution may be in the form of a transfer of money or other property; a purchase, redemption, or other acquisition of a limited liability company interest; a distribution of indebtedness; or otherwise.

(6.1) "Electronic transmission" or "electronically transmitted" means any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient.

(7) "Event of dissociation" means an event that causes a person to cease to be a member, as provided in Code Section 14-11-601 or 14-11-601.1.

(8) "Foreign corporation" means a corporation for profit formed under the laws of a jurisdiction other than this state.

(9) "Foreign limited liability company" means a limited liability company formed under the laws of a jurisdiction other than this state.

(10) "Foreign limited partnership" means a limited partnership formed under the laws of a jurisdiction other than this state.

(11) "General partnership" means a partnership (other than a limited partnership) existing under the laws of this state or the laws of any other jurisdiction.

(12) "Limited liability company" means a limited liability company formed under this chapter by one or more members.

(13) "Limited liability company interest" means a member's share of the profits and losses of a limited liability company and a member's right to receive distributions.

(14) "Limited partnership" means a limited partnership formed under the laws of this state.

(15) "Manager" means a person in whom management is vested in accordance with subsection (b) of Code Section 14-11-304.

(16) "Member" means a person who has been admitted to a limited liability company as a member as provided in Code Section 14-11-505 and who has not ceased to be a member as provided in Code Section 14-11-601 or 14-11-601.1.

(17) "Member or manager's conflicting interest transaction" with respect to a limited liability company means a transaction effected or proposed to be effected by the limited liability company (or by a person in which the limited liability company has a controlling interest) respecting which a member or manager of the limited liability company having the power to act or vote has a conflicting interest.

(18) "Operating agreement" means any agreement, written or oral, as to the conduct of the business and affairs of a limited liability company that is binding upon all of the members. A written operating agreement may provide that a person shall be admitted as a member of a limited liability company, or shall become an assignee of a limited liability company interest or other rights or powers of a member to the extent assigned, and shall become bound by the operating agreement and the provisions of the articles of organization (A) if such person (or a representative authorized by such person orally, in writing, or by other action such as payment for a limited liability company interest) executes the operating agreement or any other writing evidencing the intent of such person to become a member or assignee, or (B) without such execution, if such person (or a representative authorized by such person orally, in writing, or by other action such as payment for a limited liability company interest) complies with the conditions for becoming a member or assignee as set forth in the written operating agreement or any other writing and such person or representative requests in writing that the records of the limited liability company reflect such admission or assignment. In the case of a limited liability company with only one member, a writing signed by that member stating that it is intended to be a written operating agreement shall constitute a written operating agreement.

(19) "Person" means an individual, business entity, business trust, estate, trust, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.



(20) “Proceeding” means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal.

(21) “Related person” of a member or manager means:

(A) A child, grandchild, sibling, parent, or spouse of, or an individual occupying the same household as, the member or manager or a trust or estate of which an individual specified in this subparagraph is a substantial beneficiary; or

(B) A trust, estate, incompetent, conservator, or minor of which the member or manager is a fiduciary.

(22) “Required disclosure” means disclosure by the member or manager who has a conflicting interest of (A) the existence and nature of his or her conflicting interest, and (B) all facts known to him or her respecting the subject matter of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment as to whether or not to proceed with the transaction.

(23) “State” means the District of Columbia or the Commonwealth of Puerto Rico or any state, territory, possession, or other jurisdiction of the United States.

(24) “Time of commitment” respecting a member’s or manager’s conflicting interest transaction means the time when the transaction is consummated or, if made pursuant to contract, the time when the limited liability company (or the person in which it has a controlling interest) becomes contractually obligated so that its unilateral withdrawal from the transaction would entail significant loss, liability, or other damage. (Code 1981, § 14-11-101, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1997, p. 1380, § 3; Ga. L. 1999, p. 405, § 30; Ga. L. 2002, p. 1235, § 1.)

**The 2002 amendment**, effective July 1, 2002, added “or 14-11-601.1” at the end of paragraphs (7) and (16).

**Law reviews.** — For article commenting on the 1997 amendment of this section, see 14 Georgia St. U. L. Rev. 57 (1997).

#### 14-11-102. Evidence of filing.

A certificate attached to a copy of a document or electronic transmission filed by the Secretary of State, bearing his or her signature, which may be in facsimile, and the printed or embossed seal of this state, or its electronic equivalent, is prima-facie evidence that the original document has been filed with the Secretary of State. (Code 1981, § 14-11-102, enacted by Ga. L. 1999, p. 405, § 31.)

## ARTICLE 2 FORMATION

### 14-11-201. Purpose.

(a) A limited liability company may be formed under this chapter for any lawful purpose. If the purpose for which a limited liability company is formed makes it subject to a special provision of law, the limited liability company shall also comply with that provision.

(b) A limited liability company formed under this chapter has, unless a more limited purpose is set forth in the articles of organization or a written operating agreement, the purpose of engaging in any lawful activity. (Code 1981, § 14-11-201, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1995, p. 470, § 15.)

### RESEARCH REFERENCES

**ALR.** — Construction and application of limited liability company acts, 79 ALR5th 689.

### 14-11-202. Powers.

Each limited liability company formed in this state shall have the same powers as any person has to do all things necessary to carry out its purpose, business, and affairs. (Code 1981, § 14-11-202, enacted by Ga. L. 1993, p. 123, § 1.)

### 14-11-203. Formation.

(a) One or more persons may act as the organizer or organizers of a limited liability company by delivering articles of organization to the Secretary of State for filing and supplying to the Secretary of State, in such form as the Secretary of State may require, the following information:

(1) The name and address of each organizer;

(2) The street address and county of the limited liability company's initial registered office and the name of its initial registered agent at that office; and

(3) The mailing address of the limited liability company's principal place of business.

(b) An organizer need not be a member of the limited liability company at the time of formation or thereafter.

(c) A limited liability company is formed when the articles of organization become effective pursuant to Code Section 14-11-206.



(d) The Secretary of State's filing of the articles of organization is conclusive proof that the organizers satisfied all conditions precedent to formation, except in a proceeding by the state to cancel or revoke the formation. (Code 1981, § 14-11-203, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-204. Articles of organization.**

(a) The articles of organization shall set forth the name of the limited liability company, which name must satisfy the requirements of Code Section 14-11-207.

(b) The articles of organization may set forth:

(1) That management of the limited liability company is vested in one or more managers; and

(2) Any other provisions not inconsistent with law. (Code 1981, § 14-11-204, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1994, p. 161, § 5.)

#### **14-11-205. Execution of documents.**

(a) Unless otherwise specified in any other Code section of this chapter, any document required or permitted by this chapter to be delivered to the Secretary of State for filing shall be executed:

(1) By any member;

(2) By any manager if management of the limited liability company is vested in one or more managers;

(3) By any organizer if the limited liability company has been formed but it has no members or managers; or

(4) If the limited liability company is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary.

(b) The person executing the document shall sign it and state beneath or opposite his or her signature his or her name and the capacity in which he or she signs.

(c) The person executing the document may do so as an attorney-in-fact. Powers of attorney relating to the execution of the document do not need to be shown to or filed with the Secretary of State. (Code 1981, § 14-11-205, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-206. Filing by the Secretary of State.**

(a) A signed original and one exact or conformed copy of any document required or permitted to be filed pursuant to this chapter shall be delivered to the Secretary of State; provided, however, that if the document is

electronically transmitted, the electronic version of such person's name may be used in lieu of a signature. Unless the Secretary of State finds that the document does not conform to the filing provisions of this chapter, upon receipt of all filing fees and additional information required by law, he or she shall:

(1) Stamp or otherwise endorse his or her official title and the date and time of receipt on both the original and copy;

(2) File the original in his or her office; and

(3) Return the copy to the person who delivered the document to the Secretary of State or the person's representative.

(b) If the Secretary of State refuses to file a document, he or she shall return it to the limited liability company or its representative within ten days after the document was delivered, together with a brief written explanation of the reason for his or her refusal.

(c) The Secretary of State's duty to file documents under this chapter is ministerial.

(d) If the Secretary of State finds that any document delivered for filing does not conform to the filing provisions of this chapter at the time such document is delivered to the Secretary of State, such document is deemed to have been filed at the time of delivery (or such later time and date as is authorized by paragraph (2) of subsection (e) or subsection (f) of this Code section) if the Secretary of State subsequently determines that:

(1) The document as delivered so conforms to the filing provisions of this chapter; or

(2) Within 30 days after notification of nonconformance is given by the Secretary of State to the person who delivered the documents for filing or that person's representative, the documents are brought into conformance.

(e) Except as provided in subsection (d) of this Code section, a document accepted for filing is effective:

(1) At the time of filing on the date it is filed, as evidenced by the Secretary of State's date and time endorsement on the original document; or

(2) At the time specified in the document as its effective time on the date it is filed.

(f) A document may specify a delayed effective time and date, and, if it does so, the document shall become effective at the time and date specified. If a delayed effective date but no effective time is specified, the document shall become effective at the close of business on that date. A delayed



effective date for a document may not be later than the ninetieth day after the date on which it is filed.

(g) A certificate attached to a copy of a document filed by the Secretary of State, bearing his or her signature, which may be in facsimile, and the printed or embossed seal of this state, or its electronic equivalent, is prima-facie evidence that the original document has been filed with the Secretary of State.

(h) Notwithstanding the provisions of this chapter, the Secretary of State may authorize the filing of documents by electronic transmission, following the provisions of Chapter 12 of Title 10, the "Georgia Electronic Records and Signatures Act," and the Secretary of State shall be authorized to promulgate such rules and regulations as are necessary to implement electronic filing procedures. (Code 1981, § 14-11-206, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1999, p. 405, § 32.)

#### **14-11-207. Name.**

(a) The name of each limited liability company shall be as set forth in its articles of organization and:

(1) Must contain the words "limited liability company" or "limited company" (it being permitted to abbreviate the word "limited" as "Ltd." and the word "company" as "co.") or the abbreviation "L.L.C.", "LLC", "L.C." or "LC";

(2) Must be distinguishable on the records of the Secretary of State from the name of any corporation, limited liability company, or limited partnership; any foreign corporation, foreign limited liability company or foreign limited partnership having a certificate of authority to transact business in this state; any nonprofit corporation, professional corporation, or professional association, domestic or foreign, on file with the Secretary of State pursuant to this title; or any name reserved or registered under this title; and

(3) Shall not in any instance exceed 80 characters, including spaces and punctuation.

(b) This chapter does not control the use of fictitious or trade names. Issuance of a name under this chapter means that the name is distinguishable for filing purposes on the records of the Secretary of State pursuant to paragraph (2) of subsection (a) of this Code section. Issuance of a limited liability company name does not affect the commercial availability of the name. (Code 1981, § 14-11-207, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-208. Reservation of name; transfer of reserved name.**

(a) A person may apply to reserve a name for the purpose of forming a limited liability company by paying the fee specified in Code Section

14-11-1101. If the Secretary of State finds that the limited liability company name applied for is available, he or she shall reserve the name for the applicant's use for 30 days or until articles of organization are filed, whichever is sooner. If the Secretary of State finds that the name applied for is not distinguishable for filing purposes upon the records of the Secretary of State, he or she shall notify the applicant who may then submit another reservation request within ten days of the date of the rejection notice without payment of an additional reservation fee.

(b) Upon expiration of a name reservation after 30 days without the filing of articles of organization, the name may again be reserved for another 30 day period by the same or another applicant under the same guidelines of subsection (a) of this Code section.

(c) A person who has in effect a name reservation under subsection (a) of this Code section may transfer the reservation to another person by delivering to the Secretary of State a signed notice of the transfer that states the name and address of the transferee. (Code 1981, § 14-11-208, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1994, p. 97, § 14; Ga. L. 2003, p. 883, § 7.)

**The 2003 amendment**, effective July 1, 2003, substituted the present provisions of subsection (a) for the former provisions which read: "A person may apply to reserve the use of a limited liability company name that meets the requirements of subsection (a) of Code Section 14-11-207. If the Secre-

tary of State finds that the limited liability company name applied for is available, he or she shall reserve the name for the applicant's use for a nonrenewable 90 day period."; added subsection (b); and redesignated former subsection (b) as present subsection (c).

#### **14-11-209. Registered office and registered agent.**

(a) Each limited liability company shall continuously maintain in this state:

(1) A registered office which may, but need not, be a place of its business in this state; and

(2) A registered agent for service of process on the limited liability company. The address of the business office of the registered agent shall be the same as the address of the registered office referred to in paragraph (1) of this subsection.

(b) A registered agent must be an individual resident of this state, a corporation, or a foreign corporation having a certificate of authority to transact business in this state.

(c) A limited liability company may change its registered office or its registered agent, or both, by filing an amendment to its annual registration that sets forth:

(1) The name of the limited liability company;



- (2) The street address and county of its then registered office;
- (3) If the address of its registered office is to be changed, the new street address and county of the registered office;
- (4) The name of its then registered agent; and
- (5) If its registered agent is to be changed, the name of its successor registered agent.

(d) A registered agent of a limited liability company may resign as such agent by signing and delivering to the Secretary of State for filing a statement of resignation, which may include a statement that the registered office is also discontinued. On or before the date of the filing of the statement of resignation, the registered agent shall deliver or mail a written notice of the registered agent's intention to resign to the limited liability company at the most recent mailing address of the limited liability company's principal place of business in this state listed in the records of the Secretary of State. The agency appointment is terminated, and the registered office discontinued if so provided, on the earlier of the filing of the limited liability company's annual registration or a statement designating a new registered agent and registered office if also discontinued or the thirty-first day after the date on which the statement of resignation was filed.

(e) A registered agent may change the agent's office and the address of the registered office of any limited liability company of which the agent is the registered agent to another place within this state by filing a statement, as required in subsection (c) of this Code section, setting forth the required information for all limited liability companies for which he or she is the registered agent, except that it need be signed only by the registered agent and need not be responsive to paragraph (5) of subsection (c) of this Code section and must recite that a copy of the statement has been mailed to the limited liability company at the most recent mailing address of the limited liability company's principal place of business listed on the records of the Secretary of State.

(f) Whenever a limited liability company shall fail to appoint or maintain a registered agent in this state or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such limited liability company upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him or her or with any other person or persons designated by the Secretary of State to receive such service two copies of such process, notice, or demand. The plaintiff or his or her attorney shall certify in writing to the Secretary of State that the limited liability company failed either to maintain a registered office or appoint a registered agent in this state and that he or she has forwarded by registered or certified mail or statutory overnight delivery such process, notice, or demand to the most

recent registered office listed on the records of the Secretary of State and that service cannot be effected at such office.

(g) The Secretary of State shall keep a record of all processes, notices, and demands served upon him or her under this Code section and shall record therein the time of such service and his or her action with reference thereto.

(h) This Code section does not prescribe the only means, or necessarily the required means, of serving any process, notice, or demand required or permitted by law to be served on a limited liability company. (Code 1981, § 14-11-209, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1999, p. 405, § 33; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

#### **14-11-210. Amendment of articles of organization; restatement.**

(a) A limited liability company amending its articles of organization shall deliver to the Secretary of State for filing articles of amendment setting forth:

- (1) The name of the limited liability company;
- (2) The date the articles of organization were filed;
- (3) The amendment to the articles of organization; and
- (4) The effective date and time of the amendment if later than the date and time the articles of amendment are filed.

(b) The articles of organization may be amended in any and as many respects as may be desired so long as the articles of organization as amended contain only provisions that may be lawfully contained in articles of organization at the time of making the amendment.

(c) Articles of organization may be restated to include only those provisions then in effect, or amended and so restated, at any time. Restated articles of organization shall be delivered to the Secretary of State for filing and shall be specifically designated as such in the heading. (Code 1981, § 14-11-210, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-211. Correcting filed document.**

(a) A limited liability company or foreign limited liability company may correct a document filed by the Secretary of State if the document:

- (1) Contains an incorrect statement; or
- (2) Was defectively executed.



(b) A document is corrected:

(1) By preparing articles of correction that:

(A) Describe the document (including its filing date);

(B) Specify the incorrect statement and the reason it is incorrect or the manner in which the execution was defective; and

(C) Correct the incorrect statement or defective execution; and

(2) By delivering the articles to the Secretary of State for filing.

(c) Articles of correction that are filed by the Secretary of State are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed. (Code 1981, § 14-11-211, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 2002, p. 989, § 15.)

The 2002 amendment, effective July 1, articles of correction" following "filing 2002, deleted "or attach a copy of it to the date)" at the end of subparagraph (b)(1)(A).

#### **14-11-212. Election to become a limited liability company.**

(a) A corporation, limited partnership, or general partnership may elect to become a limited liability company. Such election shall require (1) compliance with Code Section 14-2-1109.1 in the case of a corporation, or (2) the approval of all of its partners (or such other approval as may be sufficient under applicable law to authorize such election) in the case of a limited partnership or general partnership.

(b) Such election is made by delivering a certificate of election to the Secretary of State for filing. The certificate shall set forth:

(1) The name of the corporation, limited partnership, or general partnership making the election;

(2) That the corporation, limited partnership, or general partnership elects to become a limited liability company;

(3) The effective date, or the effective date and time, of such election if later than the date and time the certificate of election is filed;

(4) That the election has been approved as required by subsection (a) of this Code section;

(5) That filed with the certificate of election are articles of organization that are in the form required by Code Section 14-11-204, that set forth a name for the limited liability company that satisfies the requirements of Code Section 14-11-207, and that shall be the articles of organization of the limited liability company formed pursuant to such election unless and until modified in accordance with this chapter; and

(6) A statement that either (A) states the manner and basis for converting the shares of the corporation or the interests of the partners in the limited partnership or general partnership into interests as members of the limited liability company formed pursuant to such election, or (B) states (i) that a written operating agreement has been entered into among the persons who will be the members of the limited liability company formed pursuant to such election, (ii) that such operating agreement will be effective immediately upon the effectiveness of such election, and (iii) that such operating agreement provides for the manner and basis of such conversion.

(c) Upon the election becoming effective:

(1) The corporation, limited partnership, or general partnership shall become a limited liability company formed under this chapter by such election;

(2) The shares of the corporation or the interests of the partners of the limited partnership or general partnership making the election shall be converted on the basis stated or referred to in the certificate of election in accordance with paragraph (6) of subsection (b) of this Code section;

(3) The articles of organization filed with the certificate of election shall be the articles of organization of the limited liability company formed pursuant to such election unless and until amended in accordance with this chapter;

(4) The articles of incorporation and bylaws of the corporation, certificate of limited partnership and partnership agreement of the limited partnership, or partnership agreement and statement of partnership, if any, of the general partnership making the election shall be of no further force or effect;

(5) The limited liability company formed by such election shall thereupon and thereafter possess all of the rights, privileges, immunities, franchises, and powers of the corporation, limited partnership, or general partnership making the election; and all property, real, personal, and mixed, and all debts due to such corporation, limited partnership, or general partnership, as well as all other choses in action, and each and every other interest of or belonging to or due to the corporation, limited partnership, or general partnership shall be taken and deemed to be vested in the limited liability company formed by such election without further act or deed; and the title to any real estate, or any interest therein, vested in the corporation, limited partnership, or general partnership shall not revert or be in any way impaired by reason of such election; and

(6) The limited liability company formed by such election shall thereupon and thereafter be responsible and liable for all the liabilities



and obligations of the corporation, limited partnership, or general partnership making the election, and any claim existing or action or proceeding pending by or against such corporation, limited partnership, or general partnership may be prosecuted as if such election had not become effective. Neither the rights of creditors nor any liens upon the property of the corporation, limited partnership, or general partnership shall be impaired by such election.

(d) A limited liability company formed by an election pursuant to this Code section may file a copy of such election to become a limited liability company, certified by the Secretary of State, in the office of the clerk of the superior court of the county where any real property owned by such limited liability company is located and record such certified copy of the election in the books kept by such clerk for recordation of deeds in such county with the entity electing to become a limited liability company indexed as the grantor and the limited liability company indexed as the grantee. No real estate transfer tax under Code Section 48-6-1 shall be due with respect to recordation of such election. (Code 1981, § 14-11-212, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1995, p. 470, § 16; Ga. L. 1997, p. 1380, § 4.)

**Law reviews.** — For article commenting on the 1997 amendment of this section, see 14 Georgia St. U. L. Rev. 57 (1997).

### ARTICLE 3

#### AGENCY; MANAGEMENT; DUTIES; LIABILITY

##### **14-11-301. Agency of members and managers.**

(a) Except as provided in subsection (b) of this Code section, every member is an agent of the limited liability company for the purpose of its business and affairs, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business and affairs of the limited liability company of which he or she is a member, binds the limited liability company, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter, and the person with whom he or she is dealing has knowledge of the fact that the member has no such authority.

(b) If the articles of organization provide that management of the limited liability company is vested in a manager or managers:

(1) No member, acting solely in the capacity as a member, is an agent of the limited liability company; and

(2) Every manager is an agent of the limited liability company for the purpose of its business and affairs, and the act of any manager, including,

but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business and affairs of the limited liability company of which he or she is a manager, binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter, and the person with whom he or she is dealing has knowledge of the fact that the manager has no such authority.

(c) An act of a manager or a member that is not apparently for the carrying on in the usual way the business or affairs of the limited liability company does not bind the limited liability company unless authorized in accordance with a written operating agreement at the time of the transaction or at any other time.

(d) No act of a manager or member in contravention of a restriction on authority shall bind the limited liability company to persons having knowledge of the restriction. (Code 1981, § 14-11-301, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-302. Limitations on authority to convey real property.**

Limitations on the authority of any or all members or managers that are set forth in a limited liability company's articles of organization shall be conclusively presumed in favor of the limited liability company and against a grantee of the limited liability company, or a person claiming through such grantee, with respect to limited liability company real property located in a county of this state if a copy of the articles of organization certified by the Secretary of State is filed in the office of the clerk of the superior court of the county where the real property is located and recorded in the book kept by such clerk for statements of partnership pursuant to Code Section 14-8-10.1. (Code 1981, § 14-11-302, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-303. Liability to third parties.**

(a) A person who is a member, manager, agent, or employee of a limited liability company is not liable, solely by reason of being a member, manager, agent, or employee of the limited liability company, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company, whether arising in contract, tort, or otherwise. Notwithstanding the provisions of this subsection, a member, manager, or employee may be personally liable for tax liabilities arising from the operation of the limited liability company as provided in Code Section 48-2-52.

(b) Notwithstanding the provisions of subsection (a) of this Code section, under a written operating agreement or under another written



agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations, and liabilities of the limited liability company. (Code 1981, § 14-11-303, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1997, p. 1380, § 5; Ga. L. 2001, p. 984, § 3.)

**The 2001 amendment**, effective April 27, 2001, added the last sentence in subsection (a).

14 Georgia St. U. L. Rev. 57 (1997).

For note on the 2001 amendment to O.C.G.A. § 14-11-303, see 18 Ga. St. U. L. Rev. 294 (2001).

**Law reviews.** — For article commenting on the 1997 amendment of this section, see

#### 14-11-304. Management.

(a) Unless the articles of organization or a written operating agreement vests management of the limited liability company in a manager or managers, management of the business and affairs of the limited liability company shall be vested in the members, and, subject to any provisions in the articles of organization or a written operating agreement, the members shall have the right and authority to manage the affairs of the limited liability company and to make all decisions with respect thereto. The articles of organization or a written operating agreement may contain any provision relating to any phase of managing the business or regulating the affairs of the limited liability company.

(b) If the articles of organization or a written operating agreement vests management of the limited liability company in one or more managers, then such persons shall have such right and authority to manage the business and affairs of the limited liability company as is provided in the articles of organization or a written operating agreement. Unless otherwise provided in the articles of organization or a written operating agreement, such persons:

(1) Shall be designated, appointed, elected, removed, or replaced by the approval of more than one half by number of the members;

(2) Need not be members of the limited liability company or natural persons; and

(3) Unless they have been earlier removed or have earlier resigned, shall hold office until their successors shall have been elected and qualified.

(c) A written operating agreement may provide that (1) a member or manager who fails to perform in accordance with, or to comply with the terms and conditions of, the written operating agreement shall be subject to specified penalties or specified consequences, and (2) at the time or upon the happening of events specified in a written operating agreement, a member or manager shall be subject to specified penalties or specified consequences.

(d) A person who is both a manager and member has the rights and powers, and is subject to the restrictions and liabilities, of a manager and, except as provided in the articles of organization or a written operating agreement, also has the rights and powers, and is subject to the restrictions and liabilities, of a member to the extent of his or her participation in the limited liability company as a member. (Code 1981, § 14-11-304, enacted by Ga. L. 1993, p. 123, § 1.)

#### 14-11-305. Duties.

In managing the business or affairs of a limited liability company:

(1) A member or manager shall act in a manner he or she believes in good faith to be in the best interests of the limited liability company and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. A member or manager is not liable to the limited liability company, its members, or its managers for any action taken in managing the business or affairs of the limited liability company if he or she performs the duties of his or her office in compliance with this Code section. Except as otherwise provided in the articles of organization or a written operating agreement, a person who is a member of a limited liability company in which management is vested in one or more managers, and who is not a manager, shall have no duties to the limited liability company or to the other members solely by reason of acting in his or her capacity as a member;

(2) A member or manager, as the case may be, is entitled to rely on information, opinions, reports, or statements, including but not limited to financial statements or other financial data, if prepared or presented by:

(A) One or more members, managers, or employees of the limited liability company whom the member or manager reasonably believes to be reliable and competent in the matter presented;

(B) Legal counsel, public accountants, or other persons as to matters the member or manager reasonably believes are within the person's professional or expert competence; or

(C) A committee of members or managers of which he or she is not a member if the manager reasonably believes the committee merits confidence;

(3) In the instances described in paragraph (2) of this Code section, a member or manager is not entitled to rely if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by paragraph (2) of this Code section unwarranted; and

(4) To the extent that, pursuant to paragraph (1) of this Code section or otherwise at law or in equity, a member or manager has duties



(including fiduciary duties) and liabilities relating thereto to a limited liability company or to another member or manager:

(A) The member's or manager's duties and liabilities may be expanded, restricted, or eliminated by provisions in the articles of organization or a written operating agreement; provided, however, that no such provision shall eliminate or limit the liability of a member or manager:

(i) For intentional misconduct or a knowing violation of law; or

(ii) For any transaction for which the person received a personal benefit in violation or breach of any provision of a written operating agreement; and

(B) The member or manager shall have no liability to the limited liability company or to any other member or manager for his or her good faith reliance on the provisions of a written operating agreement, including, without limitation, provisions thereof that relate to the scope of duties (including fiduciary duties) of members and managers. (Code 1981, § 14-11-305, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1995, p. 470, § 17.)

#### **14-11-306. Indemnification.**

Subject to such standards and restrictions, if any, as are set forth in the articles of organization or a written operating agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever arising in connection with the limited liability company; provided, however, that no limited liability company shall have the power to indemnify any member or manager for any liability that may not be eliminated or limited by the articles of organization or a written operating agreement by reason of division (4)(A)(i) or (ii) of Code Section 14-11-305. (Code 1981, § 14-11-306, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-307. Conflicting interest transactions.**

(a) The provisions of this Code section shall apply to a limited liability company unless its articles of organization or a written operating agreement provides that they shall not apply. If the provisions of this Code section apply to a limited liability company, its articles of organization or a written operating agreement may limit, expand, or modify, in any manner whatsoever, the effect thereof. If the provisions of this Code section do not apply to a limited liability company, its articles of organization or a written operating agreement may, but is not required to, contain any provision whatsoever relating to transactions that might give rise to conflicts of interest for members or managers.

(b) A transaction effected or proposed to be effected by a limited liability company (or by a person in which the limited liability company has a controlling interest) that is not a member's or manager's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in an action by a member or by or in the right of the limited liability company, on the ground of a conflicting interest in the transaction of a member or manager or any person with whom or which he or she has a personal, economic, or other association.

(c) A member's or manager's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in an action by a member or by or in the right of the limited liability company, on the ground of a conflicting interest in the transaction of the member or manager, as the case may be, or any person with whom or which he or she has a personal, economic, or other association, if:

(1) The member's or manager's action respecting the transaction was at any time taken in compliance with this Code section; or

(2) The transaction, judged in the circumstances at the time of commitment, is established to have been fair to the limited liability company.

(d) A member's or manager's action respecting a transaction is effective for purposes of paragraph (1) of subsection (c) of this Code section if the transaction received the approval of a majority of those qualified members or managers who expressed approval or disapproval of the transaction after either required disclosure to them (to the extent the information was not known by them) or compliance with subsection (e) of this Code section.

(e) If a member or manager has a conflicting interest respecting a transaction, but neither he or she nor a related person of the member or manager specified in paragraph (21) of Code Section 14-11-101 is a party thereto, and if the member or manager has a duty under law or professional canon, or a duty of confidentiality to another person, respecting information relating to the transaction such that the member or manager cannot, consistent with that duty, make the disclosure contemplated by paragraph (22) of Code Section 14-11-101, then disclosure is sufficient for purposes of subsection (d) of this Code section if the member or manager:

(1) Discloses to the members or managers voting on the transaction the existence and nature of his or her conflicting interest and informs them of the character of and limitations imposed by that duty prior to their vote on the transaction; and

(2) Plays no part, directly or indirectly, in their deliberations or vote.

(f) A majority of all the qualified members or managers constitutes a quorum for purposes of action that complies with this Code section. Members' or managers' action that otherwise complies with this Code



section is not affected by the presence or vote of a member or manager who is not a qualified member or manager.

(g) For purposes of this Code section, "qualified member or manager" means, with respect to a member's or manager's conflicting interest transaction, any member (if management of the limited liability company is not vested in a manager or managers) or manager (if management of the limited liability company is vested in a manager or managers) who does not have either a conflicting interest respecting the transaction or a familial, financial, professional, or employment relationship with a second member or manager who does have a conflicting interest respecting the transaction, which relationship would, in the circumstances, reasonably be expected to exert an influence on the first member's or manager's judgment when voting on the transaction. (Code 1981, § 14-11-307, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-308. Approval rights of members and managers.**

(a) Except as otherwise provided in this chapter or in the articles of organization or a written operating agreement, and subject to subsection (b) of this Code section:

(1) If management of the limited liability company is vested in the members, each member shall have one vote with respect to, and the affirmative vote, approval, or consent of a majority of the members shall be required to decide, any matter arising in connection with the business and affairs of the limited liability company; and

(2) If management of the limited liability company is vested in a manager or managers, each manager shall have one vote with respect to, and the affirmative vote, approval, or consent of a majority of the managers shall be required to decide, any matter arising in connection with the business and affairs of the limited liability company.

(b) Unless otherwise provided in the articles of organization or a written operating agreement, the unanimous vote or consent of the members shall be required to approve the following matters:

(1) The dissolution of the limited liability company under paragraph (3) of subsection (a) or paragraph (3) of subsection (b) of Code Section 14-11-602;

(2) The merger of the limited liability company under subsection (a) of Code Section 14-11-903;

(3) The sale, exchange, lease, or other transfer of all or substantially all of the assets of the limited liability company. For the purposes of this paragraph, assets shall be deemed to be less than all or substantially all of a limited liability company's assets if the value of the assets does not

exceed two-thirds of the value of all of the assets of the limited liability company and the revenues represented or produced by such assets do not exceed two-thirds of the total revenues of the limited liability company; provided, however, that this paragraph shall not create any inference that the sale, exchange, lease, or other transfer of assets exceeding the amounts described in this paragraph is the sale of all or substantially all of the assets of the limited liability company;

(4) The admission of any new member of the limited liability company under subsection (b) of Code Section 14-11-505;

(5) An amendment to the articles of organization under Code Section 14-11-210 or an amendment to a written operating agreement;

(6) Action under subsection (b) of Code Section 14-11-402 to reduce or eliminate an obligation to make a contribution to the capital of a limited liability company;

(7) Action to approve a distribution under Code Section 14-11-404; or

(8) Action to continue a limited liability company under paragraph (4) of subsection (a) or paragraph (4) of subsection (b) of Code Section 14-11-602. (Code 1981, § 14-11-308, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1994, p. 161, § 6; Ga. L. 2002, p. 1235, § 2.)

**The 2002 amendment**, effective July 1, 2002, in subsection (b), inserted "of subsection (a) or paragraph (3) of subsection (b)" in paragraph (b)(1) and inserted "of subsection (a) or paragraph (4) of subsection (b)" in paragraph (b)(8).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, "of" was inserted following "dissolution" in paragraph (b)(1).

#### **14-11-309. Action without meeting.**

Except as otherwise provided in the articles of organization or a written operating agreement:

(1) Action required or permitted by this chapter to be taken by members or managers may be taken without a meeting if the action is taken by all the members or managers entitled to vote on the action or, if so provided in the articles of organization or a written operating agreement, by persons who would be entitled to vote not less than the minimum number of votes that would be necessary to authorize or take the action. The action must be evidenced by one or more written consents describing the action taken, signed by members or managers entitled to take such action, and delivered to the limited liability company for inclusion in its records;

(2) If not otherwise fixed under the articles of organization or a written operating agreement, the record date for determining members



or managers entitled to take action without a meeting is the date the first member or manager signs the consent;

(3) A consent signed under this Code section has the effect of a meeting vote and may be described as such in any document; and

(4) If action is taken under this Code section by less than all of the members or managers entitled to vote on the action, all members or managers entitled to vote on the action who did not participate in taking the action shall be given written notice of the action not more than ten days after the taking of the action without a meeting, but the failure to give such notice shall not invalidate the action so taken. (Code 1981, § 14-11-309, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-310. Meetings.**

(a) Except as otherwise provided in the articles of organization or a written operating agreement, if the limited liability company has more than one manager:

(1) Meetings of managers may be called by any manager;

(2) At least two days' notice of any meeting of managers shall be given by any manager calling the meeting;

(3) Managers may participate in any meeting by, or conduct the meeting through the use of, any means of communication by which all members participating may simultaneously hear each other during the meeting. A manager participating in a meeting by this means is deemed to be present in person at the meeting;

(4) A majority in number of managers shall constitute a quorum for a meeting of managers; and

(5) The act of a majority of managers at a meeting of managers at which a quorum is present shall be required for managers to take action on any matter where a vote of managers is required.

(b) Unless otherwise provided in the articles of organization or a written operating agreement:

(1) Meetings of members may be called by at least 25 percent of the members;

(2) At least two days' notice of all meetings of members shall be given by the members authorized to call meetings;

(3) Members may participate in any meeting by, or conduct the meeting through the use of, any means of communication by which all members participating may simultaneously hear each other during the meeting. A member participating in a meeting by this means is deemed to be present in person at the meeting;

(4) A majority of the members shall constitute a quorum for a meeting of members; and

(5) Except as otherwise provided in this chapter, the act of a majority of members present at a meeting at which a quorum is present shall be required to take action on any matter where a vote of members is required. (Code 1981, § 14-11-310, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-311. Notice.**

Except as otherwise provided in the articles of organization or a written operating agreement:

(1) Notice shall be in writing unless oral notice is reasonable under the circumstances;

(2) Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published or by radio, television, or other form of public broadcast communication;

(3) Written notice to a person that is required by this title to maintain a registered agent and a registered office in this state may be, but is not required to be, addressed to its registered agent at its registered office;

(4) Written notice, if in a comprehensible form, is effective at the earliest of the following:

(A) When received, or when delivered, properly addressed, as permitted by paragraph (2) of this Code section or to the addressee's last known principal place of business or residence;

(B) Five days, or such other period as shall be provided in the articles of organization or a written operating agreement, after its deposit in the mail, as evidenced by the postmark, if mailed with first-class postage prepaid and correctly addressed to a member or manager at the address shown in the limited liability company's current record of members or managers; or

(C) On the date shown on the return receipt, if sent by registered or certified mail or statutory overnight delivery, return receipt requested, and the receipt is signed by or on behalf of the addressee;

(5) Oral notice is effective when communicated if communicated in a comprehensible manner;

(6) In calculating time periods for notice under this chapter, when a period of time measured in days, weeks, months, years, or other measurement of time is prescribed for the exercise of any privilege or the



discharge of any duty, the first day shall not be counted but the last day shall be counted; and

(7) If this chapter prescribes notice requirements for particular circumstances, those requirements govern. (Code 1981, § 14-11-311, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

#### **14-11-312. Waiver of notice.**

Except as otherwise provided in the articles of organization or a written operating agreement:

(1) A member or manager may waive any notice required by this chapter, the articles of organization, or an operating agreement before or after the date and time stated in the notice. The waiver must be in writing, be signed by the member or manager entitled to the notice, and be delivered to the limited liability company for inclusion in its records;

(2) A member or manager's attendance at a meeting:

(A) Waives objection to lack of notice or defective notice of the meeting, unless the member or manager at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; and

(B) Waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the member or manager objects to considering the matter when it is presented; and

(3) Unless required by a written operating agreement, neither the business transacted nor the purpose of the meeting need be specified in the waiver. (Code 1981, § 14-11-312, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-313. Records and information.**

Except as otherwise provided in the articles of organization or a written operating agreement:

(1) Each limited liability company shall keep at its principal office the following:

(A) A current list of the name and last known address of each member and manager;

(B) Copies of records that would enable a member to determine the relative voting rights, if any, of the members;

(C) A copy of the articles of organization, together with any amendments thereto;

(D) Copies of the limited liability company's federal, state, and local income tax returns, if any, for the three most recent years;

(E) A copy of any operating agreement that is in writing, together with any amendments thereto; and

(F) Copies of financial statements, if any, of the limited liability company for the three most recent years;

(2) A member may:

(A) At the member's own expense, inspect and copy any limited liability company record upon reasonable request during ordinary business hours;

(B) Obtain from time to time upon reasonable demand:

(i) True and complete information regarding the state of the business and financial condition of the limited liability company;

(ii) Promptly after becoming available, a copy of the limited liability company's federal, state, and local income tax returns, if any, for each year; and

(iii) Other information regarding the affairs of the limited liability company as is just and reasonable; and

(3) If the limited liability company refuses to permit the inspection authorized by paragraph (2) of this Code section, the member demanding inspection may apply to the superior court for the county in which the registered office of the limited liability company is located, upon such notice as the court may require, for an order directing the limited liability company to show cause why an order permitting such inspection by the applicant should not be granted. The court shall hear the parties summarily, by affidavit or otherwise, and if the limited liability company fails to establish that the applicant is not entitled to such inspection, the court shall grant an order permitting such inspection, subject to any limitations which the court may prescribe, and grant such other relief, including costs and reasonable attorneys' fees, as the court may deem just and proper. (Code 1981, § 14-11-313, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-314. Professional relationships.**

This chapter does not alter any law applicable to the relationship between a person rendering professional services and a person receiving those services, including liability arising out of those professional services. This chapter does not alter any law with respect to disregarding legal entities.



The failure of a limited liability company to observe formalities relating to the exercise of its powers or the management of its business and affairs is not a ground for imposing personal liability on a member, manager, agent, or employee of the limited liability company for liabilities of the limited liability company. (Code 1981, § 14-11-314, enacted by Ga. L. 1993, p. 123, § 1.)

## ARTICLE 4

### FINANCE

#### **14-11-401. Contributions to capital.**

A contribution to the capital of a limited liability company may be in cash, tangible or intangible property, services rendered, or a promissory note or other obligation to contribute cash or tangible or intangible property, or to perform services. (Code 1981, § 14-11-401, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-402. Liability for contribution.**

(a) Notwithstanding any other provision of law regarding unwritten contracts, including but not limited to Code Section 13-5-31, a promise to make a contribution to the capital of a limited liability company is not enforceable unless it is set out in the articles of organization or a written operating agreement that is binding on the person to be charged or in another writing signed by that person.

(b) Unless otherwise provided in the articles of organization or a written operating agreement, the obligation of a person to make a contribution to the capital of a limited liability company may be reduced or eliminated only with the unanimous consent of the members.

(c) A written operating agreement may provide that the interest of any member who fails to make any contribution that he or she is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company, subordinating his or her limited liability company interest to that of nondefaulting members, a forced sale of his or her limited liability company interest, forfeiture of his or her limited liability company interest, the lending by other members of the amounts necessary to meet his or her commitment, a fixing of the value of his or her limited liability company interest by appraisal or by formula and redemption or sale of his or her limited liability company interest at such value, or other penalty or consequence. (Code 1981, § 14-11-402, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-403. Allocation of profits and losses.**

The profits and losses, and each item thereof, of a limited liability company shall be allocated among the members in the manner provided in the articles of organization or in a written operating agreement. If the articles of organization or a written operating agreement does not so provide, profits and losses, and each item thereof, shall be allocated equally among the members. (Code 1981, § 14-11-403, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-404. Distributions.**

A member shall be entitled to receive distributions from a limited liability company before the dissolution and winding up of the limited liability company only to the extent, and at the times or upon the happening of the events, specified in the articles of organization or a written operating agreement, or as otherwise approved by all of the members. Subject to Code Section 14-11-405, distributions by a limited liability company to its members, both prior to and after the dissolution of the limited liability company, shall be shared among the members in the manner provided in the articles of organization or a written operating agreement. Subject to Code Section 14-11-405, if the articles of organization or a written operating agreement does not provide the manner in which distributions are to be shared, distributions shall be shared equally among the members. (Code 1981, § 14-11-404, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-405. Distributions upon event of dissociation.**

(a) Effective for limited liability companies formed prior to July 1, 1999, except as otherwise provided in the articles of organization or a written operating agreement, and subject to Code Section 14-11-407, a member with respect to which an event of dissociation occurs (other than one of the events specified in paragraphs (1), (2), and (4) of subsection (b) of Code Section 14-11-601) is entitled to receive, within a reasonable time after the occurrence of the event, the fair value of the member's interest in the limited liability company as of the date of such occurrence, but only if such event does not result in dissolution of the limited liability company.

(b) Effective for limited liability companies formed on or after July 1, 1999, except as otherwise provided in the articles of organization or a written operating agreement, a member with respect to which an event of dissociation occurs under Code Section 14-11-601.1 is not entitled to receive any payment by reason of such event and will become an assignee as to such limited liability company interest. (Code 1981, § 14-11-405, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1995, p. 470, § 18; Ga. L. 1999, p. 822, § 1; Ga. L. 2002, p. 1235, § 3.)



The 2002 amendment, effective July 1, and inserted "under Code Section 2002, substituted "subsection (b)" for "subsection (a)" in the middle of subsection (a) 14-11-601.1" in the middle of subsection (b).

#### **14-11-406. Distributions in kind.**

Except as provided in the articles of organization or a written operating agreement:

(1) A member, regardless of the nature of the member's contribution, has no right to demand and receive any distribution from a limited liability company in any form other than cash; and

(2) No member may be compelled to accept from a limited liability company a distribution of any asset in kind to the extent that the percentage of the asset distributed to the member exceeds a percentage that is equal to the percentage in which the member shares in distributions from the limited liability company. (Code 1981, § 14-11-406, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-407. Restrictions on making distributions.**

(a) No distribution to a member, to an assignee, or with respect to the interest of a member as to which an event of dissociation has occurred may be made if, after giving effect to the distribution:

(1) The limited liability company would not be able to pay its debts as they become due in the usual course of business; or

(2) The limited liability company's total assets would be less than the sum of its total liabilities plus, unless the articles of organization or a written operating agreement provides otherwise, the amount that would be needed, if the limited liability company were to be dissolved at the time of the distribution, to satisfy the preferential rights, if any, of other members upon dissolution that are superior to the rights of the member receiving the distribution.

(b) The limited liability company may base a determination that a distribution is not prohibited under subsection (a) of this Code section either on:

(1) Financial statements prepared on the basis of accounting practices and principles that are reasonable under the circumstances; or

(2) A fair valuation or other method that is reasonable under the circumstances.

(c) Except as provided in subsection (e) of this Code section, the effect of a distribution under subsection (a) of this Code section is measured:

(1) In the case of distribution by purchase, redemption, or other

acquisition of a limited liability company interest, as of the earlier of:

(A) The date money or other property is transferred or debt incurred by the limited liability company; or

(B) The date the member ceases to be a member with respect to the acquired limited liability company interest;

(2) In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) In all other cases, as of:

(A) The date the distribution is authorized if payment occurs within 120 days after the date of authorization; or

(B) The date the payment is made if it occurs more than 120 days after the date of authorization.

(d) A limited liability company's indebtedness incurred by reason of a distribution made in accordance with this Code section is at parity with the limited liability company's indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement or except to the extent secured.

(e) Indebtedness of a limited liability company, including indebtedness issued as a distribution, is not considered a liability for purposes of determinations made under subsection (a) of this Code section if its terms provide that payment of principal and interest is to be made only if, and to the extent that, payment of a distribution to members could then be made under this Code section, and if such indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is actually made. (Code 1981, § 14-11-407, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-408. Liability upon wrongful distribution.**

(a) A member or manager who votes for or expressly consents to a distribution that is made in violation of the articles of organization, a written operating agreement, or Code Section 14-11-407 is personally liable to the limited liability company for the amount of the distribution that exceeds what could have been distributed without violating the articles of organization, written operating agreement, or Code Section 14-11-407, if it is established that such member or manager did not act in compliance with Code Section 14-11-407 and violated a duty owed under Code Section 14-11-305 (without regard to any limitation on such duty permitted by paragraph (4) of Code Section 14-11-305).

(b) Each member or manager held liable under subsection (a) of this Code section for an unlawful distribution is entitled to contribution:



(1) From each other member or manager who could be held liable under subsection (a) of this Code section for the unlawful distribution; and

(2) From each member for the amount the member received knowing that the distribution was made in violation of the articles of organization, written operating agreement, or Code Section 14-11-407.

(c) A proceeding under this Code section is barred unless it is commenced within two years after the date on which the effect of the distribution is measured under Code Section 14-11-407. (Code 1981, § 14-11-408, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-409. Right to distribution.**

At the time a member becomes entitled to receive a distribution, the member has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution. (Code 1981, § 14-11-409, enacted by Ga. L. 1993, p. 123, § 1.)

### **ARTICLE 5**

#### **LIMITED LIABILITY COMPANY INTERESTS; ADMISSION OF MEMBERS**

#### **14-11-501. Nature of limited liability company interest.**

(a) A limited liability company interest is personal property. A member has no interest in specific limited liability company property.

(b) An operating agreement or the articles of organization may provide that a limited liability company interest may be evidenced by a certificate issued by the limited liability company. (Code 1981, § 14-11-501, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-502. Assignment of limited liability company interest.**

Except as otherwise provided in the articles of organization or a written operating agreement:

(1) A limited liability company interest is assignable in whole or in part;

(2) An assignment entitles the assignee to share in the profits and losses and to receive the distributions to which the assignor was entitled, to the extent assigned;

(3) An assignment of a limited liability company interest does not of itself dissolve the limited liability company or entitle the assignee to

participate in the management and affairs of the limited liability company or to become or exercise any rights of a member until admitted as a member pursuant to Code Section 14-11-505;

(4) Until the assignee of a limited liability company interest becomes a member, the assignor continues to be a member with respect to the assigned limited liability company interest, subject to the other members' right to remove the assignor pursuant to subparagraph (b)(3)(B) of Code Section 14-11-601 or subparagraph (b)(2)(B) of Code Section 14-11-601.1;

(5) Until the assignee of a limited liability company interest becomes a member, the assignee shall have no liability as a member solely as a result of the assignment;

(6) A member who assigns his or her entire limited liability company interest ceases to be a member or to have the power to exercise any rights of a member when all of the assignees of his or her entire limited liability company interest become members with respect to the assigned limited liability company interest, subject to the other members' right to remove the assignor earlier pursuant to subparagraph (b)(3)(B) of Code Section 14-11-601 or subparagraph (b)(2)(B) of Code Section 14-11-601.1; and

(7) The pledge of, or granting of a security interest, lien, or other encumbrance in or against, any or all of the limited liability company interest of a member is not an assignment and shall not cause the member to cease to be a member or to cease to have the power to exercise any rights or powers of a member. (Code 1981, § 14-11-502, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 2002, p. 1235, § 4.)

The 2002 amendment, effective July 1, 2002, substituted "subparagraph (b)(3)(B) of Code Section 14-11-601 or subparagraph (b)(2)(B) of Code Section 14-11-601.1" for

"subparagraph (a)(3)(B) of Code Section 14-11-601" at the end of paragraphs (4) and (6).

### JUDICIAL DECISIONS

**Interest obtained by transferee.** — Although a bank took only an "economic interest" in a limited liability company by a non-unanimous transfer from a member, it

was an interest upon which the bank was entitled to foreclose. *Hopson v. Bank of N. Ga.*, 258 Ga. App. 360, 574 S.E.2d 411 (2002).

### 14-11-503. Rights of assignee to become member.

Except as otherwise provided in the articles of organization or a written operating agreement:

(1) An assignee of a limited liability company interest may become a member only if the other members unanimously consent;



(2) An assignee who has become a member has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a member under the articles of organization, any operating agreement, and this chapter;

(3) An assignee who becomes a member is liable for the obligations to make contributions that are enforceable against his or her assignor under Code Section 14-11-402, but he or she is not liable for:

(A) The obligations of his or her assignor under Code Section 14-11-408; or

(B) Other obligations of his or her assignor (including obligations to make contributions) of which the assignee had no knowledge at the time he or she became a member and which could not be ascertained from the articles of organization or a written operating agreement; and

(4) Whether or not an assignee of a limited liability company interest becomes a member, the assignor is not released from his or her liability to the limited liability company under Code Section 14-11-402 or Code Section 14-11-408. (Code 1981, § 14-11-503, enacted by Ga. L. 1993, p. 123, § 1.)

#### JUDICIAL DECISIONS

**Interest obtained by transferee.** — Although a bank took only an “economic interest” in a limited liability company by a non-unanimous transfer from a member, it was an interest upon which the bank was entitled to foreclose. *Hopson v. Bank of N. Ga.*, 258 Ga. App. 360, 574 S.E.2d 411 (2002).

#### 14-11-504. Rights of judgment creditor.

(a) On application to a court of competent jurisdiction by any judgment creditor of a member or of any assignee of a member, the court may charge the limited liability company interest of the member or such assignee with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the limited liability company interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to his or her limited liability company interest.

(b) The remedy conferred by this Code section shall not be deemed exclusive of others which may exist, including, without limitation, the right of a judgment creditor to reach the limited liability company interest of the member by process of garnishment served on the limited liability company. (Code 1981, § 14-11-504, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-505. Admission of members.**

(a) In connection with the formation of a limited liability company, a person acquiring a limited liability company interest is admitted as a member of the limited liability company upon the later to occur of:

(1) The formation of the limited liability company; or

(2) The time provided in and upon compliance with the articles of organization or a written operating agreement or, if the articles of organization and any written operating agreement do not so provide, when the person's admission is reflected in the records of the limited liability company.

(b) After the formation of a limited liability company, a person acquiring a limited liability company interest directly from the limited liability company is admitted as a member of the limited liability company at the time provided in and upon compliance with the articles of organization and any written operating agreement or, if the articles of organization or a written operating agreement does not so provide, upon the consent of all members and when the person's admission is reflected in the records of the limited liability company.

(c) An assignee of a limited liability company interest is admitted as a member of the limited liability company upon compliance with paragraph (1) of Code Section 14-11-503 and at the time provided in and upon compliance with the articles of organization and any written operating agreement or, if the articles of organization or a written operating agreement does not so provide, when any such person's permitted admission is reflected in the records of the limited liability company; provided, however, that an assignee shall not be admitted as a member of the limited liability company until such assignee has consented to such admission. (Code 1981, § 14-11-505, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-506. Powers of estate of a deceased or incompetent member.**

Except as otherwise provided in the articles of organization or a written operating agreement, if a member who is an individual dies or a court of competent jurisdiction adjudges him or her to be incompetent to manage his or her person or his or her property, the member's executor, administrator, guardian, conservator, or other legal representative has all of the rights of an assignee of all of the member's limited liability company interest. (Code 1981, § 14-11-506, enacted by Ga. L. 1993, p. 123, § 1.)



## ARTICLE 6

## EVENTS OF DISSOCIATION, WITHDRAWAL, AND DISSOLUTION

**14-11-601. Events of dissociation.**

(a) This Code section is effective for limited liability companies formed prior to July 1, 1999.

(b) A person ceases to be a member of a limited liability company upon the occurrence of any of the following events:

(1) The member withdraws by voluntary act from the limited liability company as provided in subsection (d) of this Code section;

(2) The member ceases to be a member of the limited liability company as provided in paragraph (6) of Code Section 14-11-502;

(3) The member is removed as a member:

(A) In accordance with the articles of organization or a written operating agreement; or

(B) Subject to contrary provision in the articles of organization or in a written operating agreement, when the member assigns all of his or her limited liability company interest, by an affirmative vote of a majority in number of the members who have not assigned all of their limited liability company interests;

(4) The member's entire interest in the limited liability company is purchased or redeemed by the limited liability company;

(5) Subject to contrary provision in the articles of organization or a written operating agreement, or written consent of all other members at the time, the member (A) makes an assignment for the benefit of creditors; (B) files a voluntary petition in bankruptcy; (C) is adjudicated a bankrupt or insolvent; (D) files a petition or answer seeking for the member any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation; (E) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the member in any proceeding of this nature; or (F) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the member or of all or any substantial part of the member's properties;

(6) Subject to contrary provision in the articles of organization or a written operating agreement, or written consent of all other members at the time, if within 120 days after the commencement of any proceeding against the member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within 90

days after the appointment without his or her consent or acquiescence of a trustee, receiver, or liquidator of the member or of all or any substantial part of his or her properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any stay, the appointment is not vacated; or

(7) Subject to contrary provision in the articles of organization or a written operating agreement, or written consent of all other members at the time, in the case of a member who is an individual:

(A) On the date of his or her death; or

(B) On the date of the entry of an order by a court of competent jurisdiction adjudicating the member incompetent to manage his or her person or his or her property.

(c) The articles of organization or a written operating agreement may provide for other events the occurrence of which result in a person ceasing to be a member of the limited liability company.

(d) Except as otherwise provided in the articles of organization or a written operating agreement, a member may withdraw from the limited liability company at any time by giving written notice to the other members at least 30 days in advance of his or her withdrawal or such other notice as is provided for in a written operating agreement. (Code 1981, § 14-11-601, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1999, p. 822, § 2; Ga. L. 2002, p. 1235, § 5.)

**The 2002 amendment**, effective July 1, 2002, in subsection (a), substituted "This Code section is effective" for "Effective" at the beginning and substituted a period for a comma at the end; designated subsection (b); in subsection (b), substituted "A" for

"a" at the beginning of the introductory language and substituted "subsection (d)" for "subsection (c)" near the end of paragraph (b)(1); and redesignated former subsections (b) and (c) as present subsections (c) and (d), respectively.

#### **14-11-601.1. Events resulting in cessation of membership.**

(a) This Code section is effective for limited liability companies formed on or after July 1, 1999.

(b) A person ceases to be a member of a limited liability company upon the occurrence of any of the following events:

(1) The member ceases to be a member of the limited liability company as provided in paragraph (6) of Code Section 14-11-502;

(2) The member is removed as a member:

(A) In accordance with the articles of organization or a written operating agreement; or

(B) Subject to contrary provision in the articles of organization or in a written operating agreement, when the member assigns all of his or



her limited liability company interest, by an affirmative vote of a majority in number of the members who have not assigned all of their limited liability company interests;

(3) The member's entire interest in the limited liability company is purchased or redeemed by the limited liability company;

(4) Subject to contrary provision in the articles of organization or a written operating agreement, or written consent of all other members at the time, the member (A) makes an assignment for the benefit of creditors; (B) files a voluntary petition in bankruptcy; (C) is adjudicated a bankrupt or insolvent; (D) files a petition or answer seeking for the member any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation; (E) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the member in any proceeding of this nature; or (F) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the member or of all or any substantial part of the member's properties;

(5) Subject to contrary provision in the articles of organization or a written operating agreement, or written consent of all other members at the time, if within 120 days after the commencement of any proceeding against the member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within 90 days after the appointment without his or her consent or acquiescence of a trustee, receiver, or liquidator of the member or of all or any substantial part of his or her properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any stay, the appointment is not vacated; or

(6) Subject to contrary provision in the articles of organization or a written operating agreement, or written consent of all other members at the time, in the case of a member who is an individual:

(A) On the date of his or her death; or

(B) On the date of the entry of an order by a court of competent jurisdiction adjudicating the member incompetent to manage his or her person or his or her property.

(c) The articles of organization or a written operating agreement may provide for other events the occurrence of which result in a person ceasing to be a member of the limited liability company.

(d) Except as otherwise provided in the articles of organization or a written operating agreement, a member may not withdraw from the limited liability company. (Code 1981, § 14-11-601.1, enacted by Ga. L. 1999, p. 822, § 3; Ga. L. 2002, p. 1235, § 6.)

The 2002 amendment, effective July 1, 2002, in subsection (a), substituted "This Code section is effective" for "Effective" at the beginning and substituted a period for a comma at the end; designated subsection

(b); substituted "A" for "a" at the beginning of the introductory paragraph of subsection (b); redesignated former subsection (b) as present subsection (c); and added subsection (d).

#### 14-11-602. Dissolution.

(a) Effective for limited liability companies formed prior to July 1, 1999, a limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following:

(1) At the time specified in the articles of organization or a written operating agreement;

(2) Upon the happening of events specified in the articles of organization or a written operating agreement;

(3) At a time approved by all the members;

(4) Subject to contrary provision in the articles of organization or a written operating agreement, 90 days after any event of dissociation with respect to any member (other than an event specified in paragraph (1) of subsection (b) of Code Section 14-11-601), unless within such 90 day period the limited liability company is continued by the written consent of all other members or as otherwise provided in the articles of organization or a written operating agreement; or

(5) Entry of a decree of judicial dissolution under subsection (a) of Code Section 14-11-603.

(b) Effective for limited liability companies formed on or after July 1, 1999, a limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following:

(1) At the time specified in the articles of organization or a written operating agreement;

(2) Upon the happening of events specified in the articles of organization or a written operating agreement;

(3) At a time approved by all the members;

(4) Subject to contrary provision in the articles of organization or a written operating agreement, 90 days after an event of dissociation with respect to the last remaining member, unless otherwise provided in the articles of organization or a written operating agreement; or

(5) Entry of a decree of judicial dissolution under subsection (a) of Code Section 14-11-603. (Code 1981, § 14-11-602, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1995, p. 470, § 19; Ga. L. 1999, p. 822, § 4; Ga. L. 2002, p. 1235, § 7.)



The 2002 amendment, effective July 1, section (a)" near the middle of paragraph 2002, substituted "subsection (b)" for "sub- (a)(4).

#### 14-11-603. Judicial and administrative dissolution.

(a) On application by or for a member, the court may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or a written operating agreement. A certified copy of any such decree shall be delivered to the Secretary of State, who shall file it.

(b)(1) The Secretary of State may commence a proceeding under this subsection to dissolve a limited liability company administratively if:

(A) The limited liability company does not deliver its annual registration to the Secretary of State, together with all required fees and penalties, within 60 days after it is due;

(B) The limited liability company is without a registered agent or registered office in this state for 60 days or more;

(C) The limited liability company does not notify the Secretary of State within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or

(D) The limited liability company pays a fee as required to be collected by the Secretary of State by a check or some other form of payment which is dishonored and the limited liability company or its agent does not submit payment for said dishonored payment within 60 days from notice of nonpayment issued by the Secretary of State.

(2) If the Secretary of State determines that one or more grounds exist under this subsection for dissolving a limited liability company, he or she shall provide the limited liability company with written notice of his or her determination by mailing a copy of the notice, first-class mail, to the limited liability company at the last known address of its principal office or to the registered agent. If the limited liability company does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is provided to the limited liability company, the Secretary of State shall administratively dissolve the limited liability company by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The Secretary of State shall file the original of the certificate.

(3) A limited liability company administratively dissolved continues its existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs. Winding up the business of a limited liability company administratively dissolved may include, without

limitation, the limited liability company proceeding, at any time after the effective date of the administrative dissolution, in accordance with Code Sections 14-11-607 and 14-11-608. The administrative dissolution of a limited liability company does not terminate the authority of its registered agent.

(4) A limited liability company administratively dissolved under this Code section may apply to the Secretary of State for reinstatement. The application must:

(A) Recite the name of the limited liability company and the effective date of its administrative dissolution;

(B) State that the ground or grounds for dissolution either did not exist or have been eliminated;

(C) State that the limited liability company's name satisfies the requirements of Code Section 14-11-207;

(D) Contain a statement by the limited liability company reciting that all taxes owed by the limited liability company have been paid; and

(E) Be accompanied by an amount equal to the total annual registration fees and penalties that would have been payable during the periods between dissolution and reinstatement, plus the fee required for the application for reinstatement, and any other fees and penalties payable for earlier periods.

If the Secretary of State determines that the application contains the information required by this paragraph and that the information is correct, he or she shall prepare a certificate of reinstatement that recites his or her determination and the effective date of reinstatement, file the original of the certificate, and serve a copy on the limited liability company. When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited liability company resumes carrying on its business as if the administrative dissolution had never occurred.

(5) If the Secretary of State denies a limited liability company's application for reinstatement following administrative dissolution, he or she shall serve the limited liability company with a written notice that explains the reason or reasons for denial. The limited liability company may appeal the denial of reinstatement to the superior court of the county where the limited liability company's registered office is or was located within 30 days after service of the notice of denial is perfected. The limited liability company appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the Secretary of State's certificate of dissolution, the limited liability company's application for reinstatement, and the Secretary of State's notice of denial. The court's final decision may be appealed as in other civil proceedings.



(Code 1981, § 14-11-603, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1999, p. 405, § 34.)

#### **14-11-604. Winding up.**

(a) Except as otherwise provided in the articles of organization or a written operating agreement, upon dissolution, the members or managers in whom management of the limited liability company was vested prior to dissolution may wind up a dissolved limited liability company's affairs, or, if there are no such members or managers at the time of or at any time after such dissolution, such persons as may be designated by the persons then entitled to receive a majority of all subsequent distributions, if any, from the limited liability company may wind up the limited liability company's affairs. For cause shown, the court may wind up a dissolved limited liability company's affairs on application of any member as to which an event of dissociation has not occurred, any such member's legal representative, or any such member's assignee, or if there is no such member, legal representative, or assignee, on application of any assignee of an interest in the limited liability company.

(b) Except so far as may be appropriate to wind up the limited liability company's affairs or to complete transactions begun but not then finished, dissolution terminates all authority of every person to act for the limited liability company; provided, however, that, prior to the filing of a statement of commencement of winding up, the limited liability company shall be bound to any person who lacks knowledge of the dissolution with respect to any transaction which would bind the limited liability company if dissolution had not taken place. (Code 1981, § 14-11-604, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1999, p. 822, § 5.)

#### **14-11-605. Distribution of assets.**

(a) In connection with its winding up, a limited liability company shall (1) discharge, make provision to discharge, or dispose of pursuant to Code Sections 14-11-607 and 14-11-608, its liabilities, and (2) subject to any applicable provisions in the articles of organization or a written operating agreement, distribute its remaining assets to its members.

(b) To the extent a dissolved limited liability company does not discharge, make provision to discharge, or dispose of pursuant to Code Sections 14-11-607 and 14-11-608 a claim against it, such claim may be enforced:

(1) Against the limited liability company, to the extent of its undistributed assets; or

(2) Against each member receiving a distribution in winding up, to the extent of the assets so distributed to such member; provided that a

member's total liability for all such claims shall not exceed the total amount of assets so distributed to him or her.

As respects any such claims, the limited liability company and its members shall have rights of contribution among themselves so as to produce, insofar as practicable, the effects that would have been produced had such claim been discharged by the limited liability company prior to any distribution to members. (Code 1981, § 14-11-605, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-606. Statement of commencement of winding up.**

Upon dissolution, a statement of commencement of winding up may be delivered for filing to the Secretary of State by any person authorized to wind up the limited liability company's affairs. Such statement shall set forth:

- (1) The name of the limited liability company;
- (2) The fact that the limited liability company has dissolved and commenced its winding up activities; and
- (3) Any other provision, not inconsistent with law, that the persons charged with winding up the limited liability company's affairs elect to include. (Code 1981, § 14-11-606, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-607. Known claims against dissolved limited liability company.**

(a) A dissolved limited liability company that has filed a statement of commencement of winding up may dispose of the known claims against it by following the procedures described in this Code section.

(b) The dissolved limited liability company may notify its known claimants in writing of the winding up proceedings at any time after the filing of the statement of commencement of winding up. The written notice must:

- (1) Describe information that the limited liability company determines must be included in a claim;
- (2) Provide a mailing address where a claim may be sent;
- (3) State the deadline, which may not be less than six months from the date of mailing of the written notice, by which the dissolved limited liability company must receive the claim;
- (4) State that the claim will be barred if not received by the deadline; and
- (5) State that the limited liability company will give notice of acceptance or rejection of all claims that are received in timely fashion within six months after the deadline for receipt of claims.



(c) A claim against a dissolved limited liability company is barred:

(1) If a claimant who was given written notice under subsection (b) of this Code section does not deliver the claim to the dissolved limited liability company by the deadline; or

(2) If a claimant whose claim was rejected by the dissolved limited liability company does not commence a proceeding to enforce the claim within one year from the date of mailing of the rejection notice.

(d) For purposes of this Code section, the term "claim" does not include a contingent liability or a claim based on an event occurring after the filing of the statement of commencement of winding up. (Code 1981, § 14-11-607, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-608. Unknown claims against dissolved limited liability company.**

(a) A dissolved limited liability company that has filed a statement of commencement of winding up may publish, in the manner prescribed by Code Section 14-11-609, a request that persons with claims against the limited liability company present them in accordance with subsection (b) of this Code section.

(b) The request must:

(1) Describe the information that the limited liability company determines must be included in a claim and provide a mailing address where the claim may be sent; and

(2) State that, except for claims that are contingent at the time of the filing of the statement of commencement of winding up or that arise after the filing of the statement of commencement of winding up, a claim against the limited liability company not otherwise barred will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of the request.

(c) If a dissolved limited liability company that has filed a statement of commencement of winding up publishes a request described in subsection (b) of this Code section, all claims not otherwise barred will be barred unless the claimant commences a proceeding to enforce the claim against the dissolved limited liability company within two years after the date of the publication of the request, except:

(1) Claims that are contingent at the time of the filing of the statement of commencement of winding up; and

(2) Claims that arise after the filing of the statement of commencement of winding up.

(d) If a dissolved limited liability company publishes a request described in subsection (b) of this Code section, a claim not otherwise barred of a

claimant whose claim is contingent at the time of the filing of the statement of commencement of winding up or based on an event occurring after the filing of the statement of commencement of winding up is barred against the limited liability company, its members, and managers unless the claimant commences a proceeding to enforce the claim against the dissolved limited liability company within two years after the date of filing of a certificate of termination or five years after the date of the second publication of the request in accordance with subsection (b) of this Code section, whichever is later. (Code 1981, § 14-11-608, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-609. Manner of publication of request for claims.**

A limited liability company seeking to publish a request for claims described in Code Section 14-11-608 shall mail or deliver to the publisher of a newspaper that is the official organ of the county where the registered office of the limited liability company is located, or that is a newspaper of general circulation published within such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation, a request to publish the request for claims. The request for publication of the request for claims shall be accompanied by a check, draft, or money order in the amount of \$40.00 in payment of the cost of publication. The notice shall be published once a week for two consecutive weeks commencing within ten days after receipt of the notice by the newspaper. (Code 1981, § 14-11-609, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-610. Certificate of termination.**

A dissolved limited liability company shall deliver to the Secretary of State for filing a certificate of termination when the statements required to be included therein can be truthfully made. Such a certificate of termination shall set forth:

- (1) The name of the limited liability company;
- (2) That all known debts, liabilities, and obligations of the limited liability company have been paid, discharged, or barred or that adequate provision has been made therefor; and
- (3) That there are no actions pending against the limited liability company in any court, or that adequate provision has been made for the satisfaction of any judgment, order, or decree that may be entered against it in any pending action. (Code 1981, § 14-11-610, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1999, p. 405, § 35.)

**14-11-611. Execution of deeds or other instruments by signing.**

Deeds or other instruments requiring execution after the filing of a certificate of termination by a dissolved limited liability company may be



signed by any person who had authority to wind up the dissolved limited liability company under the provisions of subsection (a) of Code Section 14-11-604. (Code 1981, § 14-11-611, enacted by Ga. L. 1994, p. 161, § 7.)

## ARTICLE 7

### FOREIGN LIMITED LIABILITY COMPANIES

#### **14-11-701. Law applicable to foreign limited liability companies.**

(a) The laws of the jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its managers, members, and other owners, regardless of whether the foreign limited liability company procured or should have procured a certificate of authority under this chapter.

(b) A foreign limited liability company may not be denied a certificate of authority by reason of any difference between the laws of the jurisdiction under which such company is organized and the laws of this state. (Code 1981, § 14-11-701, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-702. Requirement for certificate of authority; application; activities not considered transacting business in this state.**

(a) A foreign limited liability company transacting business in this state shall procure a certificate of authority to do so from the Secretary of State. In order to procure a certificate of authority to transact business in this state, a foreign limited liability company shall submit to the Secretary of State an application for a certificate of authority as a foreign limited liability company, signed by a person duly authorized to sign such instruments by the laws of the jurisdiction under which the foreign limited liability company is organized, setting forth:

(1) The name of the foreign limited liability company and, if different, the name under which it proposes to qualify and transact business in this state;

(2) The name of the jurisdiction under whose laws it is organized;

(3) Its date of organization and period of duration;

(4) The street address and county of its registered office in this state and the name of its registered agent at that office;

(5) A statement that the Secretary of State is, pursuant to subsection (h) of Code Section 14-11-703, appointed the agent of the foreign limited liability company for service of process if no agent has been appointed under subsection (a) of Code Section 14-11-703 or, if appointed, the agent's authority has been revoked or the agent cannot be found or served by the exercise of reasonable diligence;

(6) The address of its principal place of business;

(7) The address of the office at which is kept a list of the names and addresses of its members and other owners, together with an undertaking by it to keep those records until its registration in this state is canceled or revoked; and

(8) The name and a business address of a person who, under the laws of the jurisdiction under which it was formed, has substantial responsibility for managing its business activities.

(b) Without excluding other activities which may not constitute transacting business in this state, a foreign limited liability company shall not be considered to be transacting business in this state, for the purpose of qualification under this chapter, solely by reason of carrying on in this state any one or more of the following activities:

(1) Maintaining or defending any action or administrative or arbitration proceeding or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its managers, members, or other owners or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts, share accounts in savings and loan associations, custodial or agency arrangements with a bank or trust company, or stock or bond brokerage accounts;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of membership or other ownership interests in it or appointing and maintaining trustees or depositaries with relation to such interests;

(5) Effecting sales through independent contractors;

(6) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance outside this state before becoming binding contracts and where such contracts do not involve any local performance other than delivery and installation;

(7) Making loans or creating or acquiring evidences of debt, mortgages, or liens on real or personal property or recording the same;

(8) Securing or collecting debts or enforcing any rights in property securing the same;

(9) Owning, without more, real or personal property;

(10) Conducting an isolated transaction not in the course of a number of repeated transactions of a like nature;

(11) Effecting transactions in interstate or foreign commerce;



(12) Serving as trustee, executor, administrator, or guardian, or in like fiduciary capacity, where permitted so to serve by the laws of this state; or

(13) Owning directly or indirectly an interest in or controlling directly or indirectly another person organized under the laws of or transacting business within this state.

(c) The list of activities in subsection (b) of this Code section is not exhaustive.

(d) This Code section shall not be deemed to establish a standard for activities that may subject a foreign limited liability company to taxation or to service of process under any of the laws of this state. (Code 1981, § 14-11-702, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1995, p. 470, § 20.)

**Code Commission notes.** — Pursuant to was substituted for “cancelled” in paragraph Code Section 28-9-5, in 1995, “canceled” (a)(7).

**14-11-703. Registered office and registered agent; requirement and qualifications; change of office or agent; resignation of agent; service on Secretary of State; venue.**

(a) Each foreign limited liability company that is required to procure a certificate of authority to transact business in this state shall continuously maintain in this state:

(1) A registered office that may, but need not, be a place of its business in this state; and

(2) A registered agent for service of process on the foreign limited liability company. The address of the business office of the registered agent shall be the same as the address of the registered office referred to in paragraph (1) of this subsection.

(b) A registered agent must be an individual resident of this state, a corporation, or a foreign corporation having a certificate of authority to transact business in this state.

(c) A foreign limited liability company may change its registered office or its registered agent, or both, by indicating any such change on its annual registration filed pursuant to this chapter or by delivering to the Secretary of State for filing a statement setting forth:

(1) The name of the foreign limited liability company;

(2) The street address and county of its then registered office;

(3) If the address of its registered office is to be changed, the new street address and county of the registered office;

(4) The name of its then registered agent; and

(5) If its registered agent is to be changed, the name of its successor registered agent.

(d) A registered agent of a foreign limited liability company may resign as such agent by signing and delivering to the Secretary of State for filing a statement of resignation, which may include a statement that the registered office is also discontinued. On or before the date of the filing of the statement of resignation, the registered agent shall deliver or mail a written notice of the registered agent's intent to resign to the foreign limited liability company at the most recent mailing address of the foreign limited liability company's principal place of business listed in the records of the Secretary of State. The agency appointment is terminated, and the registered office discontinued if so provided, on the earlier of the filing of the limited liability company's annual registration or a statement designating a new registered agent and registered office if also discontinued or the thirty-first day after the date on which the statement of resignation was filed.

(e) A registered agent of a foreign limited liability company may change the agent's office and the address of the registered office of any foreign limited liability company of which the agent is registered agent to another place within this state by filing a statement, as required in subsection (c) of this Code section, setting forth the required information for all foreign limited liability companies for which he or she is the registered agent, except that it need be signed only by the registered agent and need not be responsive to paragraph (5) of subsection (c) of this Code section and must recite that a copy of the statement has been mailed to the foreign limited liability company at the most recent mailing address of the foreign limited liability company's principal place of business listed on the records of the Secretary of State.

(f) The registered agent of one or more foreign limited liability companies may resign and appoint a successor registered agent by signing and delivering to the Secretary of State for filing a statement stating that the agent resigns and the name and street address and county of the office of the successor registered agent. There shall be attached to such statement a statement executed by each affected foreign limited liability company ratifying and approving such change of registered agent. Upon such filing, the successor registered agent shall become the registered agent of such foreign limited liability companies as have ratified and approved such substitution, and the successor registered agent's office, as stated in such statement, shall become the registered office in this state of each such foreign limited liability company. The Secretary of State shall furnish to the successor registered agent a certified copy of the statement filed pursuant to this subsection.

(g) The registered agent of a foreign limited liability company authorized to transact business in this state is an agent of the foreign limited liability company on whom may be served any process, notice, or demand



required or permitted by law to be served on the foreign limited liability company.

(h) Whenever a foreign limited liability company required to procure a certificate of authority to transact business in this state shall fail to appoint or maintain a registered agent in this state, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such foreign limited liability company upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him or her or with any other person or persons designated by the Secretary of State to receive such service two copies of such process, notice, or demand. The plaintiff or his or her attorney shall certify in writing to the Secretary of State that the foreign limited liability company failed either to maintain a registered office or appoint a registered agent in this state and that he or she has forwarded by registered or certified mail or statutory overnight delivery such process, notice, or demand to the last registered agent at the most recent registered office listed on the records of the Secretary of State and that service cannot be effected at such office.

(i) The Secretary of State shall keep a record of all processes, notices, and demands served upon him or her under this Code section and shall record therein the time of such service and his or her action with reference thereto.

(j) This Code section does not prescribe the only means, or necessarily the required means, of serving any process, notice, or demand required or permitted by law to be served on a foreign limited liability company. (Code 1981, § 14-11-703, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

#### **14-11-704. Issuance of certificate of authority.**

(a) If the Secretary of State finds that an application for a certificate of authority conforms to the filing requirements of this chapter and all requisite fees and any penalty due pursuant to Code Section 14-11-711 have been paid, he or she shall:

(1) Stamp or otherwise endorse his or her official title and the date and time of receipt on the application;

(2) File the application in his or her office; and

(3) Issue a certificate of authority to transact business in this state.

(b) The certificate of authority must be returned to the person who filed the application or such person's representative.

(c) If the certificate of authority is issued by the Secretary of State, a foreign limited liability company shall be deemed authorized to transact business in this state from the time of filing its application for the certificate of authority. (Code 1981, § 14-11-704, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-705. Name.**

(a) A foreign limited liability company may apply for a certificate of authority with the Secretary of State under any name, whether or not it is the name under which it is registered in its jurisdiction of organization; provided, however, that such name:

(1) Must contain the words "limited liability company" or "limited company" (it being permitted to abbreviate the word "limited" as "ltd." and the word "company" as "co.") or the abbreviations "L.L.C.," "LLC," "L.C." or "LC"; and

(2) Must be distinguishable on the records of the Secretary of State from the name of any corporation, limited liability company, or limited partnership; any foreign corporation, foreign limited liability company, or foreign limited partnership having a certificate of authority to transact business in this state; any nonprofit corporation, professional corporation, or professional association, domestic or foreign, on file with the Secretary of State pursuant to this title; or any name reserved or registered under this title.

(b) Whenever a foreign limited liability company is unable to procure a certificate of authority to transact business in this state because its name does not comply with paragraph (2) of subsection (a) of this Code section, it may nonetheless apply for authority to transact business in this state by adding in parentheses to its name in such application a word, abbreviation, or other distinctive and distinguishing element such as the name of the jurisdiction where it is organized. If in the judgment of the Secretary of State the name of the foreign limited liability company with such addition would comply with subsection (a) of this Code section, subsection (a) of this Code section shall not be a bar to the issuance to such foreign limited liability company of a certificate of authority to transact business in this state. In such case, any such certificate issued to such foreign limited liability company shall be issued in its name with such additions, and the foreign limited liability company shall use such name with such additions in all its dealings with the Secretary of State. (Code 1981, § 14-11-705, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 2003, p. 140, § 14.)

**The 2003 amendment**, effective May 14, and correct the Code, revised punctuation 2003, part of an Act to revise, modernize, in paragraph (a)(1).



**14-11-706. Amended certificate required for change of name or jurisdiction of organization.**

A foreign limited liability company authorized to transact business in this state must procure an amended certificate of authority from the Secretary of State if it changes its name or its jurisdiction of organization. The requirements of Code Sections 14-11-702 and 14-11-704 for procuring an original certificate of authority shall apply to procuring an amended certificate under this Code section. (Code 1981, § 14-11-706, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-707. Certificate of withdrawal; application; service after withdrawal.**

(a) A foreign limited liability company authorized to transact business in this state may not withdraw from this state until it obtains a certificate of withdrawal from the Secretary of State.

(b) A foreign limited liability company authorized to transact business in this state may apply for a certificate of withdrawal by delivering to the Secretary of State for filing an application that sets forth:

(1) The name of the foreign limited liability company and the name of the jurisdiction under whose law it is organized;

(2) That it is not transacting business in this state and that it surrenders its authority to transact business in this state;

(3) That it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state;

(4) A mailing address to which a copy of any process served on the Secretary of State pursuant to paragraph (3) of this subsection may be mailed under subsection (c) of this Code section; and

(5) A commitment to notify the Secretary of State in the future of any change in the mailing address provided pursuant to paragraph (4) of this subsection.

(c) After the withdrawal of the foreign limited liability company is effective, service of process on the Secretary of State under this Code section is service on the foreign limited liability company. Any party that serves process on the Secretary of State in accordance with this subsection shall also mail a copy of the process to the foreign limited liability company at the mailing address provided pursuant to subsection (b) of this Code section. (Code 1981, § 14-11-707, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-708. Revocation of certificate; grounds.**

The Secretary of State may commence a proceeding under Code Section 14-11-709 to revoke the certificate of authority of a foreign limited liability company authorized to transact business in this state if:

(1) The foreign limited liability company does not deliver its annual registration to the Secretary of State within 60 days after it is due;

(2) The foreign limited liability company does not pay within 60 days after they are due any fees, taxes, or penalties imposed by this chapter or other law;

(3) The foreign limited liability company is without a registered agent or registered office in this state for 60 days or more;

(4) The foreign limited liability company does not inform the Secretary of State under Code Section 14-11-703 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;

(5) A member, manager, other owner, or agent of the foreign limited liability company signed a document such person knew was false in a material respect with intent that the document be delivered to the Secretary of State for filing; or

(6) The Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of records in the jurisdiction under whose law the foreign limited liability company is organized stating that it has been dissolved, terminated, or disappeared as the result of a merger. (Code 1981, § 14-11-708, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-709. Revocation of certificate; notice to company; issuance and effect of certificate of revocation; service after revocation.**

(a) If the Secretary of State determines that one or more grounds exist under Code Section 14-11-708 for revocation of a certificate of authority, the Secretary of State shall provide the foreign limited liability company with written notice of such determination by mailing a copy of the notice, first-class mail, to the foreign limited liability company at the address of its principal place of business indicated in its most recently filed annual registration, or if no annual registration has been filed, in its application for a certificate of authority to transact business, or to its registered agent.

(b) If the foreign limited liability company does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not



exist within 60 days after the notice is provided to the foreign limited liability company, the Secretary of State may revoke the foreign limited liability company's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date.

(c) The authority of a foreign limited liability company to transact business in this state ceases on the date shown on the certificate revoking its certificate of authority.

(d) The Secretary of State's revocation of a foreign limited liability company's certificate of authority appoints the Secretary of State as the foreign limited liability company's agent for service of process in any proceeding based on a cause of action which arose during the time the foreign limited liability company was authorized to transact business in this state. Service of process on the Secretary of State under this subsection is service on the foreign limited liability company. Any party that serves process on the Secretary of State shall also mail a copy of the process to the foreign limited liability company at the most recent address of its principal place of business listed on the records of the Secretary of State or to its registered agent. This subsection does not prescribe the only means, or necessarily the required means, of serving any process, notice, or demand required or permitted by law to be served on a foreign limited liability company.

(e) Revocation of a foreign limited liability company's certificate of authority does not terminate the authority of the registered agent of the foreign limited liability company. (Code 1981, § 14-11-709, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-710. Appeal of revocation of certificate.**

(a) A foreign limited liability company may appeal the Secretary of State's revocation of its certificate of authority to the Superior Court of Fulton County within 30 days after service of the certificate of revocation is perfected under Code Section 14-11-709. The foreign limited liability company appeals by petitioning the court to set aside the revocation and attaching to the petition copies of its certificate of authority and the Secretary of State's certificate of revocation.

(b) The court may summarily order the Secretary of State to reinstate the certificate of authority or may take any other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings. (Code 1981, § 14-11-710, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-711. Failure of company to procure certificate; effect; penalty.**

(a) A foreign limited liability company transacting business in this state may not maintain an action, suit, or proceeding in a court of this state until it is authorized to transact business in this state.

(b) The failure of a foreign limited liability company to procure a certificate of authority does not impair the validity of any contract or act of the foreign limited liability company or prevent the foreign limited liability company from defending any action, suit, or proceeding in any court of this state.

(c) A foreign limited liability company that transacts business in this state without registering as required by this chapter shall be liable to the state:

(1) For all fees which would have been imposed by this chapter upon such foreign limited liability company had it registered as required by this article; and

(2) If it has not been authorized to transact business in this state within 30 days after the first day on which it transacts business in this state, for a penalty of \$500.00. (Code 1981, § 14-11-711, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 2002, p. 989, § 16.)

The 2002 amendment, effective July 1, 2002, deleted "for each year or part thereof" and inserted "ing \"\$500.00\" at the end of paragraph (c)(2). during which it so transacts business\" follow-

**14-11-712. Action to restrain company in violation of chapter.**

The Attorney General may maintain an action to restrain a foreign limited liability company from transacting business in this state in violation of this chapter. (Code 1981, § 14-11-712, enacted by Ga. L. 1993, p. 123, § 1.)

**ARTICLE 8****DERIVATIVE ACTIONS****14-11-801. Right of member to bring derivative action.**

A member may commence a derivative action in the right of the limited liability company to recover a judgment in its favor if all of the following conditions are met:

(1) Either management of the limited liability company is vested in a manager or managers who have the sole authority to cause the limited liability company to sue in its own right or management of the limited liability company is vested in the members but the plaintiff does not have the authority to cause the limited liability company to sue in its own right



under the provisions of the articles of organization or a written operating agreement;

(2) The plaintiff has made written demand on those managers or those members with such authority requesting that such managers or such members take suitable action;

(3) Ninety days have expired from the date the demand was made unless the member has earlier been notified that the demand has been rejected by the limited liability company or unless irreparable injury to the limited liability company would result by waiting for the expiration of the 90 day period;

(4) The plaintiff (A) is a member of the limited liability company at the time of bringing the action, and (B) was a member of the limited liability company at the time of the transaction of which he or she complains, or his or her status as a member of the limited liability company has devolved upon him or her by operation of law from a person who was a member at the time of the transaction; and

(5) The plaintiff fairly and adequately represents the interests of the limited liability company in enforcing the right of the limited liability company. (Code 1981, § 14-11-801, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-802. Complaint.**

In a derivative action, the complaint must set forth with particularity the effort of the plaintiff to secure commencement of the action by the managers or the members who would otherwise have the authority to cause the limited liability company to sue in its own right. (Code 1981, § 14-11-802, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-803. Stay of proceedings.**

If the limited liability company commences an inquiry into the allegations made in the demand or complaint, the court may stay any derivative action for such period as the court deems appropriate. (Code 1981, § 14-11-803, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-804. Discontinuance or settlement.**

Except as otherwise provided by the articles of organization or written operating agreement, a derivative action may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the limited liability company's members, the court shall direct that notice be given to the members affected. (Code 1981, § 14-11-804, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-805. Dismissal.**

(a) The court may dismiss a derivative proceeding if, on motion by the limited liability company, the court finds that one of the groups specified in subsection (b) of this Code section has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the limited liability company. The limited liability company shall have the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation.

(b) The determination in subsection (a) of this Code section shall be made by:

(1) A majority vote of the independent managers or members present at a meeting of managers or members, as the case may be, if the independent managers or members constitute a quorum; or

(2) A majority vote of a committee consisting of two or more independent managers or members appointed by a majority of independent managers or members present at a meeting of managers or members, as the case may be, whether or not such independent managers or members constitute a quorum; or

(3) A panel of one or more independent persons appointed by the court upon motion of the limited liability company.

(c) None of the following shall by itself cause a manager or member to be considered not independent for purposes of subsection (b) of this Code section:

(1) The nomination or election of the manager or member by managers or members who are not independent;

(2) The naming of the manager or member as a defendant in the derivative proceeding; or

(3) The fact that the manager or member approved the action being challenged in the derivative proceeding so long as the manager or member did not receive a personal benefit as a result of the action. (Code 1981, § 14-11-805, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-806. Expenses.**

(a) If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorneys' fees, and shall direct him or her to remit to the limited liability company the remainder of those proceeds received by him or her.



(b) In any derivative action instituted on or after March 1, 1994, in the right of any domestic or foreign limited liability company by a member or members thereof, the court having jurisdiction, upon termination of such action and a finding that the action was commenced or maintained without reasonable cause or for an improper purpose, may order the plaintiff or plaintiffs to pay to the parties named as defendants the reasonable expenses, including reasonable attorneys' fees, incurred by them in the defense of such action. (Code 1981, § 14-11-806, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-807. Applicability to foreign limited liability companies.**

In any derivative action in the right of a foreign limited liability company, the matters covered by this article shall be governed by the laws of the jurisdiction of organization of the foreign limited liability company except for Code Sections 14-11-803 and 14-11-804 and paragraph (b) of Code Section 14-11-806. (Code 1981, § 14-11-807, enacted by Ga. L. 1993, p. 123, § 1.)

### **ARTICLE 9**

#### **MERGER**

#### **14-11-901. Merger.**

(a) Pursuant to a written agreement, a limited liability company may merge with or into one or more business entities with such limited liability company or other business entity as the agreement shall provide being the surviving limited liability company or other business entity.

(b) In the case of a merger involving a foreign limited liability company, foreign limited partnership, or foreign corporation, the merger may take place if:

(1) The merger is permitted by the law of the state or jurisdiction under whose laws each foreign constituent entity is organized or formed and each foreign constituent entity complies with that law in effecting the merger;

(2) The foreign constituent entity complies with Code Section 14-11-904 if it is the surviving entity of the merger; and

(3) Each limited liability company complies with the applicable provisions of this Code section, Code Sections 14-11-902 and 14-11-903, and, if it is the surviving entity, with Code Section 14-11-904. (Code 1981, § 14-11-901, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1994, p. 97, § 14; Ga. L. 1995, p. 470, § 21.)

**14-11-902. Plan of merger.**

(a) Each constituent business entity shall adopt a written plan of merger, which shall be approved in accordance with Code Section 14-11-903.

(b) The plan of merger must set forth:

(1) The name of each limited liability company and each other business entity that is a constituent entity planning to merge and the name of the surviving business entity into which each other constituent entity proposes to merge;

(2) The terms and conditions of the merger; and

(3) The manner and basis of converting the interests of the members of each limited liability company and the shares or other interests in each other business entity that is a constituent entity in the merger into interests, shares, obligations, or other securities, as the case may be, of the surviving or any other business entity or, in whole or in part, into cash or other property.

(c) The plan of merger may set forth:

(1) Amendments to the articles of organization of a limited liability company that is the surviving entity in the merger; and

(2) Other provisions relating to the merger. (Code 1981, § 14-11-902, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-903. Approval of merger.**

(a) A limited liability company party to a proposed merger shall have the plan of merger authorized and approved by the unanimous consent of the members, unless the articles of organization or a written operating agreement of such limited liability company provides otherwise. A corporation or limited partnership party to a proposed merger shall have the plan of merger authorized and approved in accordance with the applicable chapter of this title.

(b) A plan of merger complying with the requirements of Code Section 14-11-902 shall be approved by each foreign constituent business entity in accordance with the laws of the state or jurisdiction in which it was organized or formed.

(c) After a merger is authorized, unless the plan of merger provides otherwise, and at any time before articles of merger (as provided for in Code Section 14-11-904) are filed by the Secretary of State, the planned merger may be abandoned (subject to any contractual rights) in accordance with the procedure set forth in the plan of merger or, if none is set forth, as follows:

(1) By the unanimous consent of the members of each limited liability



company that is a constituent entity, unless the articles of organization or a written operating agreement of any such limited liability company provides otherwise;

(2) By each corporation and limited partnership that is a constituent entity in accordance with the applicable chapter of this title; and

(3) By each foreign constituent business entity in accordance with the laws of the state or jurisdiction in which it was organized or formed. (Code 1981, § 14-11-903, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1995, p. 470, § 22.)

#### **14-11-904. Articles of merger.**

After a plan of merger is approved as provided in Code Section 14-11-903, the surviving limited liability company or other business entity shall deliver to the Secretary of State for filing articles of merger setting forth:

(1) The name and jurisdiction of organization or formation of each constituent business entity that is merging and the name of the surviving limited liability company or other business entity into which each other constituent business entity is merging;

(2) Any amendments to the articles of organization of the surviving limited liability company;

(3) The effective date and time of the merger if later than the date and time the articles of merger are filed;

(4) That the executed plan of merger is on file at the principal place of business of the surviving limited liability company or other business entity, stating the address thereof;

(5) That a copy of the plan of merger will be furnished by the surviving limited liability company or other business entity, on request and without cost, to any member of any constituent entity;

(6) A statement that the plan of merger has been duly authorized and approved by each constituent business entity in accordance with Code Section 14-11-903;

(7) If the surviving entity is a foreign limited liability company, foreign limited partnership, or foreign corporation without a certificate of authority to transact business in this state, that the Secretary of State is appointed as agent of the surviving entity on whom process in this state in any action, suit, or proceeding for the enforcement of an obligation of each limited liability company constituent to the merger may be served and the address to which a copy of the process is to be mailed; and

(8) Any other provisions relating to the merger that the constituent business entities determine to include therein. (Code 1981, § 14-11-904, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1994, p. 97, § 14.)

**14-11-905. Effects of merger.**

(a) If the surviving entity is a limited liability company, when a merger takes effect:

(1) Every other constituent business entity party to the merger merges into the limited liability company designated in the plan of merger as the surviving entity;

(2) The separate existence of each constituent business entity party to the plan of merger except the surviving limited liability company shall cease;

(3) The title to all real estate and other property owned by each constituent business entity is vested in the surviving limited liability company without reversion or impairment;

(4) The surviving limited liability company has all the liabilities of each constituent business entity;

(5) A proceeding pending against any constituent business entity may be continued as if the merger did not occur or the surviving limited liability company may be substituted in the proceeding for the constituent business entity whose existence ceased;

(6) Neither the rights of creditors nor any liens on the property of any constituent business entity shall be impaired by the merger;

(7) The articles of organization of the surviving limited liability company shall be amended to the extent provided in the plan of merger; and

(8) The interests or shares in each merging constituent business entity that are to be converted into interests of the surviving limited liability company, or into cash or other property under the terms of the plan of merger, are so converted, and the former holders thereof are entitled only to the rights provided in the plan of merger or their rights otherwise provided by law.

(b) If the surviving business entity is to be governed by the laws of any jurisdiction other than this state, the effects of merger shall be the same as provided in this Code section, except insofar as the laws of such other jurisdiction provide otherwise.

(c) Nothing in this article shall abridge or impair any dissenters' or appraisal rights that may otherwise be available to the members or shareholders or other holders of an interest in any constituent business entity.

(d) A foreign business entity authorized to transact business in this state that merges with and into a limited liability company pursuant to this



chapter and is not the surviving entity in such merger need not obtain a certificate of withdrawal from the Secretary of State. (Code 1981, § 14-11-905, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1995, p. 470, § 23.)

## ARTICLE 10

### DISSENTERS' RIGHTS

#### 14-11-1001. Definitions.

As used in this article, the term:

(1) "Beneficial member" means the person who is a beneficial owner of the membership interest held in a voting trust or by a nominee as the record member.

(2) "Dissenter" means a member who is entitled to dissent from limited liability company action under Code Section 14-11-1002 and who exercises that right when and in the manner required by Code Sections 14-11-1003 through 14-11-1010.

(3) "Fair value" with respect to a membership interest means the value of the membership interest immediately before the effectuation of the limited liability company action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of such action.

(4) "Interest" means interest from the effective date of the limited liability company action until the date of payment, at a rate that is fair and equitable under all the circumstances.

(5) "Limited liability company" means the limited liability company of which the dissenter is a member before the limited liability company action to which the dissenter objects or the surviving entity by merger of that limited liability company.

(6) "Member" means the record member or the beneficial member.

(7) "Membership interest" means a member's rights in the limited liability company, collectively, including the member's share of the profits and losses of the limited liability company, the right to receive distributions of the limited liability company's assets, and any right to vote or participate in management.

(8) "Record member" means the person in whose name the membership interest is registered in the records of a limited liability company. (Code 1981, § 14-11-1001, enacted by Ga. L. 1993, p. 123, § 1.)

#### 14-11-1002. Right to dissent.

(a) Unless otherwise provided by the articles of organization or a written operating agreement, a record member of the limited liability company is

entitled to dissent from, and obtain payment of the fair value of his or her membership interest in the event of, any of the following actions:

(1) Consummation of a plan of merger to which the limited liability company is a party if approval of less than all of the members of the limited liability company is required for the merger by the articles of organization or a written operating agreement and the member is entitled to vote on the merger;

(2) Consummation of a sale, lease, exchange, or other disposition of all or substantially all of the property of the limited liability company if approval of less than all of the members is required by the articles of organization or a written operating agreement and the member is entitled to vote on the sale, lease, exchange, or other disposition, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the members within one year after the date of sale;

(3) An amendment of the articles of organization that materially and adversely affects rights in respect of a dissenter's membership interest in the limited liability company because it:

(A) Alters or abolishes a preferential right of the member's interest;

(B) Creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the membership interest;

(C) Alters or abolishes a preemptive right of the holder of the membership interest to acquire additional interest or other securities;

(D) Excludes or limits the right of the member to vote on any matter, other than a limitation by dilution through additional member contributions or other securities with similar voting rights; or

(E) Cancels, redeems, or repurchases all or part of the membership interest of the class; or

(4) Any limited liability company action taken pursuant to a member vote to the extent that the articles of organization or a written operating agreement provides that voting or nonvoting members are entitled to dissent and obtain payment for their membership interests.

(b) A member entitled to dissent and obtain payment for his or her membership interest under this article may not challenge the limited liability company action creating his or her entitlement unless the limited liability company action fails to comply with procedural requirements of this chapter, the articles of organization, or the written operating agreement or if the vote required to obtain approval of the limited liability company action was obtained by fraudulent and deceptive means, regard-



less of whether the member has exercised dissenters' rights. (Code 1981, § 14-11-1002, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-1003. Notice of dissenters' rights.**

(a) If proposed limited liability company action creating dissenters' rights under Code Section 14-11-1002 is submitted to a vote at a members' meeting, the meeting notice must state that members are or may be entitled to assert dissenters' rights under this article and be accompanied by a copy of this article.

(b) If limited liability company action creating dissenters' rights under Code Section 14-11-1002 is taken without a vote of members, the limited liability company shall notify in writing all members entitled to assert dissenters' rights that the action was taken and send them the dissenters' notice described in Code Section 14-11-1005. (Code 1981, § 14-11-1003, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-1004. Notice of intent to demand payment.**

(a) If proposed limited liability company action creating dissenters' rights under Code Section 14-11-1002 is submitted to a vote at a members' meeting, a record member who wishes to assert dissenters' rights:

(1) Must deliver to the limited liability company before the vote is taken written notice of his or her intent to demand payment for his or her membership interest if the proposed action is effectuated; and

(2) Must not vote his or her membership interest in favor of the proposed action.

(b) A record member who does not satisfy the requirements of subsection (a) of this Code section is not entitled to payment for his or her membership interest under this article. (Code 1981, § 14-11-1004, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-1005. Dissenters' notice.**

(a) If proposed limited liability company action creating dissenters' rights under Code Section 14-11-1002 is authorized at a members' meeting, the limited liability company shall deliver a written dissenters' notice to all members who satisfied the requirements of Code Section 14-11-1004.

(b) The dissenters' notice must be sent no later than ten days after the limited liability company action was taken and must:

(1) State where the payment demand must be sent and where and when certificates for certificated membership interests must be deposited;

(2) Inform holders of uncertificated membership interests to what extent transfer of the membership interests will be restricted after the payment demand is received;

(3) Set a date by which the limited liability company must receive the payment demand, which date may not be fewer than 30 nor more than 60 days after the date the notice required in subsection (a) of this Code section is delivered; and

(4) Be accompanied by a copy of this article. (Code 1981, § 14-11-1005, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-1006. Duty to demand payment.**

(a) A record member sent a dissenters' notice described in Code Section 14-11-1005 must demand payment and deposit his or her certificates for certificated membership interests in accordance with the terms of the notice.

(b) A record member who demands payment and deposits his or her certificates under subsection (a) of this Code section retains all other rights of a member until these rights are canceled or modified by the taking of the proposed limited liability company action.

(c) A record member who does not demand payment or deposit his or her membership interest certificates where required, each by the date set in the dissenters' notice, is not entitled to payment for his or her membership interest under this article. (Code 1981, § 14-11-1006, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-1007. Membership interest restrictions.**

(a) The limited liability company may restrict the transfer of uncertificated membership interests from the date the demand for their payment is received until the proposed limited liability company action is taken or the restrictions are released under Code Section 14-11-1009.

(b) The person for whom dissenters' rights are asserted as to uncertificated membership interests retains all other rights of a member until these rights are canceled or modified by the taking of the proposed limited liability company action. (Code 1981, § 14-11-1007, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-1008. Offer of payment.**

(a) Except as provided in Code Section 14-11-1010, within ten days of the later of the date the proposed limited liability company action is taken or receipt of a payment demand, the limited liability company shall offer to



pay each dissenter who complied with Code Section 14-11-1006 the amount the limited liability company estimates to be the fair value of his or her membership interest, plus accrued interest.

(b) The offer of payment must be accompanied by:

(1) The limited liability company's balance sheet as of the end of a fiscal year ending not more than 16 months before the date of payment, an income statement for that year, a statement of changes in members' equity for that year, and the latest available interim financial statements, if any;

(2) A statement of the limited liability company's estimate of the fair value of the membership interest;

(3) An explanation of how the interest was calculated;

(4) A statement of the dissenter's right to demand payment under Code Section 14-11-1010; and

(5) A copy of this article.

(c) If the member accepts the limited liability company's offer by written notice to the limited liability company within 30 days after the limited liability company's offer, payment for his or her membership interest shall be made within 60 days after the making of the offer or the taking of the proposed limited liability company action, whichever is later. (Code 1981, § 14-11-1008, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-1009. Failure to take action.**

(a) If the limited liability company does not take the proposed action within 60 days after the date set for demanding payment and depositing membership interest certificates, the limited liability company shall return the deposited certificates and release the transfer restrictions imposed on uncertificated membership interests.

(b) If, after returning deposited certificates and releasing transfer restrictions, the limited liability company takes the proposed action, it must send a new dissenters' notice under Code Section 14-11-1005 and repeat the payment demand procedure. (Code 1981, § 14-11-1009, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-1010. Procedure if member dissatisfied with payment or offer.**

(a) A dissenter may notify the limited liability company in writing of his or her own estimate of the fair value of his membership interest and amount of interest due, and demand payment of his or her estimate of the fair value of his or her membership interest and interest due, if:

(1) The dissenter believes that the amount offered under Code

Section 14-11-1008 is less than the fair value of his or her membership interest or that the interest due is incorrectly calculated; or

(2) The limited liability company, having failed to take the proposed action, does not return the deposited certificates or release the transfer restrictions imposed on uncertificated membership interests within 60 days after the date set for demanding payment.

(b) A dissenter waives his or her right to demand payment under this Code section unless he or she notifies the limited liability company of his or her demand in writing under subsection (a) of this Code section within 30 days after the limited liability company offered payment for his or her membership interest, as provided in Code Section 14-11-1008.

(c) If the limited liability company does not offer payment within the time set forth in subsection (a) of Code Section 14-11-1008:

(1) The member may demand the information required under subsection (b) of Code Section 14-11-1008, and the limited liability company shall provide the information to the member within ten days after receipt of a written demand for the information; and

(2) The member may at any time, subject to the limitations period of Code Section 14-11-1013, notify the limited liability company of his or her own estimate of the fair value of his membership interest and the amount of interest due and demand payment of his or her estimate of the fair value of his or her membership interest and interest due. (Code 1981, § 14-11-1010, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-1011. Court action.**

(a) If a demand for payment under Code Section 14-11-1010 remains unsettled, the limited liability company shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the membership interest and accrued interest. If the limited liability company does not commence the proceeding within the 60 day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.

(b) The limited liability company shall commence the proceeding, which shall be a nonjury equitable valuation proceeding, in the superior court of the county where a limited liability company's registered office is located. If the surviving entity is a foreign entity without a registered office in this state, it shall commence the proceeding in the county in this state where the registered office of the domestic entity merged with the foreign entity was located.

(c) The limited liability company shall make all dissenters, whether or not residents of this state, whose demands remain unsettled parties to the



proceeding, which shall have the effect of an action quasi in rem against their membership interests. The limited liability company shall serve a copy of the petition in the proceeding upon each dissenting member who is a resident of this state in the manner provided by law for the service of a summons and complaint and upon each nonresident dissenting member either by registered or certified mail or statutory overnight delivery and publication or in any other manner permitted by law.

(d) The jurisdiction of the court in which the proceeding is commenced under subsection (b) of this Code section is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them or in any amendment to it. Except as otherwise provided in this chapter, Chapter 11 of Title 9, known as the "Georgia Civil Practice Act," applies to any proceeding with respect to dissenters' rights under this chapter.

(e) Each dissenter made a party to the proceeding is entitled to judgment for the amount which the court finds to be the fair value of his or her membership interest, plus interest to the date of judgment. (Code 1981, § 14-11-1011, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

#### **14-11-1012. Court costs and counsel fees.**

(a) The court in an appraisal proceeding commenced under Code Section 14-11-1011 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court, but not including fees and expenses of attorneys and experts for the respective parties. The court shall assess the costs against the limited liability company, except that the court may assess the costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under Code Section 14-11-1010.

(b) The court may also assess the fees and expenses of attorneys and experts for the respective parties, in amounts the court finds equitable:

(1) Against the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of Code Sections 14-11-1103 through 14-11-1109; or

(2) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.

(c) If the court finds that the services of attorneys for any dissenter were of substantial benefit to other dissenters similarly situated and that the fees for those services should not be assessed against the limited liability company, the court may award to these attorneys reasonable fees to be paid out of the amounts awarded the dissenters who were benefited. (Code 1981, § 14-11-1012, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1994, p. 97, § 14; Ga. L. 1995, p. 10, § 14; Ga. L. 2003, p. 140, § 14.)

The 2003 amendment, effective May 14, 2003, part of an Act to revise, modernize, and correct the Code, substituted "14-11-1109" for "14-11-1110" in paragraph (b)(1).

14-11-1013. Limitation of actions.

No action by any dissenter to enforce dissenters' rights shall be brought more than three years after the limited liability company action was taken, regardless of whether notice of the limited liability company action and of the right of dissent was given by the limited liability company in compliance with the provisions of Code Section 14-11-1003 and Code Section 14-11-1005. (Code 1981, § 14-11-1013, enacted by Ga. L. 1993, p. 123, § 1.)

ARTICLE 11

MISCELLANEOUS

14-11-1101. Filing fees and penalties.

(a) The Secretary of State shall collect the following fees when the documents described below are delivered to the Secretary of State for filing pursuant to this chapter:

<u>Document</u>	<u>Fee</u>
(1) Articles of organization .....	\$ 100.00
(2) Articles of amendment .....	20.00
(3) Articles of merger .....	20.00
(4) Certificate of election under Code Section 14-11-212 (together with articles of organization) .....	95.00
(5) Application for certificate of authority to transact business .....	225.00
(6) Statement of commencement of winding up .....	20.00
(7) Certificate of termination .....	20.00



<u>Document</u>	<u>Fee</u>
(8) Articles of correction .....	20.00
(9) Application for reservation of a name .....	25.00
(10) Statement of change of registered office or registered agent...\$ 5.00 per limited liability company (foreign or domestic), but not less than .....	\$20.00
(11) Registered agent's statement of resignation pursuant to subsection (d) of Code Section 14-11-209 or subsection (d) of Code Section 14-11-703 .....	No fee
(12) Certificate of judicial dissolution .....	No fee
(13) Annual registration (foreign or domestic) .....	30.00
(14) Reinstatement fee .....	100.00
(15) Any other document required or permitted to be filed by this chapter .....	20.00

(b) The Secretary of State shall collect the penalty provided for in paragraph (2) of subsection (c) of Code Section 14-11-711. (Code 1981, § 14-11-1101, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1999, p. 405, § 36; Ga. L. 2003, p. 883, § 8.)

The 2003 amendment, effective July 1, 2003, substituted "\$100.00" for "\$75.00" in paragraph (1), substituted "225.00" for "200.00" in paragraph (5), substituted "25.00" for "No fee" in paragraph (9), and substituted "30.00" for "25.00" in paragraph (13).

#### **14-11-1102. Execution by judicial act.**

(a) If each person required by Code Section 14-11-205 to execute any document fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the superior court of the county where the registered office of the limited liability company is located to direct the execution of the document. If the court finds that it is proper for the document to be executed and that every person so designated has failed or refused to execute the document, it shall order the Secretary of State to file the document in appropriate form notwithstanding the lack of required execution.

(b) The court shall assess the costs and expenses of such proceeding against the limited liability company, except that all or any part of such costs and expenses may be apportioned and assessed, as the court may determine, against any or all of the persons required by Code Section 14-2-205 to execute a document who failed or refused to do so if the court finds that

such failure or refusal was arbitrary, vexatious, or otherwise not in good faith. (Code 1981, § 14-11-1102, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-1103. Annual registration.**

(a) Each limited liability company and each foreign limited liability company authorized to transact business in this state shall deliver to the Secretary of State for filing an annual registration that sets forth:

(1) The name of the limited liability company or the foreign limited liability company and the jurisdiction under whose law it is organized;

(2) The street address and county of its registered office and the name of its registered agent at that office in this state;

(3) The mailing address of its principal place of business; and

(4) Any additional information that is necessary to enable the Secretary of State to carry out the provisions of this chapter.

(b) Information in the annual registration must be current as of the date the annual registration is executed on behalf of the limited liability company or foreign limited liability company.

(c) The first annual registration must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules or regulations, of the year following the calendar year in which the limited liability company was formed or a foreign limited liability company was authorized to transact business. Subsequent annual registrations must be delivered to the Secretary of State between January 1 and April 1, or such other date as the Secretary of State may specify by rules and regulations, of the following calendar years.

(d) If an annual registration does not contain the information required by this Code section, the Secretary of State shall promptly notify the limited liability company or foreign limited liability company in writing and return the registration to it for correction. If the registration is corrected to contain the information required by this Code section and delivered to the Secretary of State within 30 days after the date of notice, it is deemed to be timely filed. (Code 1981, § 14-11-1103, enacted by Ga. L. 1993, p. 123, § 1.)

**14-11-1104. Taxation.**

Each limited liability company and foreign limited liability company shall be classified as a partnership for Georgia income tax purposes unless classified otherwise for federal income tax purposes, in which case the limited liability company or foreign limited liability company shall be classified for Georgia income tax purposes in the same manner as it is classified for federal income tax purposes. A member or an assignee of a



member of a limited liability company or foreign limited liability company shall be treated for Georgia income tax purposes as either a resident or nonresident partner in the limited liability company or foreign limited liability company unless classified otherwise for federal income tax purposes, in which case the member or assignee of a member shall have the same status for Georgia income tax purposes as such member or assignee of a member has for federal income tax purposes. (Code 1981, § 14-11-1104, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 2001, p. 984, § 4.)

**The 2001 amendment**, effective April 27, 2001, inserted "income" in four places throughout this Code section.

**Law reviews.** — For note on the 2001 amendment to O.C.G.A. § 14-11-1104, see 18 Ga. St. U. L. Rev. 294 (2001).

#### **14-11-1105. Administrative powers of Secretary of State.**

The Secretary of State shall have the power and authority reasonably necessary to enable him or her to administer this chapter efficiently and to perform the duties imposed upon him or her pursuant to this chapter, including, without limitation, the power and authority to employ from time to time such additional personnel as in his or her judgment are required for such purposes. (Code 1981, § 14-11-1105, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-1106. Rules and regulations.**

The Secretary of State may promulgate such rules and regulations, not inconsistent with the provisions of this chapter, as are incidental to and necessary for the implementation and enforcement of such provisions of this chapter as are administered by the Secretary of State. Such rules and regulations shall be promulgated in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 14-11-1106, enacted by Ga. L. 1993, p. 123, § 1.)

#### **14-11-1107. Laws governing chapter; limited liability companies.**

(a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(b) It is the policy of this state with respect to limited liability companies to give maximum effect to the principle of freedom of contract and to the enforceability of operating agreements.

(c) Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.

(d) If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter that can be given effect without the invalid

provision or application. To this end, the provisions of this chapter are severable.

(e) A limited liability company may conduct its business, carry on its operations and have and exercise the powers granted by this chapter in any state, territory, district, or possession of the United States or in any foreign country.

(f) The laws of this state relating to establishment and regulation of professional services are amended and superseded to the extent such laws are inconsistent as to form of organization with the provisions of this chapter and are deemed amended to permit the provision of professional services within this state by limited liability companies.

(g) Nothing in this chapter is intended to restrict or limit in any manner the authority and duty of any regulatory or other body licensing professionals within this state to license individuals rendering professional services or to regulate the practice of any profession that is within the jurisdiction of the regulatory or other body licensing such professionals within this state, notwithstanding that the person is a member, manager, or employee of a limited liability company and rendering the professional services or engaging in the practice of the profession through a limited liability company.

(h) The personal liability of a member of a limited liability company to any person or in any action or proceeding for the debts, obligations, or liabilities of the limited liability company, or for the acts or omissions of other members, managers, employees, or agents of the limited liability company, shall be governed solely and exclusively by this chapter and the laws of this state. Whenever a conflict arises between the laws of this state and the laws of any other state with regard to the liability of members of a limited liability company for the debts, obligations, and liabilities of the limited liability company or for the acts or omissions of other members, managers, employees, or agents of the limited liability company, this state's laws shall be deemed to govern in determining such liability.

(i) The provisions of this chapter shall determine the rights and obligations of a limited liability company organized under this chapter in commerce with foreign nations and among the several states to the extent permitted by law.

(j) A member of a limited liability company is not a proper party to a proceeding by or against a limited liability company, solely by reason of being a member of the limited liability company, except:

(1) Where the object of the proceeding is to enforce a member's right against or liability to the limited liability company; or

(2) In a derivative action authorized by Article 8 of this chapter.

(k) The General Assembly has power to amend or repeal all or part of this chapter at any time, and all limited liability companies and foreign



limited liability companies subject to this chapter are governed by the amendment or repeal.

(l) Any provision that this chapter requires or permits to be set forth in an operating agreement may be set forth in the articles of organization. In the event of any conflict between a provision of the articles of organization and a provision of an operating agreement, the provision of the articles of organization shall govern.

(m) Each provision of this chapter shall have independent legal significance.

(n) Nothing in this chapter shall be construed as establishing that a limited liability company interest is not a "security" within the meaning of paragraph (26) of subsection (a) of Code Section 10-5-2 (or any successor statute). (Code 1981, § 14-11-1107, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 1994, p. 97, § 14.)

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cause the affiliation finding was not supported by the record, the hotel entities were separate limited liability companies, the hotel entities were not conducting business in Georgia, and their contacts with the separate affiliate were too tenuous to confer personal jurisdiction over them. *Yukon Partners, Inc. v. Lodge Keeper Group, Inc.*, 258 Ga. App. 1, 572 S.E.2d 647 (2002).

### 14-11-1108. Service of process; venue.

(a) A limited liability company's registered agent is the limited liability company's agent for service of process, notice, or demand required or permitted by law to be served on the limited liability company. If a limited liability company has no registered agent or the agent cannot with reasonable diligence be served, the limited liability company may be served by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the limited liability company at its principal office. Service is perfected under the immediately preceding sentence at the earliest of:

(1) The date the limited liability company receives the mail;

(2) The date shown on the return receipt, if signed on behalf of the limited liability company; or

(3) Five days after its deposit in the mail, as evidenced by the postmark, if mailed postage prepaid and correctly addressed.

This subsection does not prescribe the only means, or necessarily the required means, of serving a limited liability company.

(b) Venue in proceedings against a limited liability company or foreign limited liability company shall be determined in accordance with the pertinent constitutional and statutory provisions of this state in effect on March 1, 1994, or thereafter. For purposes of determining venue, the residence of a limited liability company or foreign limited liability company shall be determined in accordance with Code Section 14-2-510 as though such limited liability company or foreign limited liability company were a corporation. (Code 1981, § 14-11-1108, enacted by Ga. L. 1993, p. 123, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code

section is applicable with respect to notices delivered on or after July 1, 2000.

#### **14-11-1109. Effective date; repealer.**

This chapter shall become effective on March 1, 1994. The provisions of law that became effective on July 1, 1992, and that were codified at Code Sections 14-11-1 through 14-11-19 are hereby repealed. A foreign limited liability company that prior to March 1, 1994, obtained a certificate of authority to transact business in this state is not required to obtain a new certificate of authority by reason of the enactment of this chapter. (Code 1981, § 14-11-1109, enacted by Ga. L. 1993, p. 123, § 1.)



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